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**THE**  
**ENGLISH AND EMPIRE DIGEST**  
**WITH**  
**COMPLETE AND EXHAUSTIVE**  
**ANNOTATIONS.**

**VOLUME XXXVII.**



# THE ENGLISH AND EMPIRE DIGEST

COMPLETE AND EXHAUSTIVE  
ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED  
FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL  
CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE  
OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE  
SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN  
GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

VOLUME XXXVII.

*PAWNS AND PLEDGES.  
PEERAGES AND DIGNITIES.  
PERPETUITIES.  
PERSONAL PROPERTY.  
POLICE.  
POOR LAW.*

*POST OFFICE.  
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**In this Volume English Cases reported up to 1st September, 1927, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.**





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# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 ( <i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1904—1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) ( <i>e.g.</i> , [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. O.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. R. A.	Butterworths' Rating Appeals, 2 vols., 1913—1925	Eng.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854	Eng.

# xxii      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Baild. ... ..	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B. ... ..	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814	Ir.
Bankr. & Ins. R. ... ..	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855	Eng.
Bar. & Arn. ... ..	Barron and Arnold's Election Cases, 1 vol., 1843—1846	Eng.
Bar. & Aust. ... ..	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch. ... ..	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741	Eng.
Barn. K. B. ... ..	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734	Eng.
Barnes ... ..	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt. ... ..	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826	Ir.
Beat. ... ..	Beatty's Reports, Chancery (Ireland), 1 vol., 1818—1830	Ir.
Beav. ... ..	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal. ... ..	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw. ... ..	Beawes's Lex Mercatoria	Eng.
Bell, C. C. ... ..	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ... ..	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ... ..	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ... ..	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App. ... ..	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe ... ..	Bellewe's Cases <i>temp.</i> Richard II., King's Bench, 1 vol.	Eng.
Belt's Sup. ... ..	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1740—1756	Eng.
Ben. ... ..	Benloe's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl. ... ..	Benloe's (or Bendloe's) Reports, King's Bench, fol., 1 vol., 1440—1627	Eng.
Ber. ... ..	New Brunswick Reports (Berton)	Can.
Bing. ... ..	Bingham's Reports, Common Pleas, 10 vols., 1822—1834	Eng.
Bing. N. C. ... ..	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840	Eng.
Biss. & Sm. ... ..	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ... ..	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ... ..	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884	Eng.
Bl. Com. ... ..	Blackstone's Commentaries	Eng.
Bl. D. & Osb. ... ..	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli. ... ..	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S. ... ..	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett ... ..	Bluett's Isle of Man Cases	I. of M.
Bom. ... ..	Bombay High Court Reports	Ind.
Bom. A. C. ... ..	Bombay Reports, Appellate Jurisdiction	Ind.
Bom. Cr. Ca. ... ..	Bombay Reports, Crown Cases	Ind.
Bom. O. C. ... ..	Bombay Reports, Original Civil Jurisdiction	Ind.
Bos. & P. ... ..	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
Bos. & P. N. R. ... ..	Bosanquet and Puller's New Reports, Common Pleas, 2 vols., 1804—1807	Eng.
Bott. ... ..	Bott's Laws Relating to the Poor, 2 vols., 6th ed., 1827	Eng.
Bourke ... ..	Bourke's Reports	Ind.
Br. & Col. Pr. Cas. ... ..	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract. ... ..	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr. ... ..	Sir R. Brooke's Abridgement	Eng.
Bro. C. C. ... ..	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep. ... ..	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C. ... ..	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas. ... ..	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor. ... ..	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop. ... ..	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing. ... ..	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F. ... ..	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun ... ..	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845	Scot.
Brown. & Lush. ... ..	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866	Eng.
Brownl. ... ..	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624	Eng.
Bruce ... ..	Bruce's Decisions, Court of Session (Scotland), 1714—1715	Scot.

Buch. ... ..	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879	S. Af.
Buch. A. C. ... ..	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan. ... ..	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck ... ..	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull N. P. ... ..	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst. ... ..	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb. ... ..	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr. ... ..	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C. ... ..	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell ... ..	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A. ... ..	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P. ... ..	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B. ... ..	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S. ... ..	Common Bench Reports, New Series, 20 vols., 1850—1865	Eng.
C. B. R. ... ..	Canadian Bankruptcy Reports Annotated, 1920—(current)	Can.
C. C. Ct. Cas. ... ..	Central Criminal Court Cases (Sessions Papers), 1834—1913	Eng.
C. L. Ch. ... ..	Common Law Chambers	Can.
C. L. J. ... ..	Cape Law Journal	S. Af.
C. L. J. N. S. ... ..	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S. ... ..	Canada Law Journal, Old Series, 1855—1864	Can.
C. L. R. ... ..	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R. ... ..	Commonwealth Law Reports	Aus.
C. L. R. ... ..	Calcutta Law Reporter	Ind.
C. L. T. ... ..	Canadian Law Times	Can.
C. L. T. Occ. N. ... ..	Canadian Law Times, Occasional Notes	Can.
C. P. ... ..	Upper Canada Common Pleas	Can.
C. P. D. ... ..	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D. ... ..	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C. ... ..	Canadian Reports, Appeal Cases	Can.
C. T. R. ... ..	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N.... ... ..	Calcutta Weekly Notes	Ind.
Cab. & El. ... ..	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas. ... ..	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth. ... ..	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas. ... ..	Cameron's Supreme Court Cases	Can.
Cam. Prac. ... ..	Cameron's Supreme Court Practice	Can.
Camp. ... ..	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas. ... ..	Commercial Law Reports of Canada, 4 vols., 1901—1905	Can.
Can. Crim. Cas. ... ..	Canadian Criminal Cases, Annotated, 1898—(current)	Can.
Can. Gaz. ... ..	Canadian Gazette	Can.
Can. Ry. Cas. ... ..	Canadian Railway Cases	Can.
Car. & Kir. ... ..	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M. ... ..	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Car. C. L. ... ..	Carrington's Treatise on Criminal Law	Can.
Card. Doc. Ann. ... ..	Cardwell's Documentary Annals of the Reformed Church of England, 2 vols., 1546—1716	Eng.
Carl. ... ..	New Brunswick Reports (Carleton)	Can.
Carp. Pat. Cas. ... ..	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart. ... ..	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Cart. ... ..	Cases on British North America Act (Cartwright)	Can.
Carth. ... ..	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary ... ..	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch. ... ..	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B. ... ..	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett. ... ..	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. temp. Finch ... ..	Cases temp. Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. temp. King ... ..	Select Cases temp. King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cas. temp. Talb. ... ..	Cases in Equity temp. Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig. ... ..	Cassells' Digest	Can.
Ch. (preceded by date) ... ..	Law Reports, Chancery Division, since 1890 (e.g., [1891] 1 Ch.)	Eng.
Ch. App. ... ..	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch. ... ..	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch. ... ..	Upper Canada Chancery Chambers Reports	Can.
Ch. D. ... ..	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob. ... ..	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas. ... ..	Charley's Chamber Cases, 2 vols., 1875—1876	Eng.
Char. Fr. Cas. ... ..	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip. ... ..	New Brunswick Reports (Chipman)	Can.

# xxiv      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Chit. ... ..	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822...	Eng.
Cl. & Fin. ... ..	Clark and Finnely's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas. ... ..	Clark and Scully's Drainage Cases ... ..	Can.
Clay. ... ..	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	Eng.
Cliff. & Rick. ... ..	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Cliff. & Steph. ... ..	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A. ... ..	Cook's Lower Canada Admiralty Court Cases ... ..	Can.
Co. Ent. ... ..	Coke's Entries ... ..	Eng.
Co. Inst. ... ..	Coke's Institutes ... ..	Eng.
Co. L. J. ... ..	Colonial Law Journal ... ..	N.Z.
Co. Litt. ... ..	Coke on Littleton (1 Inst.) ... ..	Eng.
Co. Rep. ... ..	Coke's Reports, 13 parts, 1572—1616 ... ..	Eng.
Coch. ... ..	Nova Scotia Reports (Cochran) ... ..	Can.
Cockb. & Rowe ... ..	Cockburn and Rowe's Election Cases, 1 vol., 1833 ... ..	Eng.
Coll. ... ..	Collyer's Reports, Chancery, 2 vols., 1844—1846 ... ..	Eng.
Coll. Jurid. ... ..	Collectanea Juridica, 2 vols. ... ..	Eng.
Colles ... ..	Colles' Cases in Parliament, 1 vol., 1697—1713 ... ..	Eng.
Colt. ... ..	Coltman's Registration Cases, 1 vol., 1879—1885 ... ..	Eng.
Com. ... ..	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740 ... ..	Eng.
Com. Cas. ... ..	Commercial Cases, 1895—(current) ... ..	Eng.
Com. Dig. ... ..	Comyns' Digest ... ..	Eng.
Comb. ... ..	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698 ... ..	Eng.
Con. & Law. ... ..	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843 ... ..	Ir.
Cong. Dig. ... ..	Congdon's Digest ... ..	Can.
Const ... ..	Const's edition of Bott's Poor Laws, 3 vols., 1807 ... ..	Eng.
Cooke & Al. ... ..	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834 ... ..	Ir.
Cooke, Pr. Cas. ... ..	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747 ... ..	Eng.
Cooke, Pr. Reg. ... ..	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742 ... ..	Eng.
Coop. G. ... ..	G. Cooper's Reports, Chancery, 1 vol., 1792—1815 ... ..	Eng.
Coop. Pr. Cas. ... ..	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838 ... ..	Eng.
Coop. temp. Brough. ... ..	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834 ... ..	Eng.
Coop. temp. Cott. ... ..	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1846—1848 (and miscellaneous earlier cases) ... ..	Eng.
Cor. ... ..	Coryton's Reports ... ..	Ind.
Corb. & D. ... ..	Corbett and Daniell's Election Cases, 1 vol., 1819 ... ..	Eng.
Correspondances Jud. ... ..	Correspondances Judiciaires ... ..	Can.
Couper ... ..	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885 ... ..	Scot.
Cout. ... ..	Coutlees' Unreported Cases ... ..	Can.
Cout. Dig. ... ..	Coutlees' Digest ... ..	Can.
Cowp. ... ..	Cowper's Reports, King's Bench, 2 vols., 1774—1778 ... ..	Eng.
Cox & Atk. ... ..	Cox and Atkinson's Registration Appeal Cases, 1 vol., 1843—1846 ... ..	Eng.
Cox, C. C. ... ..	E. W. Cox's Criminal Law Cases, 1843—(current) ... ..	Eng.
Cox, Eq. Cas. ... ..	S. C. Cox's Equity Cases, 2 vols., 1745—1797 ... ..	Eng.
Cox, M. & H. ... ..	Cox, Macrae, and Hertslet's County Courts Cases and Appeals, 1 vol., 1846—1852 ... ..	Eng.
Cr. & J. ... ..	Crompton and Jervis's Reports, Exchequer, 2 vols., 1830—1832 ... ..	Eng.
Cr. & M. ... ..	Crompton and Meeson's Reports, Exchequer, 2 vols., 1832—1834 ... ..	Eng.
Cr. & Ph. ... ..	Craig and Phillips' Reports, Chancery, 1 vol., 1840—1841 ... ..	Eng.
Cr. App. Rep. ... ..	Cohen's Criminal Appeal Reports, 1908—(current) ... ..	Eng.
Cr. M. & R. ... ..	Crompton, Meeson, and Roscoe's Reports, Exchequer, 2 vols., 1834—1835 ... ..	Eng.
Craw. & D. ... ..	Crawford and Dix's Circuit Cases (Ireland), 3 vols., 1838—1846 ... ..	Ir.
Craw. & D. Abr. O. ... ..	Crawford and Dix's Abridged Cases (Ireland), 1 vol., 1837—1838 ... ..	Ir.
Cress. Insolv. Cas. ... ..	Cresswell's Insolvency Cases, 1 vol., 1827—1829 ... ..	Eng.
Cripps' Church Cas. ... ..	Cripps' Church and Clergy Cases, 2 parts, 1847—1850 ... ..	Eng.
Cro. Car. ... ..	Croke's Reports temp. Charles I., King's Bench and Common Pleas, 1 vol., 1625—1641 ... ..	Eng.
Cro. Eliz. ... ..	Croke's Reports temp. Elizabeth, King's Bench and Common Pleas, 1 vol., 1582—1603 ... ..	Eng.
Cro. Jac. ... ..	Croke's Reports temp. James I., King's Bench and Common Pleas, 1 vol., 1603—1625 ... ..	Eng.
Cru. Dig. ... ..	Cruise's Digest of the Law of Real Property, 7 vols. ... ..	Eng.
Cunn. ... ..	Cunningham's Reports, King's Bench, fol., 1 vol., 1734—1735 ... ..	Eng.
Curt. ... ..	Curtels' Ecclesiastical Reports, 3 vols., 1834—1844 ... ..	Eng.
D. ... ..	Duxbury's Reports of the High Court of the South African Republic ... ..	S. Af.
D. C. A. ... ..	Dorion's Queen's Bench Reports ... ..	Can.
D. L. R. ... ..	Dominion Law Reports ... ..	Can.

Dal.	...	...	Dalison's Reports, Common Pleas, fol., 1 vol., 1546—1574	...	Eng.
Dalr.	...	...	Dalrymple's Decisions, Court of Session (Scotland), fol., 1 vol., 1698—1720	...	Scot.
Dan.	...	...	Daniell's Reports, Exchequer in Equity, 1 vol., 1817—1823	...	Eng.
Dan. & Ll.	...	...	Danson and Lloyd's Mercantile Cases, 1 vol., 1828—1829	...	Eng.
Dav. & Mer.	...	...	Davison and Merivale's Reports, Queen's Bench, 1 vol., 1843—1844	...	Eng.
Dav. Ir.	...	...	Davys' (or Davis' or Davy's) Reports (Ireland), 1 vol., 1604—1611	...	Ir.
Dav. Pat. Cas.	...	...	Davies' Patent Cases, 1 vol., 1785—1816	...	Eng.
Day	...	...	Day's Election Cases, 1 vol., 1892—1893	...	Eng.
Dea. & Sw.	...	...	Deane and Swabey's Ecclesiastical Reports, 1 vol., 1855—1857	...	Eng.
Deac.	...	...	Deacon's Reports, Bankruptcy, 4 vols., 1834—1840	...	Eng.
Deac. & Ch.	...	...	Deacon and Chitty's Reports, Bankruptcy, 4 vols., 1832—1835	...	Eng.
Dears. & B.	...	...	Dearsley and Bell's Crown Cases Reserved, 1 vol., 1856—1858	...	Eng.
Dears. C. O.	...	...	Dearsley's Crown Cases Reserved, 1 vol., 1852—1856	...	Eng.
Deas & And.	...	...	Deas and Anderson's Decisions (Scotland), 5 vols., 1829—1832	...	Scot.
De G.	...	...	De Gex's Reports, Bankruptcy, 2 vols., 1844—1848	...	Eng.
De G. & J.	...	...	De Gex and Jones's Reports, Chancery, 4 vols., 1857—1859	...	Eng.
De G. & Sm.	...	...	De Gex and Smale's Reports, Chancery, 5 vols., 1846—1852	...	Eng.
De G. F. & J.	...	...	De Gex, Fisher and Jones's Reports, Chancery, 4 vols., 1859—1862	...	Eng.
De G. J. & Sm.	...	...	De Gex, Jones, and Smith's Reports, Chancery, 4 vols., 1862—1865	...	Eng.
De G. M. & G.	...	...	De Gex, Macnaghten and Gordon's Reports, Chancery, 8 vols., 1851—1857	...	Eng.
Delane	...	...	Delane's Decisions, Revision Courts, 1 vol., 1832—1835	...	Eng.
Den.	...	...	Denison's Crown Cases Reserved, 2 vols., 1844—1852	...	Eng.
Dick.	...	...	Dickens' Reports, Chancery, 2 vols., 1559—1798	...	Eng.
Dirl.	...	...	Dirleton's Decisions, Court of Session (Scotland), fol., 1 vol., 1665—1677	...	Scot.
Dods.	...	...	Dodson's Reports, Admiralty, 2 vols., 1811—1822	...	Eng.
Donnelly	...	...	Donnelly's Reports, Chancery, 1 vol., 1836—1837	...	Eng.
Doug. El. Cas.	...	...	Douglas' Election Cases, 4 vols., 1774—1776	...	Eng.
Doug. K. B.	...	...	Douglas' Reports, King's Bench, 4 vols., 1778—1785	...	Eng.
Dow	...	...	Dow's Reports, House of Lords, 6 vols., 1812—1818	...	Eng.
Dow & Cl.	...	...	Dow and Clark's Reports, House of Lords, 2 vols., 1827—1832	...	Eng.
Dow. & L.	...	...	Dowling and Lowndes' Practice Reports, 7 vols., 1843—1849	...	Eng.
Dow. & Ry. K. B.	...	...	Dowling and Ryland's Reports, King's Bench, 9 vols., 1822—1827	...	Eng.
Dow. & Ry. M. O.	...	...	Dowling and Ryland's Magistrates' Cases, 4 vols., 1822—1827	...	Eng.
Dow. & Ry. N. P.	...	...	Dowling and Ryland's Reports, Nisi Prius, 1 part, 1822—1823	...	Eng.
Dowl.	...	...	Dowling's Practice Reports, 9 vols., 1830—1841	...	Eng.
Dowl. N. S.	...	...	Dowling's Practice Reports, New Series, 2 vols., 1841—1843	...	Eng.
Dr. & Wal.	...	...	Drury and Walsh's Reports, Chancery (Ireland), 2 vols., 1837—1841	...	Ir.
Dr. & War.	...	...	Drury and Warren's Reports, Chancery (Ireland), 4 vols., 1841—1843	...	Ir.
Dra.	...	...	Draper's King's Bench Reports	...	Can.
Drew.	...	...	Drewry's Reports, Chancery, 4 vols., 1852—1859	...	Eng.
Drew. & Sm.	...	...	Drewry and Smale's Reports, Chancery, 2 vols., 1859—1865	...	Eng.
Drinkwater	...	...	Drinkwater's Reports, Common Pleas, 1 vol., 1840—1841	...	Eng.
Drury temp. Nap.	...	...	Drury's Reports temp. Napier, Chancery (Ireland), 1 vol., 1858—1859	...	Ir.
Drury temp. Sug.	...	...	Drury's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1841—1844	...	Ir.
Dugd. Orig.	...	...	Dugdale's Origines Juridiciales	...	Eng.
Dunl. (Ct. of Sess.)	...	...	Dunlop, Court of Session Cases (Scotland), 2nd Series, 24 vols., 1838—1862	...	Scot.
Dunning	...	...	Dunning's Reports, King's Bench, 1 vol., 1753—1754	...	Eng.
Durie	...	...	Durie's Decisions, Court of Session (Scotland), fol., 1 vol., 1621—1642	...	Scot.
Dyer	...	...	Dyer's Reports, King's Bench, 3 vols., 1518—1581	...	Eng.
E. & A.	...	...	Upper Canada Error and Appeal	...	Can.
E. & B.	...	...	Ellis and Blackburn's Reports, Queen's Bench, 8 vols., 1852—1858	...	Eng.
E. & E.	...	...	Ellis and Ellis's Reports, Queen's Bench, 3 vols., 1858—1861	...	Eng.
E. B. & E.	...	...	Ellis, Blackburn, and Ellis's Reports, Queen's Bench, 1 vol., 1858—1860	...	Eng.
E. D. C.	...	...	Reports of the Eastern Districts Court (Cape) from 1880	...	S. Af.
E. D. L.	...	...	South African Law Reports, Eastern Districts Local Division	...	S. Af.
E. L. R.	...	...	Eastern Law Reporter	...	Can.
E. R. (or Eng. Rep.)	...	...	English Reports	...	Eng.
E. R.	...	...	Ontario Election Reports	...	Can.
Eag. & Y.	...	...	Eagle and Younge's Tithe Cases, 4 vols., 1204—1825	...	Eng.

East	...	...	East's Reports, King's Bench, 16 vols., 1800—1812	...	Eng.
East, P. C.	...	...	East's Pleas of the Crown	...	Eng.
Ecc. & Ad.	...	...	Spinks' Ecclesiastical and Admiralty Reports, 2 vols., 1853—1855	...	Eng.
Eden	...	...	Eden's Reports, Chancery, 2 vols., 1757—1766	...	Eng.
Edgar	...	...	Edgar's Decisions, Court of Session (Scotland), fol., 1724—1725	...	Scot.
Edw.	...	...	Edwards' Reports, Admiralty, 1 vol., 1808—1812	...	Eng.
Elchies	...	...	Elchies' Decisions, Court of Session (Scotland), 2 vols., 1733—1754	...	Scot.
Emden's B. C.	...	...	Emden's Building Contracts, Building Leases and Building Statutes	...	Eng.
Eng. Pr. Cas.	...	...	Roscoe's English Prize Cases, 2 vols., 1745—1858	...	Eng.
Eq. Cas. Abr.	...	...	Abridgment of Cases in Equity, fol., 2 vols., 1667—1744	...	Eng.
Eq. Rep.	...	...	Equity Reports, 3 vols., 1853—1855	...	Eng.
Esp.	...	...	Espinasse's Reports, Nisi Prius, 6 vols., 1793—1810	...	Eng.
Ex. D.	...	...	Law Reports, Exchequer Division, 5 vols., 1875—1880	...	Eng.
Exch.	...	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	Eng.
Exch. C. R.	...	...	Exchequer Court Reports	...	Can.
F. (Ct. of Sess.)	...	...	Fraser, Court of Session Cases (Scotland), 5th series, 8 vols., 1898—1906	...	Scot.
F.	...	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1879—1880	...	S. Af.
F. & F.	...	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1850—1867	...	Eng.
F. N. D.	...	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	S. Af.
Fac. Coll.	...	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	Scot.
Falc.	...	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	Scot.
Falc. & Fitz.	...	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	Eng.
Fenton	...	...	Fenton, Important Judgments	...	N.Z.
Ferg.	...	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	Scot.
Fitz. Nat. Brev.	...	...	Fitzherbert's Natura Brevium	...	Eng.
Fitz-G.	...	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	Eng.
Fl. & K.	...	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	Ir.
Fonbl.	...	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1849—1852	...	Eng.
For.	...	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	Eng.
Forb.	...	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	Scot.
Fort. De Laud.	...	...	Fortesque, De Laudibus Legum Angliæ	...	Eng.
Fortes. Rep.	...	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	Eng.
Fost.	...	...	Foster's Crown Cases, 1 vol., 1708—1760	...	Eng.
Fount.	...	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	Scot.
Fox & S. Ir.	...	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	Ir.
Fox & S. Reg.	...	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1886—1895	...	Eng.
Fras.	...	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	Eng.
Freem. Ch.	...	...	Freeman's Reports, Chancery, 1 vol., 1660—1706	...	Eng.
Freem. K. B.	...	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	Eng.
G.	...	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	S. Af.
G. & R.	...	...	Nova Scotia Reports (Geldert & Russell)	...	Can.
G. I. Dig.	...	...	General Index Digest	...	Can.
G. W. D.	...	...	South African Law Reports, Griqualand West Local Division	...	S. Af.
G. W. L.	...	...	South African Law Reports, Griqualand West Local Division	...	S. Af.
Gal. & Dav.	...	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	Eng.
Gale	...	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	Eng.
Gaz. L. R.	...	...	New Zealand Gazette Law Reports	...	N.Z.
Geld. Dig.	...	...	Geldert's Digest	...	Can.
Gib. Cod.	...	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	Eng.
Giff.	...	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	Eng.
Gilb.	...	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	Eng.
Gilb. C. P.	...	...	Gilbert's History and Practice of the Court of Common Pleas	...	Eng.
Gilb. Ch.	...	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	Eng.
Gilm. & F.	...	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1681—1686	...	Scot.
Gl. & J.	...	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	Eng.
Glanv.	...	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	Eng.
Glanv. El. Cas	...	...	Glanville's Election Cases, 1 vol., 1623—1624	...	Eng.
Glasc.	...	...	Glascoc's Reports (Ireland), 1 vol., 1831—1832	...	Ir.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Godb. ... ..	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	Eng.
Gouldsb. ... ..	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	Eng.
Gow ... ..	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	Eng.
Gr. ... ..	Upper Canada Chancery (Grant)	Can.
Griffin's Patent Cases ... ..	Griffin's Patent Cases, 1884—1887	Eng.
Gwill. ... ..	Gwillim's Tithe Cases, 4 vols., 1224—1824	Eng.
H. ... ..	Hertzog's Reports of the High Court of the South African Republic, 1893	S. Af.
H. & C. ... ..	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1866	Eng.
H. & N. ... ..	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	Eng.
H. & Tw. ... ..	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	Eng.
H. & W. ... ..	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	Eng.
H. B. R. (preceded by date) ... ..	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (e.g., [1915] H. B. R.)	Eng.
H. C. ... ..	Reports of the High Court of Griqualand West	S. Af.
H. E. C. ... ..	Hodgin's Election Reports	Can.
H. L. Cas. ... ..	Clark's Reports, House of Lords, 11 vols., 1847—1866	Eng.
Hag. Adm. ... ..	Haggard's Reports, Admiralty, 3 vols., 1822—1838	Eng.
Hag. Con. ... ..	Haggard's Consistorial Reports, 2 vols., 1789—1821	Eng.
Hag. Eco. ... ..	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	Eng.
Hailes ... ..	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	Scot.
Hale, C. L. ... ..	Hale's Common Law	Eng.
Hale, P. C. ... ..	Hale's Pleas of the Crown, 2 vols.	Eng.
Han. ... ..	New Brunswick Reports (Hannay)	Can.
Har. & Ruth. ... ..	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	Eng.
Har. & W. ... ..	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	Eng.
Harc. ... ..	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	Scot.
Hard. ... ..	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	Eng.
Hare ... ..	Hare's Reports, Chancery, 11 vols., 1841—1853	Eng.
Hawk. P. C. ... ..	Hawkins's Pleas of the Crown, 2 vols.	Eng.
Hay ... ..	Hay's Reports	Ind.
Hay & Marr. ... ..	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	Eng.
Hayes ... ..	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	Ir.
Hayes & Jo. ... ..	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	Ir.
Hem. & M. ... ..	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	Eng.
Het. ... ..	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	Eng.
Hob. ... ..	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	Eng.
Hodg. ... ..	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	Eng.
Hog. ... ..	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	Ir.
Holt, Adm. ... ..	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	Eng.
Holt, Eq. ... ..	W. Holt's Equity Reports, 2 vols., 1845...	Eng.
Holt, K. B. ... ..	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	Eng.
Holt, N. P. ... ..	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	Eng.
Home, Ct. of Sess. ... ..	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	Scot.
Hong Kong L. R. ... ..	Hong Kong Reports	Hong Kong
Hop. & Colt. ... ..	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	Eng.
Hop. & Ph. ... ..	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	Eng.
Horn & H. ... ..	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	Eng.
Hov. Supp. ... ..	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	Eng.
How. C. ... ..	Howard's Chancery Practice	Ir.
How. C. S. ... ..	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	Ir.
How. E. E. ... ..	Howard's Equity Exchequer	Ir.
How. P. L. ... ..	Howard on the Popery Laws	Ir.
Hud. & B. ... ..	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	Ir.
Hudson's B. C. ... ..	Hudson on Building Contracts, 2 vols.	Eng.
Hume ... ..	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	Scot.
Hut. ... ..	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	Eng.
Hy. Bl. ... ..	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	Eng.
Hyde ... ..	Hyde's Reports	Ind.
I. C. L. R. ... ..	Irish Common Law Reports, 17 vols., 1849—1866	Ir.
I. Ch. R. ... ..	Irish Chancery Reports, 17 vols., 1850—1867	Ir.
I. Eq. R. ... ..	Irish Equity Reports, 13 vols., 1838—1851	Ir.

# xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

I. L. R. ...	Irish Law Reports, 18 vols., 1838—1851	Ir.
I. L. R. (Vol.) All.	Indian Law Reports, Allahabad	Ind.
I. L. R. (Vol.) Bom.	Indian Law Reports, Bombay	Ind.
I. L. R. (Vol.) Calc.	Indian Law Reports, Calcutta	Ind.
I. L. R. (Vol.) Lah.	Indian Law Reports, Lahore	Ind.
I. L. R. (Vol.) Mad.	Indian Law Reports, Madras	Ind.
I. L. R. (Vol.) Pat.	Indian Law Reports, Patna	Ind.
I. L. R. (Vol.) Ran.	Indian Law Reports, Rangoon	Ind.
I. L. T. ...	Irish Law Times, 1867—(current)	Ir.
I. L. T. Jo. ...	Irish Law Times Journal, 1867—(current)	Ir.
I. R. (preceded by date)	Irish Reports, since 1893 ( <i>e.g.</i> , [1894] 1 I. R.)	Ir.
I. R. (Vol.) C. L.	Irish Reports, Common Law, 11 vols., 1866—1877	Ir.
I. R. Eq.	Irish Reports, Equity, 11 vols., 1866—1877	Ir.
I. R., R. & L.	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	Ir.
Ind. Awards	Industrial Awards Recommendations	N.Z.
Ind. Jur. N. S.	Indian Jurist, New Series	Ind.
Ind. Jur. O. S.	Indian Jurist, Old Series	Ind.
Ir. Cir. Rep.	Reports of Irish Circuit Cases, 1 vol., 1841—1843	Ir.
Ir. Jur.	Irish Jurist, 18 vols., 1849—1866	Ir.
Ir. L. Rec. 1st ser.	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	Ir.
Ir. L. Rec. N. S.	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	Ir.
Irv.	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	Scot.
J. Bridg.	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	Eng.
J. D. R.	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	S. Af.
J. P.	Justice of the Peace, 1837—(current)	Eng.
J. P. Jo.	Justice of the Peace (Weekly Notes of Cases)	Eng.
J. R.	Jurist Reports	N.Z.
J. R. N. S.	Jurist Reports, New Series	N.Z.
J. Shaw, Just.	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	Scot.
Jac.	Jacob's Reports, Chancery, 1 vol., 1821—1823	Eng.
Jac. & W.	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	Eng.
James	Nova Scotia Reports (James)	Can.
Jebb & B.	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol. 1841—1842	Ir.
Jebb & S.	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	Ir.
Jebb, C. C.	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	Ir.
Jebb, Cr. & Pr. Cas.	Jebb's Crown and Presentment Cases	Ir.
Jenk.	Jenkins' Reports, 1 vol., 1220—1623	Eng.
Jo. & Car.	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	Ir.
Jo. & Lat.	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	Ir.
Jo. Ex. Ir.	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	Ir.
John.	Johnson's Reports, Chancery, 1 vol., 1858—1860	Eng.
John. & H.	Johnson and Hemming's Reports, Chancery, 2 vols., 1859—1862	Eng.
Jur.	Jurist Reports, 18 vols., 1837—1854	Eng.
Jur. N. S.	Jurist Reports, New Series, 12 vols., 1855—1867	Eng.
K.	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	S. Af.
K. & G.	Keane and Grant's Registration Cases, 1 vol., 1854—1862	Eng.
K. & J.	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	Eng.
K. B. (preceded by date)	Law Reports, King's Bench Division, since 1900 ( <i>e.g.</i> , [1901] 2 K. B.)	Eng.
Kames, Dict. Dec.	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	Scot.
Kames, Rem. Dec.	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	Scot.
Kames, Sel. Dec.	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	Scot.
Kay	Kay's Reports, Chancery, 1 vol., 1853—1854	Eng.
Keb.	Keble's Reports, fol., 3 vols., 1661—1677	Eng.
Keen	Keen's Reports, Rolls Court, 2 vols., 1836—1838	Eng.
Keil.	Keilwey's Reports, King's Bench, fol., 1 vol., 1327—1578	Eng.
Kel.	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	Eng.
Kel. W.	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1734	Eng.
Keny.	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1759	Eng.
Keny. Ch.	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	Eng.
Kerr	New Brunswick Reports (Kerr)	Can.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Kilkerran	...	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	Scot.
Kn. & Omb.	...	...	Knapp and Ombler's Election Cases, 1 vol., 1834—1835	...	Eng.
Knapp	...	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	Eng.
Knox	...	...	Knox's Reports	...	Aus.
Konst. & W. Rat. App.	...	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	...	Eng.
Konst. Rat. App.	...	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	...	Eng.
L. & G. temp. Plunk.	...	...	Lloyd and Goold's Reports temp. Plunkett, Chancery (Ireland), 1 vol., 1834—1839	...	Ir.
L. & G. temp. Sugd.	...	...	Lloyd and Goold's Reports temp. Sugden, Chancery (Ireland), 1 vol., 1835	...	Ir.
L. & Welsb.	...	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	...	Eng.
L. C. & M. Gaz.	...	...	Local Courts and Municipal Gazette	...	Can.
L. C. J.	...	...	Lower Canada Jurist	...	Can.
L. C. L. J.	...	...	Lower Canada Law Journal	...	Can.
L. C. R.	...	...	Lower Canada Reports	...	Can.
L. G. R.	...	...	Local Government Reports, 1902—(current)	...	Eng.
L. J. Adm.	...	...	Law Journal, Admiralty, 1865—1875	...	Eng.
L. J. Bey.	...	...	Law Journal, Bankruptcy, 1832—1880	...	Eng.
L. J. C. C.	...	...	Law Journal (County Courts Reporter), 1912—(current)	...	Eng.
L. J. C. P.	...	...	Law Journal, Common Pleas, 1831—1875	...	Eng.
L. J. Ch.	...	...	Law Journal, Chancery, 1831—(current)	...	Eng.
L. J. Eccl.	...	...	Law Journal, Ecclesiastical Cases, 1866—1875	...	Eng.
L. J. Ex.	...	...	Law Journal, Exchequer, 1831—1875	...	Eng.
L. J. Ex. Eq.	...	...	Law Journal, Exchequer in Equity, 1835—1841	...	Eng.
L. J. K. B. or Q. B.	...	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	...	Eng.
L. J. M. C.	...	...	Law Journal, Magistrates' Cases, 1831—1896	...	Eng.
L. J. N. C.	...	...	Law Journal, Notes of Cases, 1866—1892 (from 1893, see Law Journal)	...	Eng.
L. J. O. S.	...	...	Law Journal, Old Series, 10 vols., 1822—1831	...	Eng.
L. J. P.	...	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	...	Eng.
L. J. P. & M.	...	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1866—1875	...	Eng.
L. J. P. C.	...	...	Law Journal, Privy Council, 1865—(current)	...	Eng.
L. J. P. M. & A.	...	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	...	Eng.
L. Jo.	...	...	Law Journal Newspaper, 1866—(current)	...	Eng.
L. L. R.	...	...	Leader Law Reports	...	S. Af.
L. M. & P.	...	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	...	Eng.
L. N.	...	...	Legal News	...	Can.
L. R. A. & E.	...	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	...	Eng.
L. R. C. C. R.	...	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	...	Eng.
L. R. C. P.	...	...	Law Reports, Common Pleas, 10 vols., 1865—1875	...	Eng.
L. R. Eq.	...	...	Law Reports, Equity Cases, 20 vols., 1865—1875	...	Eng.
L. R. Exch.	...	...	Law Reports, Exchequer, 10 vols., 1865—1875	...	Eng.
L. R. H. L.	...	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	...	Eng.
L. R. Ind. App.	...	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	...	Eng.
L. R. Ind. App. Supp. Vol.	...	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	...	Eng.
L. R. Ir.	...	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	...	Ir.
L. R. P. & D.	...	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	...	Eng.
L. R. P. C.	...	...	Law Reports, Privy Council, 6 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	...	Quebec Reports, Queen's Bench	...	Can.
L. R. Sc. & Div.	...	...	Law Reports, Scotch and Divorce Appeals, House of Lords 2 vols., 1866—1875	...	Eng.
L. T.	...	...	Law Times Reports, 1859—(current)	...	Eng.
L. T. Jo.	...	...	Law Times Newspaper, 1843—(current)	...	Eng.
L. T. O. S.	...	...	Law Times Reports, Old Series, 34 vols., 1843—1860	...	Eng.
L. Th.	...	...	La Themis	...	Can.
Lane	...	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	...	Eng.
Lat.	...	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	...	Eng.
Laws. Reg. Cas.	...	...	Lawson's Registration Cases, 1895—(current)	...	Eng.
Ld. Raym.	...	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	...	Eng.
Le. & Ca.	...	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	...	Eng.
Leach	...	...	Leach's Crown Cases, 2 vols., 1730—1814	...	Eng.
Lee	...	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1752—1758	...	Eng.
Lee temp. Hard.	...	...	T. Lee's Cases temp. Hardwicke, King's Bench, 1 vol., 1733—1738	...	Eng.

# xxx. REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Leg. Rep.	...	Legal Reporter	...	Ir.
Legge	...	Legge's Reports	...	Aus.
Leon.	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	Eng.
Lev.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	Eng.
Lew. C. C.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	Eng.
Ley	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	Eng.
Lib. Ass.	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	Eng.
Lilly	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	Eng.
Litt.	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	Eng.
Lloyd, L. R.	...	Lloyd's List Law Reports, 1919—(current)	...	Eng.
Lloyd, Pr. Cas.	...	Lloyd's Reports of Prize Cases, 10 vols., 1914—1924	...	Eng.
Lofft	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	Eng.
Long. & T.	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	Ir.
Lords Journals	...	Journals of the House of Lords	...	Eng.
Lud. E. C.	...	Luder's Election Cases, 3 vols., 1784—1787	...	Eng.
Lumley, P. L. C.	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	Eng.
Lush.	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	Eng.
Lut.	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	Eng.
Lut. Reg. Cas.	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	Eng.
Lynd.	...	Lyndwood, Provinciale, fol., 1 vol.	...	Eng.
M.	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
M. & S.	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	Eng.
M. & W.	...	Meeson and Welsby's Reports, Exchequer, 16 vols., 1836—1847	...	Eng.
M. C. C.	...	Mining Commissioner's Cases	...	Can.
M. C. R.	...	Montreal Condensed Reports	...	Can.
M. H. C. R.	...	Madras High Court Reports	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	Montreal Law Reports, King's Bench or Queen's Bench	...	Can.
M. L. R. (Vol.) S. C.	...	Montreal Law Reports, Superior Court	...	Can.
M. M. Cas.	...	Martin's Reports of Mining Cases	...	Can.
Mac.	...	Macassey's New Zealand Reports	...	N.Z.
Mac. & G.	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	Eng.
Mac. & H.	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1847—1852	...	Eng.
M'Cle.	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	Eng.
M'Cle. & Yo.	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	Eng.
Macfarlane	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	Scot.
Macl. & Rob.	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1830	...	Scot.
Macph. (Ct. of Sess.)	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1862—1873	...	Scot.
Macq.	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1849—1865	...	Scot.
Macr.	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	Eng.
Mad.	...	Madras High Court Reports	...	Ind.
Madd.	...	Maddock's Reports, Chancery, 6 vols., 1815—1822	...	Eng.
Madd. & G.	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	Eng.
Madox	...	Madox's Formulæ Anglicanum	...	Eng.
Madox, Exch.	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	Eng.
Mag.	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	Eng.
Man. & G.	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	Eng.
Man. & Ry. K. B.	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	Eng.
Man. & Ry. M. C.	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	Eng.
Man. L. J.	...	Manitoba Law Journal	...	Can.
Man. L. R.	...	Manitoba Law Reports	...	Can.
Man. R. temp. Wood	...	Manitoba Reports temp. Wood	...	Can.
Mans.	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	Eng.
Mar. L. C.	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	Eng.
March	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	Eng.
Marr.	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	Eng.
Marsh.	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	Eng.
Marsh.	...	Marshall's Reports	...	Ind.
Mayn.	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	Eng.
Meg.	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	Eng.

Men. ... ..	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	S. Af. Eng.
Mer. ... ..	Merivale's Reports, Chancery, 3 vols., 1815—1817	Ir.
Milw. ... ..	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	Eng.
Mod. Rep. ... ..	Modern Reports, 12 vols., 1669—1755	Ir.
Mol. ... ..	Molloy's Reports, Chancery (Ireland), 3 vols., 1808—1831	Eng.
Mont. ... ..	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	Eng.
Mont. & A. ... ..	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	Eng.
Mont. & B. ... ..	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ... ..	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ... ..	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G. ... ..	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1840—1844	Eng.
Moo. & P. ... ..	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ... ..	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App. ... ..	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C. ... ..	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S. ... ..	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ... ..	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R. ... ..	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C. ... ..	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ... ..	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B. ... ..	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict. ... ..	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ... ..	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ... ..	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ... ..	Municipal Reports	Can.
Murd. Epit. ... ..	Murdoch's Epitome	Can.
Murp. & H. ... ..	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ... ..	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ... ..	Myline and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K. ... ..	Myline and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. (preceded by date) ... ..	Northern Ireland Law Reports, 1925—(current) (e.g., [1925] N.)	Ir.
N. A. C. ... ..	Native Appeal Cases	S. Af.
N. & S. ... ..	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig. ... ..	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ... ..	New Brunswick Equity Reports	Can.
N. B. R. ... ..	New Brunswick Reports	Can.
N. B. R. (All.) ... ..	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.) ... ..	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.) ... ..	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.) ... ..	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.) ... ..	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr) ... ..	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.) ... ..	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.) ... ..	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.) ... ..	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.) ... ..	New Brunswick Reports (Trueman)	Can.
N. L. R. ... ..	Natal Law Reports	S. Af.
N. P. D. ... ..	South African Law Reports, Natal Provincial Division	S. Af.
N. S. R. ... ..	Nova Scotia Reports	Can.
N. S. R. (Coch.) ... ..	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & O.) ... ..	Nova Scotia Reports (Goldert and Oxley)	Can.
N. S. R. (G. & R.) ... ..	Nova Scotia Reports (Geldert and Russell)	Can.
N. S. R. (James) ... ..	Nova Scotia Reports (James)	Can.
N. S. R. (Old.) ... ..	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.) ... ..	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.) ... ..	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.) ... ..	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad. ... ..	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ... ..	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas. ... ..	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq. ... ..	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas. ... ..	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R. ... ..	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts. ... ..	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.) ... ..	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.) ... ..	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S. ... ..	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N. ... ..	New South Wales Weekly Notes	Aus.
N. W. ... ..	North-Western Provinces High Court Reports	Ind.
N. W. T. R. ... ..	North-West Territories Reports	Can.
N. Z. Jur. ... ..	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law ... ..	New Zealand Jurist Mining Law	N.Z.

# xxxii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

N. Z. Jur. N. S. ...	...	New Zealand Jurist, New Series ... ..	N.Z.
N. Z. L. R. ...	...	New Zealand Law Reports, 1883—(current) ... ..	N.Z.
N. Z. L. R. C. A. ...	...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels. ...	...	Nelson's Reports, Chancery, 1 vol., 1625—1693 ... ..	Eng.
Nev. & M. K. B. ...	...	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C. ...	...	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B. ...	...	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C. ...	...	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837 ...	Eng.
New Mag. Cas. ...	...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850 ... ..	Eng.
New Pract. Cas. ...	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep. ...	...	New Reports, 6 vols., 1862—1865 ... ..	Eng.
New Sess. Cas. ...	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851 ... ..	Eng.
Nfld. L. R. ...	...	Newfoundland Reports ... ..	Nfld.
Nolan ...	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793 ... ..	Eng.
Notes of Cases ...	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850 ... ..	Eng.
Noy ...	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649 ... ..	Eng.
O. B. & F. ...	...	Ollivier Bell and Fitzgerald's Reports ... ..	N.Z.
O. B. S. P. ...	...	Old Bailey Session Papers ... ..	Eng.
O. Bridg. ...	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1666 ... ..	Eng.
O. F. S. ...	...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R. ...	...	Ontario Law Reports ... ..	Can.
O'M. & H. ...	...	O'Malley and Hardcastle's Election Cases, 1869—(current) ...	Eng.
O. P. D. ...	...	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R. ...	...	Ontario Reports ... ..	Can.
O. R. ...	...	Official Reports of the South African Republic, 1894—1899 ...	S. Af.
O. R. C. ...	...	Reports of the High Court of the Orange River Colony ...	S. Af.
O. S. ...	...	Upper Canada Queen's Bench, Old Series ... ..	Can.
O. W. N. ...	...	Ontario Weekly Notes ... ..	Can.
O. W. R. ...	...	Ontario Weekly Reporter ... ..	Can.
Old. ...	...	Nova Scotia Reports (Oldrights) ... ..	Can.
Ont. Dig. ...	...	Digest of Ontario Case Law, 4 vols., 1823—1900 ... ..	Can.
Owen ...	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614 ... ..	Eng.
P. (preceded by date) ...	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 ( <i>e.g.</i> , [1891] P.) ... ..	Eng.
P. & B. ...	...	New Brunswick Reports (Pugsley and Burbidge) ... ..	Can.
P. & T. ...	...	New Brunswick Law Reports (Pugsley and Trueman) ... ..	Can.
P. Cas. ...	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922 ... ..	Eng. & Col.
P. D. ...	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890 ... ..	Eng.
P. E. I. ...	...	Prince Edward Island Reports ... ..	Can.
P. R. ...	...	Ontario Practice ... ..	Can.
P. Wms. ...	...	Peere Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735 ... ..	Eng.
Palm. ...	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629 ...	Eng.
Park. ...	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717 ... ..	Eng.
Pat. App. ...	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App. ...	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake ...	...	Peake's Reports, Nisi Prius, 1 vol., 1790—1794 ... ..	Eng.
Peake, Add. Cas. ...	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812 ...	Eng.
Peck. ...	...	Peckwell's Election Cases, 2 vols., 1803—1806 ... ..	Eng.
Pelham ...	...	Pelham (S. A.) Reports ... ..	Aus.
Per. & Dav. ...	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn. ...	...	Perry and Knapp's Election Cases, 1 vol., 1833 ... ..	Eng.
Per. C. S. ...	...	Perrault's Conseil Supérieur ... ..	Can.
Per. P. ...	...	Perrault's Prévosté de Quebec, 1726—1756 ... ..	Can.
Ph. ...	...	Phillips' Reports, Chancery, 2 vols., 1841—1849 ... ..	Eng.
Phil. El. Cas. ...	...	Phillips' Election Cases, 1 vol., 1780 ... ..	Eng.
Phillim. ...	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821 ...	Eng.
Phillim. Eccl. Jud. ...	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip. ...	...	Phipson's Digest of Natal Reports, 1858—1859 ... ..	S. Af.
Pig. & R. ...	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845 ...	Eng.
Pitc. ...	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624 ...	Scot.
Plowd. ...	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Queries, Vol. I. ... ..	Eng.
Poll. ...	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682 ...	Eng.
Poph. ...	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627 ...	Eng.
Pow. R. & D. ...	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Pratt ... ..	Pratt's Supplement to Bott's Poor Laws, 1833 ... ..	Eng.
Prec. Ch. ... ..	Precedents in Chancery, fol., 1 vol., 1689—1722 ... ..	Eng.
Price ... ..	Price's Reports, Exchequer, 13 vols., 1814—1824 ... ..	Eng.
Price ... ..	Price's Mining Commissioners' Cases ... ..	Can.
Pug. ... ..	New Brunswick Reports (Pugsley) ... ..	Can.
Py. R. ... ..	Pykes' Lower Canada Reports ... ..	Can.
Q. B. ... ..	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852 ... ..	Eng.
Q. B. (preceded by date)	Law Reports, Queen's Bench Division, 1891—1901 ( <i>e.g.</i> , [1891] 1 Q. B.) ... ..	Eng.
Q. B. D. ... ..	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ... ..	Eng.
Q. J. P. ... ..	Queensland Justice of Peace Reports ... ..	Aus.
Q. L. J. ... ..	Queensland Law Journal and Reports, 11 vols., 1879—1901 ... ..	Aus.
Q. L. R. ... ..	Quebec Law Reports ... ..	Can.
Q. L. R. (Beor) ... ..	Queensland Law Reports by Beor, 1870—1878 ... ..	Aus.
Q. P. R. ... ..	Quebec Practice Reports ... ..	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current) ... ..	Can.
Q. R. (Vol.) S. C. ... ..	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current) ... ..	Can.
Q. S. C. R. ... ..	Queensland Supreme Court Reports, 5 vols., 1860—1881 ... ..	Aus.
Q. S. R. ... ..	Queensland State Reports, 6 vols., 1902—1906 ... ..	Aus.
Q. W. N. ... ..	Weekly Notes, Queensland ... ..	Aus.
R. ... ..	The Reports, 15 vols., 1893—1895 ... ..	Eng.
R. ... ..	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878 ... ..	S. Af.
R. (Ct. of Sess.) ... ..	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898 ... ..	Scot.
R. A. C. ... ..	Ramsay, Appeal Cases ... ..	Can.
R. & C. ... ..	Nova Scotia Reports (Russell & Chesley) ... ..	Can.
R. & G. ... ..	Nova Scotia Reports (Russell and Geldert) ... ..	Can.
R. C. ... ..	La Revue Critique de Législation et de Jurisprudence de Canada ... ..	Can.
R. de J. ... ..	Revue de Jurisprudence ... ..	Can.
R. de L. ... ..	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848 ... ..	Can.
R. E. D. ... ..	New South Wales, Reserved and Equity Decisions ... ..	Aus.
R. E. D. ... ..	Ritchie's Equity Decisions (Russell) ... ..	Can.
R. J. R. Q. ... ..	Quebec Revised Reports ... ..	Can.
R. L. N. S. ... ..	Revue Légale, New Series, 1895—(current) ... ..	Can.
R. L. O. S. ... ..	Revue Légale, Old Series, 21 vols., 1869—1892 ... ..	Can.
R. P. C. ... ..	Reports of Patent Cases, 1884—(current) ... ..	Eng.
R. R. ... ..	Revised Reports ... ..	Eng.
Rast. ... ..	Rastell's Entries ... ..	Eng.
Rayn. ... ..	Rayner's Tithe Cases, 3 vols., 1575—1782 ... ..	Eng.
Real Prop. Cas. ... ..	Real Property Cases, 2 vols., 1848—1847 ... ..	Eng.
Rep. Ch. ... ..	Reports in Chancery, fol., 3 vols., 1615—1710 ... ..	Eng.
Rep. in C. of A. ... ..	Reports in Courts of Appeal ... ..	N.Z.
Res. & Eq. Jud. ... ..	New South Wales Reserved and Equity Judgments ... ..	Aus.
Reserv. Cas. ... ..	Reserved Cases ... ..	Ir.
Rick. & M. ... ..	Rickards and Michael's Locust Standi Reports, 1 vol., 1885—1889 ... ..	Eng.
Rick. & S. ... ..	Rickards and Saunders' Locust Standi Reports, 1 vol., 1890—1894 ... ..	Eng.
Ridg. L. & S. ... ..	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795 ... ..	Ir.
Ridg. Parl. Rep. ... ..	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1796 ... ..	Ir.
Ridg. temp. H. ... ..	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746 ... ..	Eng.
Ritch. Eq. Rep. ... ..	Ritchie's Equity Reports ... ..	Can.
Rob. Eccl. ... ..	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853 ... ..	Eng.
Rob. L. & W. ... ..	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851 ... ..	Eng.
Robert. App. ... ..	Robertson's Scotch Appeals, House of Lords, 1 vol., 1707—1727 ... ..	Scot.
Robin. App. ... ..	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841 ... ..	Scot.
Roll. Abr. ... ..	Rolle's Abridgment of the Common Law, fol., 2 vols. ... ..	Eng.
Roll. Rep. ... ..	Rolle's Reports, King's Bench, fol., 2 vols., 1614—1625 ... ..	Eng.
Rom. ... ..	Romilly's Notes of Cases, 1 part, 1767—1787 ... ..	Eng.
Roscoe's B. C. ... ..	Roscoe, Digest of Building Cases ... ..	Eng.
Rose ... ..	Rose's Reports, Bankruptcy, 2 vols., 1810—1816 ... ..	Eng.
Ross, L. C. ... ..	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols. ... ..	Eng.
Rowe ... ..	Rowe's Reports (England and Ireland), 1 vol., 1798—1823 ... ..	Eng.
Rul. Cas. ... ..	Campbell's Ruling Cases, 25 vols. ... ..	Eng.
Russ. ... ..	Russell's Reports, Chancery, 5 vols., 1824—1829 ... ..	Eng.
Russ. & M. ... ..	Russell and Myrnes' Reports, Chancery, 2 vols., 1829—1833 ... ..	Eng.

# xxxiv REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Russ. & Ry. ...	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R. ...	Russell's Election Reports ...	Can.
Ry. & Can. Cas. ...	Railway and Canal Cases, 7 vols., 1835—1854 ...	Eng.
Ry. & Can. Tr. Cas. ...	Railway and Canal Traffic Cases, 1855—(current) ...	Eng.
Ry. & M. ...	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823—1826 ...	Eng.
Ryde & K. Rat. App. ...	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904 ...	Eng.
Ryde, Rat. App. ...	Ryde's Rating Appeals, 3 vols., 1871—1893 ...	Eng.
S. ...	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J. ...	South African Law Journal ...	S. Af.
S. A. L. R. ...	South Australian Law Reports ...	Aus.
S. A. L. R. ...	South African Law Reports ...	S. Af.
S. A. R. ...	Reports of the High Court of the South African Republic, 1881—1892 ...	S. Af.
S. A. S. R. ...	South Australian State Reports, since 1921 ( <i>e.g.</i> , [1921] S. A. S. R.) ...	Aus.
S. C. ...	Reports of the Supreme Court of the Cape of Good Hope from 1880 ...	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1901 ( <i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date)	Court of Session Cases (Scotland) (House of Lords), since 1906 ( <i>e.g.</i> , [1906] S. C. (H. L.)) ...	Scot.
S. C. (J.) (preceded by date)	Court of Justiciary Cases (Scotland), since 1906 ( <i>e.g.</i> , [1906] S. C. (J.)) ...	Scot.
S. C. R. ...	Canada, Supreme Court Reports ...	Can.
S. L. T. ...	Scots Law Times, 1893 (current) ...	Scot.
S. Q. R. ...	Queensland State Reports ...	Aus.
S. R. ...	Reports of the High Court of Southern Rhodesia ...	S. Af.
S. R. C. ...	Stuart's Lower Canada Reports ...	Can.
S. R. N. S. W. ...	New South Wales, State Reports ...	Aus.
S. R. Q. ...	Queensland Reports, Supreme Court ...	Aus.
S. V. A. R. ...	Stuart's Vice-Admiralty Reports ...	Can.
S. W. A. ...	South-West Africa Law Reports ...	S.-W. Af.
Saint ...	Saint's Digest of Registration Cases, 1843—1906, 1 vol. ...	Eng.
Salk. ...	Salkeld's Reports, King's Bench, 3 vols., 1689—1712 ...	Eng.
Sask. L. R. ...	Saskatchewan Law Reports ...	Can.
Sau. & Sc. ...	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840 ...	Ir.
Saund. ...	Saunders's Reports, King's Bench, 2 vols., 1666—1672 ...	Eng.
Saund. & A. ...	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904 ...	Eng.
Saund. & B. ...	Saunders and Bidder's Locus Standi Reports, 1905—(current) ...	Eng.
Saund. & C. ...	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M. ...	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858 ...	Eng.
Sav. ...	Savile's Reports, Common Pleas, fol. 1 ... , 1580—1591 ...	Eng.
Say. ...	Sayer's Reports, King's Bench, fol. 1 vol., 1751—1756 ...	Eng.
Sc. Jur. ...	Scottish Jurist, 46 vols., 1829—1873 ...	Scot.
Sc. L. R. ...	Scottish Law Reporter, 61 vols., 1865—1924 ...	Scot.
Sc. R. R. ...	Scots Revised Reports ...	Scot.
Sch. & Lef. ...	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806 ...	Ir.
Scott ...	Scott's Reports, Common Pleas, 8 vols. 1834—1840 ...	Eng.
Scott, N. R. ...	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm. ...	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860 ...	Eng.
Sel. Cas. Ch. ...	Select Cases in Chancery, fol. 1 vol., 1665—1698 (Pt. III. of Cas. in Ch.) ...	Eng.
Selwyn's N. P. ...	Selwyn's Abridgement of the Law of Nisi Prius ...	Eng.
Sess. Cas. K. B. ...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747 ...	Eng.
Sett. & Rem. ...	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1685—1727 ...	Eng.
Sh. (Ct. of Sess.) ...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838 ...	Scot.
Sh. & MacL. ...	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838 ...	Scot.
Sh. Dig. ...	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868 ...	Scot.
Sh. Just. ...	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831 ...	Scot.
Sh. Sc. App. ...	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824 ...	Scot.
Sh. Teind Ct. ...	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831 ...	Scot.
Shep. Touch. ...	Sheppard's Touchstone of Common Assurances ...	Eng.
Show. ...	Shower's Reports, King's Bench, 2 vols., 1678—1695 ...	Eng.
Show. Parl. Cas. ...	Shower's Cases in Parliament, fol. 1 vol., 1694—1699 ...	Eng.
Sid. ...	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol. 2 vols., 1657—1670 ...	Eng.

# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Sim. ... ..	Simons' Reports, Chancery, 17 vols., 1826—1852 ... ..	Eng.
Sim. & St. ... ..	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ... ..	Eng.
Sim. N. S. ... ..	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ... ..	Eng.
Skin. ... ..	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ... ..	Eng.
Sm. & Bat. ... ..	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825 ... ..	Ir.
Sm. & G. ... ..	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ... ..	Eng.
Smith, K. B. ... ..	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ... ..	Eng.
Smith, L. C. ... ..	Smith's Leading Cases, 2 vols. ... ..	Eng.
Smith, Reg. Cas. ... ..	C. L. Smith's Registration Cases, 1895—(current) ... ..	Eng.
Smythe ... ..	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840 ... ..	Ir.
Sol. Jo. ... ..	Solicitors' Journal, 1856—(current) ... ..	Eng.
Spence ... ..	Spence's Equitable Jurisdiction of the Court of Chancery ... ..	Eng.
Spinks ... ..	Spinks' Prize Court Cases, 2 parts, 1854—1856 ... ..	Eng.
St. R. Qd. (preceded by date) ... ..	Queensland State Reports, since 1902 ( <i>e.g.</i> , [1902] St. R. Qd.) ... ..	Aus.
Stair Rep. ... ..	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681 ... ..	Scot.
Stark. ... ..	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823 ... ..	Eng.
State Tr. ... ..	State Trials, 34 vols., 1163—1820 ... ..	Eng.
State Tr. N. S. ... ..	State Trials, New Series, 8 vols., 1820—1858 ... ..	Eng.
Stewart ... ..	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ... ..	Can.
Stockton ... ..	Stockton's Vice Admiralty Report and Digest ... ..	Can.
Story ... ..	Story's Commentaries on Equity Jurisprudence ... ..	Eng.
Stra. ... ..	Strange's Reports, 2 vols., 1716—1747 ... ..	Eng.
Stu. M. & P. ... ..	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853 ... ..	Scot.
Stuart ... ..	Sessions Cases (Stuart) ... ..	Scot.
Stuart, Adm. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ... ..	Can.
Stuart, Adm. N. S. ... ..	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874 ... ..	Can.
Stuart, K. B. ... ..	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835 ... ..	Can.
Sty. ... ..	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ... ..	Eng.
Sw. ... ..	Swabey's Report, Admiralty, 1 vol., 1855—1859 ... ..	Eng.
Sw. & Tr. ... ..	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865 ... ..	Eng.
Svan. ... ..	Swanston's Reports, Chancery, 3 vols., 1818—1821 ... ..	Eng.
Swin. ... ..	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ... ..	Scot.
Syme ... ..	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ... ..	Scot.
T. & M. ... ..	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ... ..	Eng.
T. H. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909 ... ..	S. Af.
T. Jo. ... ..	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685 ... ..	Eng.
T. L. ... ..	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current) ... ..	S. Af.
T. L. R. ... ..	The Times Law Reports, 1884—(current) ... ..	Eng.
T. P. ... ..	Reports of the Supreme Court of the Transvaal, 1910—(current) ... ..	S. Af.
T. P. D. ... ..	South African Law Reports, Transvaal Provincial Division ... ..	S. Af.
T. Raym. ... ..	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683 ... ..	Eng.
T. S. ... ..	Reports of the Supreme Court of the Transvaal, 1902—1909 ... ..	S. Af.
Taml. ... ..	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830 ... ..	Eng.
Tas. L. R. ... ..	Tasmanian Law Reports ... ..	Aus.
Taunt. ... ..	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ... ..	Eng.
Tax Cas. ... ..	Tax Cases, 1875—(current) ... ..	Eng.
Tay. ... ..	Taylor's King's Bench Reports ... ..	Can.
Temp. Wood ... ..	Manitoba Reports <i>temp.</i> Wood ... ..	Can.
Term Rep. ... ..	Term Reports (Durnford and East), fol., 3 vols., 1785—1800 ... ..	Eng.
Terr. L. R. ... ..	Territories Law Reports ... ..	Can.
Thom. ... ..	Nova Scotia Reports (Thomson) ... ..	Can.
Toth. ... ..	Tothill's Transactions in Chancery, 1 vol., 1559—1646 ... ..	Eng.
Town St. Tr. ... ..	Townsend, Modern State Trials ... ..	Eng.
Trem. P. O. ... ..	Tremaine Pleas of the Crown, 1 vol., 1667 ... ..	Eng.
Trist. ... ..	Tristram's Consistory Judgments, 1 vol., 1872—1890 ... ..	Eng.
Tru. ... ..	New Brunswick Reports (Trueman) ... ..	Can.
Tudor, L. C. Merc. Law. ... ..	Tudor's Leading Cases on Mercantile and Maritime Law ... ..	Eng.
Tudor, L. C. Real Prop. ... ..	Tudor's Leading Cases on Real Property ... ..	Eng.
Turn. & R. ... ..	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ... ..	Eng.
Tyr. ... ..	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835 ... ..	Eng.
Tyr. & Gr. ... ..	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ... ..	Eng.
U. C. Jur. ... ..	Upper Canada Jurist ... ..	Can.
U. C. L. J. N. S. ... ..	Canada Law Journal, New Series, 1865—(current) ... ..	Can.

# xxxvi      REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

U. C. L. J. O. S.	...	Canada Law Journal, Old Series, 10 vols., 1855—1864	...	Can.
U. C. R.	...	Upper Canada Reports, Queen's Bench	...	Can.
Udal	...	Fiji Law Reports (Udal)	...	Fiji.
V. L. R.	...	Victorian Law Reports	...	Aus.
V. R.	...	Victorian Reports	...	Aus.
V. R. (Adm.)	...	Victorian Reports (Admiralty)	...	Aus.
V. R. (Eq.)	...	Victorian Reports (Equity)	...	Aus.
V. R. (Law)	...	Victorian Reports (Law)	...	Aus.
Vaugh.	...	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673	...	Eng.
Vent.	...	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	...	Eng.
Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	West Australian Law Reports	...	Aus.
W. A'B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	Wyatt and Webb	...	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	Western Law Reporter	...	Can.
W. L. T.	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866—(current) (e.g., [1866] W. N.)	...	Eng.
W. N.	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A'B.	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	Western Weekly Reports	...	Can.
Wallis by Lyne	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	...	Eng.
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West temp. Hard.	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	...	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	...	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	...	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1850—1798	...	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	...	Can.



# REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS. xxxvii

<b>Y. &amp; C. Ch. Cas.</b>	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	...	Eng.
<b>Y. &amp; C. Ex.</b>	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	...	Eng.
<b>Y. &amp; J.</b>	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	...	Eng.
<b>Y. B.</b>	...	Year Books	...	Eng.
<b>Y. B. (Rolls Series)</b>	...	Year Books (Rolls Series)	...	Eng.
<b>Y. B. (Sel. Soc.)</b>	...	Year Books (Selden Society)	...	Eng.
<b>Yelv.</b>	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	...	Eng.
<b>Yon.</b>	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	...	Eng.



# ABBREVIATIONS

## USED IN THIS WORK.

(For Abbreviations used in citing Reports, see pp. xxi—xxxvii, *ante*.)

A.-G. . . .	for Attorney-General.
Act. . . .	„ Actiengesellschaft.
Admlty. . . .	„ Admiralty.
Affd. . . .	„ Affirmed.
Affg. . . .	„ Affirming.
Akt. . . .	„ Aktiengesellschaft; Aktiebolaget; Aktieselskabet.
Alta. . . .	„ Alberta.
Anon. . . .	„ Anonymous.
Apid. . . .	„ Applied.
Appet. . . .	„ Applicant.
Appln. . . .	„ Application.
Appln. . . .	„ Application to Register a Trade Mark.
Appit. . . .	„ Appellant.
Apprvd. . . .	„ Approved.
Arbn. . . .	Arbitration.
Archbp. . . .	Archbishop.
Art. . . .	Article.
Ass. Tax Case	Assessed Tax Case.
Assce. . . .	Assurance.
Assocn. . . .	Association.
B. C. . . .	Borough Council.
B. C. . . .	British Columbia.
Bkpcy. . . .	Bankruptcy.
Bkpt. . . .	Bankrupt.
Bldg. Soc. . . .	Building Society.
Bp. . . .	Bishop.
C. A. . . .	Court of Appeal.
C. & S. L. Ry. Co.	City & South London Railway Co.
C. C. A. . . .	Court of Criminal Appeal.
C. C. R. . . .	County Court Rules.
C. C. R. . . .	Court of Crown Cases Reserved.
C. L. P. Act. . . .	Common Law Procedure Act.
C. L. Ry. Co.	Central London Railway Co.
C. O. R. . . .	Crown Office Rules.
C. S. U. O. . . .	Consolidated Statutes of Upper Canada.
Ca. sa. . . .	<i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	Caledonian Railway Co.
Ch. . . .	Chancery.
Ch. Div. . . .	Chancery Division.
Co. . . .	Company.
Co-op. Assocn.	Co-operative Supply Association.
Comrs. . . .	Commissioners.
Consd. . . .	Considered.
Corpn. . . .	Corporation.
Ct. . . .	Court.
Ct. of Ch. . . .	Court of Chancery.
Ct. of Eq. . . .	Court of Equity.
Ct. of R. . . .	Court of Review.
D. C. . . .	Divisional Court.
Dbtd. . . .	Doubted.

Def't.	.	.	.	.	.	for Defendant.
Distd.	.	.	.	.	.	" Distinguished.
Div. Ct.	.	.	.	.	.	" Divisional Court.
Ecc'l. Comrs.	.	.	.	.	.	" Ecclesiastical Commissioners.
Ecc'l. Ct.	.	.	.	.	.	" Ecclesiastical Court.
Ex. Ch.	.	.	.	.	.	" Exchequer Chamber.
Ex p.	.	.	.	.	.	" <i>Ex parte</i> .
Exch.	.	.	.	.	.	" Exchequer.
Exor.	.	.	.	.	.	" Executor.
Exorship.	.	.	.	.	.	" Executorship.
Expld.	.	.	.	.	.	" Explained.
Ext'd.	.	.	.	.	.	" Extended.
Extrix.	.	.	.	.	.	" Executrix.
Fi. fa.	.	.	.	.	.	" <i>Fieri facias</i> .
Foll'd.	.	.	.	.	.	" Followed.
G. & S. W. Ry. Co.	.	.	.	.	.	" Glasgow & South Western Railway Co.
G. C. Ry. Co.	.	.	.	.	.	" Great Central Railway Co.
G. E. Ry. Co.	.	.	.	.	.	" Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	.	.	.	.	.	" Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	.	.	.	.	.	" Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	.	.	.	.	.	" Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	.	.	.	.	.	" Great Southern & Western Railway Co. of Ireland
G. W. Ry. Co.	.	.	.	.	.	" Great Western Railway Co.
Govt.	.	.	.	.	.	" Government.
Grdns.	.	.	.	.	.	" Guardians or Guardians of the Poor.
H. C. of A.	.	.	.	.	.	" High Court of Australia.
H. L.	.	.	.	.	.	" House of Lords.
I. R. Comrs.	.	.	.	.	.	" Inland Revenue Commissioners.
Insce.	.	.	.	.	.	" Insurance.
JJ.	.	.	.	.	.	" Justices.
Jud. Act	.	.	.	.	.	" Judicature Act.
K. B. Div.	.	.	.	.	.	" King's Bench Division.
L. & B. Ry. Co.	.	.	.	.	.	" London & Brighton Railway Co.
L. & N. E. Ry. Co.	.	.	.	.	.	" London & North Eastern Railway Co.
L. & N. W. Ry. Co.	.	.	.	.	.	" London & North Western Railway Co.
L. & S. W. Ry. Co.	.	.	.	.	.	" London & South Western Railway Co.
L. & Y. Ry. Co.	.	.	.	.	.	" Lancashire & Yorkshire Railway Co.
L. B.	.	.	.	.	.	" Local Board.
L. B. & S. C. Ry. Co.	.	.	.	.	.	" London, Brighton & South Coast Railway Co.
L. C.	.	.	.	.	.	" Lord Chancellor.
L. C. & D. Ry. Co.	.	.	.	.	.	" London, Chatham & Dover Railway Co.
L. C. C.	.	.	.	.	.	" London County Council.
L. Elec. Ry. Co.	.	.	.	.	.	" London Electric Railway Co.
L. G. Board	.	.	.	.	.	" Local Government Board.
L.J.	.	.	.	.	.	" Lord Justice.
L.JJ.	.	.	.	.	.	" Lords Justices.
L. M. & S. Ry. Co.	.	.	.	.	.	" London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	.	.	.	.	.	" London, Tilbury & Southend Railway Co.
M. S. Act	.	.	.	.	.	" Merchant Shipping Act.
M. S. & L. Ry. Co.	.	.	.	.	.	" Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	.	.	.	.	.	" Magistrates.
Man.	.	.	.	.	.	" Manitoba.
Mentd.	.	.	.	.	.	" Mentioned.
Met. Dist. Ry. Co.	.	.	.	.	.	" Metropolitan District Railway Co.
Met. Ry. Co.	.	.	.	.	.	" Metropolitan Railway Co.
Mid. G. W. Ry. Co.	.	.	.	.	.	" Midland Great Western Railway Co.
Mid. Ry. Co.	.	.	.	.	.	" Midland Railway Co.
Mtge.	.	.	.	.	.	" Mortgage.
Mtgee.	.	.	.	.	.	" Mortgagee.
Mtgor.	.	.	.	.	.	" Mortgagor.
N. B.	.	.	.	.	.	" New Brunswick.
N. B. Ry. Co.	.	.	.	.	.	" North British Railway Co.
N. E. Ry. Co.	.	.	.	.	.	" North Eastern Railway Co.
N. F.	.	.	.	.	.	" Not Followed.
N. P.	.	.	.	.	.	" <i>Nisi Prius</i> .

# ABBREVIATIONS.

xli

N. S.	.	.	.	.	for Nova Scotia.
N. W. P.	.	.	.	.	„ North-West Provinces:
N. W. T.	.	.	.	.	„ North-West Territories.
Ont.	.	.	.	.	„ Ontario.
Ord.	.	.	.	.	„ Order.
Overd.	.	.	.	.	„ Overruled.
P. C.	.	.	.	.	„ Privy Council.
P. E. I.	.	.	.	.	„ Prince Edward Island.
Petn.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	„ <i>Quære</i> .
Que.	.	.	.	.	„ Quebec.
R. C.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	„ Registration of Trade Mark.
Reg. of Trade Mks.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	„ Reversed.
Revsd.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	„ Steamship.
Sask.	.	.	.	.	„ Saskatchewan.
Sched.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	„ Workmen's Compensation Act.
Y. T.	.	.	.	.	„ Yukon Territory.



## MEANING OF TERMS

### USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Ext'd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.





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## Part I.—In General.

1. **Pawn or pledge defined.**—(1) If the thing pawned may be the worse for using, as clothes, etc., the pawnee cannot use them; if it will not be the worse . . . he [the pawnee] may use them, but then it must be at peril. If the pawn is of such a nature that the keeping is a charge to the pawnee, as a cow or horse, the pawnee may milk the one, or ride the other, as this is a recompense for his keeping (HOLT, C.J.).

(2) The pawnee is not answerable for the robbery of things pledged of which he takes proper care (HOLT, C.J.).

(3) If creditor takes a pawn, he is bound to restore it upon the repayment of the debt, but if his care of keeping it be exact, & the pawn is lost, he shall be excused, for there was no default in him (HOLT, C.J.).

(4) Goods in the hands of the pawnee shall not be taken in execution . . . until the money is paid to the pawnee (HOLT, C.J.).

(5) . . . The law requires nothing extraordinary of the pawnee, but only that he shall take what care he can to restore the goods, upon payment of the money (HOLT, C.J.).

(6) There are six sorts of bailment. . . . The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for

money borrowed of him by the bailor; & this is called in Latin *vadium* & in English a pawn or pledge. . . . As to the fourth sort of bailment, viz. *vadium* or a pawn, in this I shall consider two things: first, what property the pawnee has in the pawn or pledge, & secondly, for what neglect he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee that he shall be repaid his debt & to compel the pawner to pay him (HOLT, C.J.).

(7) If the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them (HOLT, C.J.).—*COGGS v. BERNARD* (1703), 2 Ld. Raym. 909; 3 Salk. 268; Holt, K. B. 528; 1 Com. 133; 92 E. R. 107; *sub nom.* ANON., Holt, K. B. 569; 2 Salk. 522.

*Annotations*.—As to (2) *Appl. R. v. Cording* (1832), 1 Nev. & M. K. B. 35. *Reid, Syred v. Carruthers* (1858), E. B. & F. 469; *Swire v. Leach* (1895), 5 New Rep. 314. As to (3) *Reid, Ex v. Cording* (1832), 4 B. & Ad. 198. As to (5) *Reid, Ryall v. Rowles* (1750), 1 Ves. Sen. 348. As to (6) *Reid, Hartopp v. Hoare* (1743), 3 Atk. 44; *Attenborough v. Solomon*, [1913] A. C. 76. *Generally*, *Reid, Martin v. Reid* (1862), 11 C. B. N. S. 730; *Pigot v. Cubley* (1864), 15 C. B. N. S. 701; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585. *Mentid. Buckmyr v. Darnall* (1704), 2 Ld. Raym. 1085; *Grand Opinion for Prerogative Concerning the Royal Family* (1717), Fortes. Rep. 401; *Robinson v. Green* (1723), 1 Stra. 574; *Shelton v. Osborn* (1739), 1 Barn. K. B. 260; *Boucher v. Lawson* (1735), *Lee temp.*



**Hard.** 194; *Kettle v. Bromsall* (1738), *Willes*, 118; *Charitable Corp'n. v. Sutton* (1742), 2 *Atk.* 400; *Pasley v. Freeman* (1796), 3 *Term Rep.* 51; *Mason v. Lickbarrow* (1790), 1 *Hy. Bl.* 357; *Elise v. Gatward* (1793), 5 *Term Rep.* 143; *Guilliam v. Barnett* (1804), 2 *Smith, K. B.* 156; *Gibson v. Inglis* (1814), 4 *Camp.* 73; *Pippin v. Sheppard* (1822), 11 *Price*, 400; *Storr v. Crowley* (1825), *McCle. & Yo.* 129; *Whitehead v. Groetham* (1825), 2 *Bing.* 464; *Corbett v. Paekington* (1827), 6 *B. & C.* 268; *Gledstane v. Hewitt* (1831), 1 *Tyr.* 445; *McKenzie v. McLeod* (1834), 10 *Bing.* 385; *Vaughan v. Menlove* (1837), 3 *Bing. N. C.* 468; *Boorman v. Brown* (1842), 3 *Q. B.* 511; *Ross v. Hill* (1846), 2 *C. B.* 877; *G. N. Ry. v. Shepherd* (1852), 8 *Exch.* 30; *Baile v. West* (1853), 13 *C. B.* 466; *Crouch v. L. & N. W. Ry.* (1854), 14 *C. B.* 355; *Dansey v. Richardson* (1854), 3 *E. & B.* 144; *Barendale v. Eastern Counties Ry.* (1858), 27 *L. J. C. P.* 137; *Blakemore v. Bristol & Exeter Ry.* (1858), 8 *E. & B.* 1035; *MacCarthy v. Young* (1861), 6 *H. & N.* 329; *Mariott v. Anohor Reversionary Co.* (1861), 3 *De G. F. & J.* 177; *Taylor v. Caldwell* (1863), 3 *B. & S.* 826; *Peninsular & Oriental Steam Navigation Co. v. Shand* (1865), 3 *Mo. P. C. C. N. S.* 272; *Grill v. General Iron Screw Collier Co.* (1866), 12 *Jur. N. S.* 727; *Skelton v. L. & N. W. Ry.* (1867), *L. R.* 2 *C. P.* 631; *Giblin v. McMullen* (1868), *L. R.* 2 *P. C.* 317;

*Readhead v. Mid. Ry.* (1869), *L. R.* 4 *Q. B.* 379; *Liver Alkali Co. v. Johnson* (1874), *L. R.* 9 *Exch.* 338; *Searle v. Laverick* (1874), *L. R.* 9 *Q. B.* 122; *Nugent v. Smith* (1875), 1 *C. P. D.* 19; *Harris v. G. W. Ry.* (1876), 1 *Q. B. D.* 415; *Bergheim v. G. E. Ry.* (1878), 3 *C. P. D.* 221; *Foulkes v. Mot. Dist. Ry.* (1880), 28 *W. R.* 526; *Cutler v. North London Ry.* (1887), 56 *L. T.* 639; *The Moorcock* (1889), 14 *P. D.* 64; *Shaw v. G. W. Ry.*, [1894] 1 *Q. B.* 373; *The Winkfield*, [1902] *P.* 42; *Harris v. Perry*, [1903] 2 *K. B.* 219; *Cheshtre v. Bailey*, [1905] 1 *K. B.* 237; *Clarke v. West Ham Corp'n.*, [1909] 2 *K. B.* 858; *Shrimpton v. Hertfordshire County Council* (1910), 74 *J. P.* 306; *Bath v. Standard Land Co.*, [1911] 1 *Ch.* 618; *Hatton v. Car Maintenance Co.* (1914), 110 *L. T.* 765; *Banbury v. Bank of Montreal*, [1918] *A. C.* 626; *Coldman v. Hill*, [1919] 1 *K. B.* 443; *The Empress* (1923), 92 *L. J. P.* 42; *Ellis's Trustee v. Dixon-Johnson*, [1924] 2 *Ch.* 451; *Pratt v. Patrick*, [1924] 1 *K. B.* 488.

—.]—*See, also*, Part II., Sect. 1; *Pawnbrokers Act*, 1872 (c. 93), s. 5; & *Factors Act*, 1889 (c. 45), s. 1 (5).

**Pawns at common law.**—*See* Part II.

**Pawns under Pawnbrokers Acts.**—*See* Part III.

## Part II.—Pawns at Common Law.

### SECT. 1.—THE CONTRACT OF PAWN.

#### SUB-SECT. 1.—NATURE OF CONTRACT.

2. **Species of bailment.**—*COGGS v. BERNARD*, No. 1, *ante*.

3. **Distinguished from bailment—Special property in pledgee—Not mere custody.**—The difference between bailing & pledging of goods is that a pawnee hath a special property & a bailor custody only.—*HARTOP v. HOARE* (1743), 3 *Atk.* 44; 2 *Stra.* 1187; 1 *Wils.* 8; 20 *E. R.* 828.

**Annotations.**—*Reid*, *Boyson v. Coles* (1817), 6 *M. & S.* 14; *Wookey v. Pole* (1820), 4 *B. & Ald.* 1; *Clayton v. Le Roy*, [1811] 2 *K. B.* 1031. *Mentl.* *Mason v. Lickbarrow* (1790), 1 *Hy. Bl.* 357.

4. **Intermediate between lien & mortgage.**—A holder of scrip certificates for shares borrowed of debt. a sum of money on his own promissory note, payable on demand, & on the security of the shares, & deposited with debt. the scrip certificates. He afterwards became bkpt. & debt., without demand & without notice, sold ten of the fifteen shares to repay himself his debt. Creditors' assignee, without making any tender of the amount of the debt, brought an action of trover against debt. to recover the value of the shares:—*Held*: even assuming the sale to be wrongful, the immediate right to the possession of the shares was not by the sale revested in pltf. & he could not therefore maintain trover, either for the whole value of the shares or for nominal damages.

There are three kinds of security: the first, a simple lien; the second, a mtge., passing the property out & out; the third, a security intermediate between a lien & a mtge.—viz. a pledge—where by contract a deposit of goods is made a security for a debt, & the right to the property vests in the pledgee so far as is necessary to secure the debt (*WILLES, J.*)—*HALLIDAY v. HOLGATE* (1868), *L. R.* 3 *Exch.* 299; 37 *L. J. Ex.* 174; 18 *L. T.* 656; 17 *W. R.* 13, *Ex. Ch.*

**Annotations.**—*Consd.* *Yungmann v. Brlesemann* (1892), 67 *L. T.* 642. *Reid*, *Durham v. Robertson*, [1898] 1 *Q. B.* 765; *Hughes v. Pump House Hotel Co.*, [1902] 2 *K. B.* 190; *Ellis's Trustee v. Dixon-Johnson*, [1924] 2 *Ch.* 451. *Mentl.* *Mulliner v. Florence* (1878), 3 *Q. B. D.* 484; *Cox v. Liddell* (1895), 2 *Mans.* 212; *Whiteley v. Hilt*, [1918] 2 *K. B.* 808.

**Distinguished from lien.**—*See* LIEN, Vol. XXXII., pp. 217, 218, Nos. 25–29.

**Distinguished from mortgage.**—*See* MORTGAGE, Vol. XXXV., pp. 247, 248, Nos. 72–82.

**Distinguished from bills of sale.**—*See* BILLS OF SALE, Vol. VII., pp. 19, 20, Nos. 87–93.

**Necessity for stamp.**—*See* Part II., Sect. 1, sub-sect. 5, *post*.

#### SUB-SECT. 2.—SUBJECT-MATTER.

##### A. In General.

5. **Goods must be in existence.**—I assume without discussion that as against Anderson & Colman there has been a pledge as effectual as if they had given it themselves. But, if in such a case there was a shortage, the right of action accruing would be not because there had been, but because there had not been, an effectual pledge of the goods which were wanting. A pledge implies possession, & you cannot either give possession of or pledge things which do not exist (*WILLES, J.*)—*GILBERTSON & Co. v. ANDERSON & COLTMAN, LTD.* (1901), 18 *T. L. R.* 224.

6. **Money.**—*ISAACK v. CLARK* (1615), 2 *Bulst.* 306; *Moore, K. B.* 841; 1 *Roll. Rep.* 126; 80 *E. R.* 1143.

**Annotations.**—*Reid*, *Mason v. Farnell* (1844), 1 *Dow. & L.* 578; *Cooper v. Willomatt* (1845), 1 *C. B.* 672; *Clements v. Flight* (1846), 1 *New Pract. Cas.* 567. *Mentl.* *Manby v. Scott* (1663), 1 *Kob.* 441; *Mires v. Solebay* (1678), 2 *Mod. Rep.* 242; *Cranch v. White* (1835), 4 *L. J. C. P.* 113; *Garland v. Carlisle* (1837), 4 *Scott.* 587; *Whitehead v. Harrison* (1844), 6 *Q. B.* 423; *Hollins v. Fowler* (1875), *L. R.* 7 *H. L.* 757.

**Negotiable instruments.**—*See* BANKERS, Vol. III., pp. 268–270.

**Bills of lading.**—*See* SHIPPING.

**Vessel & freight.**—*See* SHIPPING.

##### B. Unlawful Pledges.

**Hosiery materials.**—*See* Hosiery Act, 1843 (c. 40), ss. 2, 4, 11; *Summary Jurisdiction Act*, 1848 (c. 43), s. 4.

**Linen & unfinished apparel.**—*See* Pawnbrokers Act, 1872 (c. 93), s. 35.

### PART II. SECT. 1, SUB-SECT. 2.—A.

a. **Award.**—*HOBSTRAWER v. ROBINSON* (1874), 23 *C. P.* 350.—*CAN.*

b. **Timber kmtd.**—*GRANT v. BANQUE NATIONAL* (1886), 9 *O. R.* 411.—*CAN.*

c. **Bond.**—*WEST CUMBERLAND IRON & STEEL CO. v. WINNIPEG & HUDSON'S BAY RY. CO.* (1890), 6 *Man. L. R.* 388.—*CAN.*

d. —.]—*NETHERLANDS BANK OF*

*SOUTH AFRICA v. YULL'S TRUSTEE*, [1914] *W. L. D.* 133.—*S. AF.*

e. **Chose in action.**—*NATIONAL BANK OF S. A., LTD. v. COHEN'S TRUSTEES*, [1911] *App. D.* 235.—*S. AF.*

**Sect. 1.—The contract of pawn: Sub-sect. 2, B. & C.; sub-sect. 3, A. & B.]**

**Police clothing.]—See Metropolitan Police Act, 1839 (c. 47), s. 17; County Police Act, 1839 (c. 93), s. 15.**

**Public stores.]—See Public Stores Act, 1875 (c. 25), s. 9.**

**Royal Forces.]—See, generally, ROYAL FORCES.**

**Identity or life certificates of military & naval forces.]—See Army Act, 1881 (c. 58), s. 156 (9); Army Annual Act, 1904 (c. 5), s. 9; Army (Amendment) No. 2 Act, 1915 (c. 58), s. 1 (2); Navy (Pledging of Certificates, etc.) Act, 1914 (c. 89), s. 1.**

**Naval stores.]—See Naval Discipline Act, 1866 (c. 109), s. 33.**

**7. —Regimental equipments, arms & military stores.]—(1) Whereas Army Act, 1881 (c. 58), s. 156 (1), makes it an offence for a person to receive any of the goods mentioned in the section from a soldier, it makes it an offence for a person to buy, exchange, or to take in pawn such goods from any person, or to detain such goods. (2) The word “detains” as used in the sect. meant the adverse withholding of possession of the goods from the Govt., & does not bear the technical meaning applied to it in an action of detainee, & therefore it is not necessary to prove that there has been a demand for the goods & a refusal to deliver them up.—*PULLEN v. CARLTON*, [1918] 2 K. B. 207; 87 L. J. K. B. 904; 119 L. T. 82; 82 J. P. 153; 16 L. G. R. 770; 26 Cox C. C. 206, D. C.**

**—.]—See Army Act, 1881 (c. 58), s. 156; Army (Amendment) No. 2 Act, 1915 (c. 58), s. 6; Volunteer Act, 1863 (c. 65), ss. 28, 29; Volunteer Act, 1869 (c. 81), ss. 3–5; Territorial & Reserve Forces Act, 1907 (c. 9), s. 22; 3 Edw. 7, c. 6, ss. 1, 2 (ii); Statutory Rules & Orders, 1924, Nos. 1212, 1213.**

**Seamen's clothing.]—See Seamen's Clothing Act, 1869 (c. 57), s. 4.**

**Workhouse property.]—See Poor Relief Act, 1815 (c. 137), s. 2; Poor Law (Amendment) Act, 1844 (c. 101), ss. 58, 67.**

### C. Void Pledges.

**Pawns by infants.]—See Infants Relief Act, 1874 (c. 62), s. 1.**

**Pawns by drunken persons.]—See Pawnbrokers Act, 1872 (c. 93), s. 32.**

**Pledges by military & naval forces—Pay, pensions or rewards.]—See Army Act, 1881 (c. 58), s. 141; Naval & Marine Pay & Pensions Act, 1865 (c. 73), ss. 4, 5; 47 & 48 Vict. c. 44, ss. 2, 4; Army (Amendment) No. 2 Act, 1915 (c. 58); CHOSSES IN ACTION, Vol. VIII., pp. 436 *et seq.***

### SUB-SECT. 3.—DELIVERY.

#### A. In General.

**8. Necessity for.]—Ordinarily by the common law, although of course a mtge. may be given of chattels as well as of land without delivering possession, yet a mere pledge cannot be given without the delivery of the possession of the goods (MELLISH, L.J.).—*AYERS v. SOUTH AUSTRALIAN***

### PART II. SECT. 1, SUB-SECT. 3.—A.

**81. Necessity for.]—The rule that a pledge, unless accompanied or followed by delivery of the goods to the creditor, creates no obligation by which the latter can resort to them in the hands of a third person, is subject to**

**the qualification that where a purchaser obtains pledged articles, with a knowledge that they have been pledged, he has no greater right in regard to the pledged articles than the pledgor himself.—*COATON v. ALEXANDER*, [1879] Buch. 17.—S. AF.**

101. *Actual or constructive*

**BANKING CO. (1871), L. R. 3 P. C. 548; 7 Moo. P. C. C. N. S. 432; 40 L. J. P. C. 22; 19 W. R. 860; 17 E. R. 163, P. C.**

**Annotations:—*Reid, Burdick v. Sewell* (1883), 10 Q. B. D. 363. *Mentd. Batson v. London School Board* (1903), 87 J. P. 457; *Cholham & Woldingham Assocn. v. Hayward* (1911), 76 J. P. 52.**

**9. —.]—In a pledge of goods it is not essential that the advance & delivery of possession should be contemporaneous. It is sufficient if possession be delivered within a reasonable time of the advance in pursuance of the contract to pledge.**

In Nov. 1883, A. agreed to lend B. £2,500 on the security of a valuable collection of prints & engravings. On Nov. 19, 1883, A. advanced B. £1,250 on account of the loan, & it was arranged between them that the collection should be stored in a certain room, & on Dec. 21, 1883, B. wrote to A.: “The collection was moved in to-day. L. has the key, which I place entirely at your disposal.” On Dec. 24, 1883, A. advanced to B. the balance of the loan, & on Jan. 11, 1884, B. wrote to A.: “You having advanced to me the sum of £2,500, I hereby authorise you to retain possession of my collection of engraved prints, now deposited by me in a certain room . . . the key of which room is at present in your possession or power; & I hereby acknowledge that you are to retain possession of such prints, etc., until the whole of the said sum of £2,500, with interest at 5 per cent., has been repaid to you.” B. died insolvent, & his administratrix disputed the validity of A.'s security on the ground that the letter of Jan. 11 constituted a bill of sale, which was void under Bills of Sale, 1878 (Amendment) Act, 1882 (c. 43):—*Held*: (1) the transaction was one of pledge, independent of the letters, & Bills of Sale 1878 (Amendment) Act, 1882 (c. 43), did not apply; (2) the pledge was perfected by delivery of the key to L., which amounted to constructive delivery of the goods to A.

The pledge therefore consists in the delivery. At any rate a delivery is an essential part of the pledge (*KEKEWICH, J.*).—*HILTON v. TUCKER* (1888), 39 Ch. D. 609; 57 L. J. Ch. 973; 59 L. T. 172; 36 W. R. 762; 4 T. L. R. 618.

**Annotations:—*Reid, Mills v. Charlesworth* (1890), 25 Q. B. D. 421; *Wrightson v. McArthur & Hutchisons*, [1921] 2 K. B. 807. *Mentd. Morris v. Delobel Filipo* (1892), 66 L. T. 320.**

**10. —Actual or constructive delivery.]—(1) Pltf., being indebted to one B. in the sum of £40, entered into a written agreement with him, whereby he agreed that B. should have his horse, van, cart, & two sets of harness, “for what he owed him”; & by the memorandum it was further agreed that B. should keep the articles mentioned until pltf. paid him the £40: & the memorandum concluded thus—“The said B. has received into his possession the said horse, van, cart, & two sets of harness this Dec. 24, 1860.” B. received into his actual possession the horse & van & one set of harness, but having no place to put them in, he left the cart & the other set of harness with pltf., with an understanding that he was to take them whenever he pleased. B. having become insolvent, pltf. got back the horse, van, & set of harness: but B.'s assignee seized the whole of the things mentioned in the memorandum, &**

**delivery.]—To complete an underhand pledge of movables, delivery thereof to the pledgee is necessary. But, where a pledgee has already possession of the movables of the pledgor in some other capacity, no actual delivery of the movables is necessary to create a valid pledge, provided there be clear**

caused them to be sold by debt., an auctioneer :—*Held*: that being the only question raised at the trial, there had been a sufficient delivery of the goods to B. to vest the property in him, subject to the right of the pawnee to redeem; & consequently, *pltf.* was not entitled to recover.

(2) *Qu.*: as to the right of a pawnee to sell the pledge, where no day has been fixed for the payment of the sum for which the chattel is impignorated?

Now, I take the law to be, that, to constitute a valid pledge, there must be a delivery of the article either actual or constructive to the pawnee (ERLE, C.J.).—*MARTIN v. REID* (1862), 11 C. B. N. S. 730; 31 L. J. C. P. 126; 5 L. T. 727; 142 E. R. 982.

*Annotations*:—*Consd. Langton v. Waring* (1865), 18 C. B. N. S. 315. *Reid. Meyerstein v. Barber* (1866), L. R. 2 C. P. 38.

11. Time for delivery—Within reasonable time after advance—In pursuance of contract.—*HILTON v. TUCKER*, No. 9, *ante*.

12. Effect of delivery—Property of pawnee in pledge.]—Pawnees of goods, etc., permitting bkpt. to continue in possession, order, & disposition, have no specific lien against general assignees under the commission.

There is one case more, where the proper distinction between mtge. & pawns is taken, *Ratcliff v. Davis*, No. 75, *post*, where the ct. held that there was a special property in pawnee, entitling to the custody till the condition is performed; but that on payment the whole property vested in pawner; distinguishing it from a mtge. which is a conveyance of the thing (BURNET, J.).—*RYALL v. ROWLES* (1750), 1 Ves. Sen. 348; 1 Atk. 165; 1 Wils. 260; 9 Bl. N. S. 377, n.; 27 E. R. 1074, J. C.

*Annotations*:—*Distd. Reeves v. Capper* (1838), 1 Arn. 427. *Reid. Lingham v. Biggs* (1797), 1 Bos. & P. 82; *Dearle v. Hall*, *Loveridge v. Copor* (1828), 3 Russ. 1; *Bartlett v. Bartlett* (1857), 1 De G. & J. 127; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Re Bainbridge, Ex p. Fletcher* (1878), 8 Ch. D. 218. *Mentd. Doddington v. Hallett* (1750), 1 Ves. Sen. 497; *Ward v. Turner* (1752), 2 Ves. Sen. 431; *Ex p. Dumas* (1754), 2 Ves. Sen. 582; *Ex p. Shank* (1754), 1 Atk. 234; *Worsley v. Demattos & Slader* (1758), 1 Burr. 467; *Wilson v. Day* (1759), 2 Burr. 827; *Mason v. Vere* (1779), 2 Wm. Bl. 1369; *Falkener v. Case* (1781), 1 Bro. C. C. 125; *Atkinson v. Malling* (1788), 2 Term Rep. 462; *Plumb v. Flutt* (1791), 2 Anst. 432; *Gordon v. East India Co.* (1797), 7 Term Rep. 228; *Evans v. Bicknell* (1801), 6 Ves. 174; *Jones v. Gibbons* (1804), 9 Ves. 407; *Horn v. Baker* (1808), 9 East, 215; *Taylor v. Plumer* (1815), 3 M. & S. 562; *Re Fraser, Ex p. Monro* (1819), Buck, 300; *Hartley v. Smith* (1819), Buck, 368; *Storer v. Hunter* (1824), 3 B. & C. 368; *Hubbard v. Bagshaw* (1831), 4 Sim. 326; *Re Severn, Ex p. Colville* (1831), 9 L. J. O. S. Ch. 56; *Re Severn, Ex p. Tennyson* (1832), Mont. & B. 67; *Thuck v. Lee* (1834), 1 Ad. & El. 304; *Re Ogden, Ex p. Lloyd* (1834), 1 Mont. & A. 494; *Gardner v. Lachlan* (1838), 4 My. & Cr. 129; *Belcher v. Capper* (1842), 4 Man. & G. 502; *Eddy v. Bridges* (1843), 2 Y. & C. Ch. Cas. 486; *Belcher v. Bellamy* (1848), 2 Exch. 303; *Beckham v. Drako* (1849), 2 H. L. Cas. 579; *North v. Gurney* (1861), 1 John. & B. 509; *Graince v. Warner, Re Graince* (1865), 6 New Rep. 219; *Cooke v. Hemming* (1868), L. R. 3 C. P. 334; *Re West of England & South Wales District Bank, Ex p. Dale* (1870), 11 Ch. D. 772; *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696; *Colonial Bank v. Whinnay* (1886), 11 App. Cas. 426; *Re Patrick, Bills v. Tatham* (1890), 63 L. T. 752; *Re Richards, Humber v. Richards* (1890), 45 Ch. D. 589; *Thomas v. Searles*, [1891] 2 Q. B. 408; *English & Scottish Mercantile Investment Trust v. Brunton*, [1892] 3 Q. B. 1; *Re Wyatt, White v. Mills*, [1892] 1 Ch. 188; *Ward v. Duncombe*, [1893] A. C. 369; *Sharman v. Mason*, [1899] 2 Q. B. 679; *Rose v. Buckett*, [1901] 2 K. B. 449; *Glegg v. Bromley* (1911), 81 L. J. K. B. 334.

### B. Sufficiency of Delivery.

13. Constructive delivery—Goods remaining in pawner's possession.]—W., the captain of a ship of which debts. were the owners, delivered a chronometer to debts., as security for an advance of money, under a written agreement that the instrument was to be considered the property of debts. until the money was repaid, they allowing him the use of it during the voyage about to be undertaken. Upon the completion of the voyage, W. pledged it again to *pltf.*, the chronometer then being in the hands of the makers, who, in ignorance of the former pledge, agreed to hold the instrument for *pltf.* The sum advanced by debts. not being paid :—

*Held*: (1) the property in the chattel vested in debts. by the first pledge, & nothing remained in the pawner, but a reversionary interest in the chattel, until the money was paid; (2) debts.' right was not affected by fraud, to be inferred necessarily from the want of possession, as the want of possession is but a ground of fraud to be submitted to the jury. Neither did debts. lose their property in the pledge, by parting with the possession, for though, generally speaking, in the case of a simple pawn of a personal chattel, the property is lost with the possession, yet, the delivery to the pawner, under the terms of the agreement, was not a parting with the possession, & in such case, the possession of the pawner was that of debts.—*REEVES v. CAPPER* (1838), 5 Bing. N. C. 136; 1 Arn. 427; 6 Scott, 877; 8 L. J. C. P. 44; 2 Jur. 1067; 132 E. R. 1057.

*Annotations*:—*As to* (1) *Reid. Walker v. Clyde* (1861), 10 C. B. N. S. 381. *As to* (2) *Consd. Flory v. Denny* (1852), 7 Exch. 581. *Distd. Dublin City Distillery v. Doherty*, [1914] A. C. 823. *Reid. Langton v. Waring* (1865), 18 C. B. N. S. 315; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585; *Meyerstein v. Barber* (1866), L. R. 2 C. P. 38; *Young v. Lambert* (1870), L. R. 3 P. C. 142; *Burdick v. Sewell* (1883), 10 Q. B. D. 363; *Hilton v. Tucker* (1888), 39 Ch. D. 669; *Cochrane v. Moore* (1890), 25 Q. B. D. 57; *Mills v. Charlesworth* (1890), 25 Q. B. D. 421; *Morris v. Delobbel Filipo* (1892), 66 L. T. 320.

14. ——— To be removed at will.]—*MARTIN v. REID*, No. 10, *ante*.

15. ——— Shipment of goods in boat of pawnee—Boat receipt for delivery of goods to pawnee.]—Where a merchant, in Newcastle, who was in the habit of consigning goods to his agents, *pltf.*s, in London, for sale, & of drawing upon them to certain amounts, had overdrawn his account, & advised his agents that he would ship them twenty tons of alkali to cover his draft, did accordingly ship the alkali on board a ship of debts., who were wharfingers between Newcastle & London, & received from debts.' servant, the captain of the ship, a boat receipt, to the effect that the goods were to be delivered to *pltf.*s:—*Held*: (1) debts. were estopped from denying *pltf.*s' title in the goods upon their arrival in London; (2) no bill of lading was requisite to vest the property in *pltf.*s; (3) as between A. & *pltf.*s, the relation was not that of principal & factor, but of pawner & pawnee, in which case the property would vest in the pawnee without actual delivery, in the same manner as in that of vendor & vendee.—*EVANS v. NICHOL* (1841), 3 Man. & G. 614; 4 Scott, N. R. 43; 11 L. J. C. P. 6; 5 Jur. 1110; 133 E. R. 1286.

*Annotation*:—*Generally, Mentd. Kerford v. Mondel* (1859), 28 L. J. Ex. 303.

evidence of the bona fides of the transaction.—*VIOB'S INSOLVENT ESTATE v. CHERNOTSKY & LEVY*, [1914] C. P. D. 100.—S. AF.

### PART II. SECT. 1, SUB-SECT. 3.—B.

#### 13.1. Constructive delivery—Goods re-

maining in pawner's possession.]—An insolvent executed a so-called "deed of sale," whereby he purported to sell certain goods to his father for the amount of a debt due to the father, & the latter agreed that the sale should be considered as cancelled upon payment of the debt. Upon the execution

of the deed of sale the goods were delivered to the father, but were afterwards allowed to remain in possession of the son as his own property:—*Held*: the transaction amounted to a pledge, & not a sale.—*HORMEYER v. Gous* (1891), 10 S. C. 115.—S. AF.

*Sect. 1.—The contract of pawn: Sub-sect. 3, B.; sub-sect. 4.]*

**16. — Goods left in possession of vendor—To secure purchase-money.]**—Teas are sold to be paid for at appointed days, the sales being made according to the custom of the trade, whereby the goods, when sold, are left as a pledge for full payment with the vendor, who, in case of non-payment, is at liberty to resell & charge the loss to the original purchaser. The purchase-money is not paid at the appointed time; the purchaser becomes bkpt.; & the vendor having sold part of the teas before the flat, & the rest afterwards, gives the estate credit for the clear proceeds of the sales, tendering a proof for the residue of the original purchase-money:—*Held*: although there was no delivery of the goods, the original sale was a binding contract within Stat. Frauds.—*Re TATE, Ex p. MOFFATT* (1841), 2 Mont. D. & De G. 170.

*Annotation*:—*Mentd. Re Gales, Ex p. Harrison* (1843), 1 L. T. O. S. 456.

**17. — — — — —.]**—It is not disputed that if a vendor who has sold goods should, after the sale has been completed, agree with the vendee to retain the physical possession of the goods, but on such terms that the nature & character of his former possession is changed from that of owner to that of bailee for the purchaser, that transaction will amount to an acceptance & actual receipt of the goods within Stat. Frauds, s. 17, & necessarily to a good constructive delivery sufficient to create a pledge (*LORD ATKINSON*).—*DUBLIN CITY DISTILLERY, LTD. v. DOHERTY*, [1914] A. C. 823; 83 L. J. P. C. 265; 111 L. T. 81; 58 Sol. Jo. 413, H. L.

*Annotations*:—*Refd. Wrightson v. McArthur & Hutchisons* [1921] 2 K. B. 807; *Re Allester*, [1922] 2 Ch. 211.

**Goods warehoused with third person—Transfer of bill of lading.]**—Goods shipped from India having been landed & warehoused at a bonded sufferance wharf in London, were under a stop put upon them by the master for freight:—*Held*: the transfer of the bill of lading operated as a transfer of the goods, so as to constitute a valid pledge of them for an advance, without the necessity of the pledgees getting actual possession of them, because the bill of lading remained in full force so long as complete delivery of the goods had not been made to some person claiming under it.—*BARBER v. MEYERSTEIN* (1870), L. R. 4 H. L. 317; 39 L. J. C. P. 187; 22 L. T. 808; 18 W. R. 1041; 3 Mar. L. C. 449, H. L.; *affg. S. C. sub nom. MEYERSTEIN v. BARBER* (1867), L. R. 2 C. P. 661, Ex. Ch.

*Annotations*:—*Consd. Glyn, Mills v. East & West India Dock Co.* (1882), 7 App. Cas. 591; *Sewell v. Burdick* (1884), 10 App. Cas. 74; *Hilton v. Tucker* (1888), 39 Ch. D. 669. *Refd. Young v. Lambert* (1870), 6 Moo. P. C. C. N. S. 406; *Burdick v. Sewell* (1884), 13 Q. B. D. 159; *Mills v. Charlesworth* (1890), 25 Q. B. D. 421; *Morris v. Delobbel Filpo* (1892), 66 L. T. 320; *Dublin City Distillery v. Doherty*, [1914] A. C. 823. *Mentd. The John Bellamy* (1870), L. R. 3 A. & E. 129; *Mors-Blanch v. Wilson* (1873), L. R. 8 C. P. 227; *The Rona* (1884), 51 L. T. 28; *Furness Withy v. White*, [1894] 1 Q. B. 483.

**19. — — — — — Request note ordering delivery on payment of charges.]**—Goods imported from England into Quebec, consigned to M. & S., & stored in the Customs' warehouse there, according to the Customs' regulations, for freight, duties, & storage, were, by a contract in writing, pledged by

M. & S. for advances made to them by G. & K., & a note of such pledge entered in the book of the Chief Officer of the Customs, specifying the conditions on which the loan was made, with a request to such officer to hold the goods subject to the orders of G. & K., they paying the duty & storage charges before removal. L., creditor of M. & S., obtained judgment in an action against them, & under a *fi. fa.*, seized the goods so in bond, the execution of which was opposed by G. & K., who made an application main levée to the ct., on the ground that by the above contract the property of M. & S. in the goods in question was conveyed to them to secure repayment of the advances made by them:—*Held*: the circumstances of the case & the dealings of the parties constituted a constructive delivery, & the judgment which dismissed the opposition of G. & K., & gave effect to the seizure under the execution to their prejudice as pledgees, could not be supported.—*YOUNG v. LAMBERT* (1870), L. R. 3 P. C. 142; 6 Moo. P. C. C. N. S. 406; 39 L. J. P. C. 21; 22 L. T. 499; 18 W. R. 497; 3 Mar. L. C. 412; 16 E. R. 779, P. C.

**20. — — — — — Delivery order ordering delivery to pawnee.]**—Pltf. applied verbally to defts. for a loan, offering as security certain furniture of his then at a warehouse in his name. Defts. made the loan to pltf., who gave them a promissory note for the amount, & also signed a memorandum by which he agreed to pay interest on the amount of the note if not paid by the stipulated time. On the same day pltf. signed & handed to the warehouseman a delivery order, requesting him to "deliver to defts. or their order" all property warehoused with you in my name on payment of your charges":—*Held*: the delivery order was not a "bill of sale" within the Bills of Sale Acts, 1878 (c. 31), & 1882 (c. 43), the whole transaction being one of pledge, & the effect of the delivery order being equivalent to actual possession by defts., the pledgees.—*GRIGG v. NATIONAL GUARDIAN ASSURANCE CO.*, [1891] 3 Ch. 206; 61 L. J. Ch. 11; 64 L. T. 787; 39 W. R.

**21. — — — — — Advance on security of delivery warrants.]**—*CAPITAL & COUNTIES BANK, LTD. v. WARRINER & BRETHERTON, FORD & CO.* (1896), 12 T. L. R. 216; 1 Com. Cas. 314.

*Annotation*:—*Föld. Ant. Jurgens Margarinefabriken v. Dreytus*, [1914] 3 K. B. 40.

**22. — — — — — Delivery of key of place of deposit of goods—To third person.]**—*HILTON v. TUCKER*, No. 9, ante.

**23. — — — — — To pawnee.]**—*BOWKER v. WILLIAMSON* (1889), 5 T. L. R. 382.

**24. — — — — — With licence for access to premises.]**—Deft. co., in order to secure pltf. against loss on a certain contract & in consideration of pltf. giving further time within which to pay for the goods, set aside certain specified goods in two rooms in defts.' premises which were locked up, & the keys handed to pltf., no other goods being in those two rooms. The terms of the transaction were recorded in two letters written by deft. co. to pltf., one letter written before the keys were handed over, & the second letter subsequently. The last letter contained the words: "The goods to be locked up, the keys in your possession, & you to have the right to remove same as desired." The co. went into liquidation & the liquidator claimed that the transaction was

**25 i. — — — — — Delivery of key of place of deposit of goods—To pawnee.]**—E. pledged certain goods in a store, hired by him, to pltf., who was present when the goods were placed in the store & there received the key of the same from E. Subsequently E. ob-

tained advances from deft. S., & fraudulently purported to pledge the same goods to S., to whom he gave a duplicate key of the store. S. obtained an assignment of the lease, but afterwards removed the goods to another store:—*Held*: there had been a valid

delivery of the goods to pltf., & he was not deprived of his rights as a pledgee by reason of the subsequent fraudulent conduct of the pledgor & removal of the goods by S.—*HEYDENRYCH v. SABER* (1900), 17 S. C. 73.—S. A. F.

invalid under Companies (Consolidation) Act, 1908 (c. 69), s. 93 (1) (c), as being a charge created or evidenced by an instrument which if executed by an individual would require registration as a bill of sale. Pltf. brought an action claiming a declaration that the goods were in his possession, & that he was entitled to remove them:—*Held*: possession of the goods passed to pltf. by the delivery of the keys of the rooms in which they were locked up, notwithstanding that those rooms were on defts.' premises, inasmuch as defts. had conferred upon pltf. a licence to make the necessary entry in order to use the keys, which licence could not be revoked, & therefore the transaction was valid as against the liquidator & pltf. was entitled to remove the goods.—*WRIGHTSON v. MCARTHUR & HUTCHISONS* (1919), *LTD.*, [1921] 2 K. B. 807; 90 L. J. K. B. 842; 125 L. T. 383; 37 T. L. R. 575; 65 Sol. Jo. 553; [1921] B. & C. R. 136.

25. *Actual delivery—For purpose of valuation & offer of loan—Pledge completed later.*—On Nov. 1, 1919, pltf. handed her jewellery to M. to value it & let her know what offer he could make as to lending her money; he was to keep the jewellery as security if he made the advance. On the same day M. pledged the jewellery with deft., a pawnbroker, who in good faith agreed to advance £1,000 on it, the transaction being completed on Nov. 3. On Nov. 5 it was arranged between pltf. & M. that he should lend her £500, & that she should give him her promissory note for £600 payable in six equal monthly instalments, & that he should retain possession of her jewellery as security for the payment of the promissory note. On Dec. 8, M. borrowed £300 from one B., & deposited with him as security pltf.'s promissory note & deft.'s counterfoil deposit note. B. gave notice to pltf. of the deposit of the promissory note & required that payments under it should be made to him. On Dec. 16 M. died. Pltf. paid B. sums amounting to £400 on account of the sum due on the promissory note, the payments being made with notice of deft.'s position & claim. Pltf. made no tender to deft., & claimed the return of her jewellery:—*Held*: there was on Nov. 1 a delivery of possession of the jewellery to M., which was a good delivery for the purpose of creating a pledge whenever that pledge should be created, the pledge being completed on Nov. 5; & the character of the delivery was not affected by the act of M. in pledging the jewellery to deft. on Nov. 3; pltf. having made no tender to deft. was not entitled to recover the jewellery.—*BLUNDELL-LEIGH v. ATTENBOROUGH*, [1921] 3 K. B. 235; 90 L. J. K. B. 1005; 125 L. T. 356; 37 T. L. R. 567; 65 Sol. Jo. 474, C. A.

#### SUB-SECT. 4.—EXTINCTION OF THE CONTRACT.

26. *What amounts to extinction—Repossession gained by fraud.*—Deft. employed a stock broker to obtain a loan on the security of bonds, which were transferable by delivery. The broker, accordingly, borrowed a sum from pltf., but he wrongfully applied a part to his own use. The broker was unable to redeem the bonds, & deft. with knowledge of the circumstances, promised & agreed to call & give the broker his cheque for the deficiency on receiving back the bonds. The broker, acting on the faith of this promise, gave a

crossed cheque to pltf., & redeemed the bonds. On the same day deft., by a trick, obtained possession of the bonds, without giving his cheque; & the broker's crossed cheque was consequently returned, & he became a defaulter:—*Held*: deft. was responsible to pltf. for the fraud, & the bonds in his hands were still liable to repay pltf. his debt.—*MOCATTA v. BELL* (1857), 24 Beav. 585; 27 L. J. Ch. 237; 30 L. T. O. S. 239; 4 Jur. N. S. 77; 53 E. R. 483.

27. ——— *Repledged with bonâ fide holder for value.*—D. & co. deposited certain goods with pltf. as security for an advance: they afterwards obtained possession of the goods by fraudulently representing to pltf. that they had sold them to defts., & would hand over to pltf. the money to be received in payment. D. & co. obtained an advance from defts., & deposited the goods, with a power of sale, with them:—*Held*: as pltf. had parted with their special property in the goods to D. & co., they could not recover them in an action from defts. who had obtained them *bonâ fide* & for a good consideration.—*BABCOCK v. LAWSON* (1880), 5 Q. B. D. 234, 49 L. J. Q. B. 408; 42 L. T. 289; 28 W. R. 591, C. A.

*Annotations*:—*Maud.* Nash v. De Freville, [1900] 2 Q. B. 74; Farquharson v. King (1902), 71 L. J. K. B. 667.

28. ——— *Pawnee parting with special property in goods.*—*REEVES v. CAPPER*, No. 13, *ante*.

29. ———.]—*BABCOCK v. LAWSON*, No. 27, *ante*.

30. ——— *Goods restored for special purpose—Return of bill of lading for sale of the goods.*—

The law of Scotland as well as the law of England is that a pledgee may redeliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge.

The pledgors of a bill of lading representing a specific cargo were under contract to sell a larger quantity of like goods to third parties. The pledgees returned the bill of lading to the pledgors to obtain delivery of the merchandise & sell on the pledgees' behalf, & account for the proceeds towards satisfaction of the debt:—*Held*: the pledgees' security was not affected, & they were entitled to the proceeds of the cargo as against the diligence of general creditors of the pledgors.—*NORTH WESTERN BANK v. POYNTER, SON & MACDONALDS*, [1895] A. C. 56; 64 L. J. P. C. 27; 72 L. T. 93; 11 R. 125, H. L.

*Annotations*:—*Distd.* Inglis v. Robertson, [1898] A. C. 616. *Consd.* *Re Allester*, [1922] 2 Ch. 211; *Pennington v. Reliance Motor Works*, [1923] 1 K. B. 127.

31. ———.]—A limited co. pledged bills of lading with a bank to secure an overdraft. When it was time to sell the goods, the co. in accordance with the well-established mercantile practice obtained the bills of lading from the bank for realisation on the terms stated in the usual letter of trust given by the co. to the bank, to wit that the co. received the bills of lading in trust on the bank's account & undertook to hold the goods when received & the proceeds when sold as the bank's trustees & to remit the entire net proceeds as realised:—*Held*: as the letter of trust merely recorded the terms on which the co. was authorised to realise the goods on the bank's behalf, & did not really create any charge at all, it did not require registration under Companies (Consolidation) Act, 1908 (c. 69), s. 93 (1) (c), (e), either as a bill of sale within clause (c) or a charge on book debts within clause (e).—*Re ALLESTER (DAVID), LTD.*, [1922] 2 Ch. 211; 91 L. J. Ch. 797; 127 L. T. 434, 38

#### PART II. SECT. 1, SUB-SECT. 4.

30 1. *What amounts to extinction—Goods restored for special purpose—Return of bill of lading for sale of the goods.*—*TOD & SON v. MERCHANT BANKING CO. OF LONDON* (1883), 10 R. (Ct. of Sess.) 1009.—*SCOT.*

**Sect. 1.—The contract of pawn: Sub-sects. 4 & 5.**  
**Sect. 2: Sub-sect. 1, A., B., C., D., E. & F.;**  
**sub-sects. 2 & 3, A. & B.; sub-sect. 4, A.]**

T. L. R. 611; 66 Sol. Jo. 486; [1922] B. & C. R. 190.

See, also, No. 133, *post*.

#### SUB-SECT. 5.—STAMPS.

**32. Necessity for.]—**A letter from a principal to his factor containing bills of exchange drawn upon the latter, & in which the principal promised to provide for the bills, if certain goods, then either in the factor's possession or about to be placed in his hands, should remain unsold at the time of the bills falling due, requires to be stamped, & does not come within the exception in the Stamp Act, as a letter for or relating to the sale of goods. The primary object of such letter not being the sale of goods, but the obtaining of an advance of money on the goods.—*SMITH v. CATOR* (1819), 2 B. & Ald. 778; 106 E. R. 549.

**Annotations:—***Distd. Southgate v. Bohn* (1846), 16 M. & W. 34. *Meatd. Kilbeck v. Vander Vyser* (1847), 8 J. T. O. S. 461; *Chatfield v. Cox* (1852), 18 Q. B. 324; *Rein v. Lane* (1897), L. R. 2 Q. B. 144; *Horsey v. Graham* (1869), 21 L. T. 530.

**33. — Mortgage stamp.]—**A firm that was negotiating to obtain an advance of money on their bill, wrote to the proposed lender, stating that, in consideration of his accepting their draft, they handed him therewith the bill of lading & policy of insurance for wines expected to arrive, which would afford him security beyond the amount of the bill, & engaging to land & warehouse the wines, to be held at his disposal:—*Held*: this document did not require a mtge. stamp, within 55 Geo. 3, 1815 (c. 184), sched., part 1, title "Mortgage."—*HARRIS v. BIRCH* (1842), 9 M. & W. 591; 1 Dowl. N. S. 899; 11 L. J. Ex. 219; 152 E. R. 249.

**Annotations:—***Apld. Re Attenborough & I. R. Comrs.* (1855), 11 Exch. 461. *Reid. Sewell v. Burdick* (1884), 10 App. Cas. 74.

**34. — — —.]—**The following instrument was held not to require a mtge. stamp: I have this day deposited with A. the following goods, viz. tea & coffee set, etc., to be held by him as a security for the payment of £160, this day lent to me, together with interest, & should such sum of £160 not be paid by me to A. by Mar. 25 next, I hereby authorise & empower him to sell & dispose of the said articles, & out of the proceeds thereof to pay the expenses of the sale, & retain the said sum of £160 & interest thereon.—*Re ATTENBOROUGH & INLAND REVENUE COMRS.* (1855), 11 Exch. 461; 156 E. R. 912; *sub nom. ATTENBOROUGH v. INLAND REVENUE COMRS.*, 25 L. J. Ex. 22.

**As to exemption of special contracts.]—**See Pawnbrokers Act, 1872 (c. 93), s. 24.

### SECT. 2.—RIGHTS AND DUTIES OF PAWNER.

#### SUB-SECT. 1.—WHO MAY PAWN.

##### A. Agents and Factors.

**Authority to pledge—Implied authority.]—**See AGENCY, Vol. I., pp. 304, 305, Nos. 291–294.

**— Goods—Under Factors Acts.]—**See AGENCY, Vol. I., pp. 330–340, Nos. 487–524.

**— Apart from Factors Acts.]—**See AGENCY, Vol. I., pp. 340–343, Nos. 525–549.

**— Negotiable Instruments.]—**See AGENCY, Vol. I., pp. 343–346, 550–570.

**Unauthorised pawns.]—**See Sub-sect. 3, B. (a), *post*.

##### B. Bailees.

**No title conferred on pawnee.]—**See BAILMENT, Vol. III., pp. 110, 111, Nos. 343, 353.

**Bailee on sale or return.]—**See SALE OF GOODS.

**Hirer under hire-purchase agreement.]—**See BAILMENT, Vol. III., pp. 93, 97, 98, Nos. 245, 265–267; SALE OF GOODS.

##### C. Executors and Administrators.

See EXECUTORS & ADMINISTRATORS, Vol. XXIV., pp. 569, 571, 801, Nos. 6073, 6080–6082, 8306.

##### D. Husband and Wife.

**As to disposition of wife's property generally,** see HUSBAND & WIFE, Vol. XXVII., pp. 101 *et seq.*

**35. Property settled by wife on herself—With power to use—Pledge by wife.]—**A woman on her marriage settled, among other property, furniture on trustees in trust to allow her to use it during life & to dispose of it by will or deed to operate after death:—*Held*: she had no power to pledge the furniture, & her trustees might recover it from the pawnbroker.—*WORSNOP v. BENASSI* (1873), 21 W. R. 684.

**Property settled on wife by husband for separate use—With restraint on alienation—Pledge by husband with consent of wife.]—**See HUSBAND & WIFE, Vol. XXVII., p. 116, No. 932.

##### E. Master of Ship.

See SHIPPING.

##### F. Partners.

See PARTNERSHIP, Vol. XXXVI., pp. 399–401, Nos. 700–715.

#### SUB-SECT. 2.—WARRANTY BY PAWNER.

**36. Warranty of title.]—**Pltf. being possessed of some plate, transferred it by bill of sale to M. & B. for a valuable consideration, but in order to defeat the execution of a judgment creditor pltf. continued in possession of the plate, & the creditor having assigned his judgment to M. & B. they issued execution thereon; whereupon pltf. in order to defeat the execution, deposited the plate with deft.:—*Held*: deft. was entitled to set up the right of M. & B.—*Semble*: where a person pledges property to which he has no title, the pledgee may deliver it to the real owner; there being, in the ordinary case of a pledge, an implied undertaking, on the part of the pledgor, that the property pledged is his own, & on the part of the pledgee, that he will return it to the pledgor, provided it be not the property of another.—*CHEESMAN v. EXALL* (1851), 6 Exch. 341; 20 L. J. Ex. 209; 155 E. R. 574.

**Annotations:—***Consd. Biddle v. Bond* (1865), 6 B. & S. 325. *Reid. Sheridan v. New Quay Co.* (1858), 28 L. J. C. P. 58; *Thorne v. Tilbury* (1858), 27 L. J. Ex. 407; *Singer Manufacturing Co. v. Clark* (1879), 5 Ex. D. 37.

**37. —.]—**Upon its coming to the knowledge of applts. that a sewing machine belonging to them had, without their knowledge or consent, been pledged by S., to whom they had let it on hire, or by some one with or without S.'s consent, with resp., a pawnbroker, for a sum under 40s., they served resp. with notice informing him that the machine was their property, & demanding redelivery thereof to them. Resp. refused to comply with this notice, on the ground that it was invalid, as not being in conformity with Pawnbrokers Act, 1872 (c. 93), & subsequently delivered the pledge to a person producing the



pawn ticket relating thereto, on payment of the loan & profit, but gave no notice to applts. of having done so. In an action subsequently brought by applts. against resp. for an unlawful conversion of their property:—*Held*: (1) the applts., as true owners of an article pledged without their knowledge or consent, were entitled, in exercise of their common law right, to recover it or its value from the pawnbroker by action, notwithstanding that the latter had returned it to the pawner or person holding the ticket who had redeemed it, their common law right so to do not having been taken away by Pawnbrokers Act, 1872 (c. 93), s. 29; (2) Pawnbrokers Act, 1872 (c. 93), s. 25, justifies the pawnbroker only to this extent, *viz.*, in treating the holder of a pawn ticket as the person lawfully entitled to hold it; & the indemnity given by Pawnbrokers Act, 1872 (c. 93), s. 25, is limited to & protects the pawnbroker only against the pawner, the owner who has authorised the pledging, & all those who claim title under them; & none of the provisions of Pawnbrokers Act, 1872 (c. 93), were intended to, nor do they, affect the common law right of an owner of property pledged against his will who claims by title paramount to that of the pawner. —*SINGER MANUFACTURING CO. v. CLARK* (1879), 5 Ex. D. 37; 49 L. J. Q. B. 224; 41 L. T. 591; 44 J. P. 59; 28 W. R. 170.

**Warranty as to quality.**—*See CRIMINAL LAW*, Vol. XV., pp. 994–995, Nos. 11,131, 11,134–11,137.

### SUB-SECT. 3.—TITLE AND PROPERTY OF PAWNER.

#### A. In General.

**Unauthorised pawns—Rights of true owner.**—*See Sect. 4, sub-sect. 3, B. (a), post.*

#### B. Right of Sale before Redemption.

**38. Pawners right to sell.**—*FRANKLIN v. NEATE*, No. 55, *post*.

**39. What rights acquired by purchaser.**—*FRANKLIN v. NEATE*, No. 55, *post*.

### SUB-SECT. 4.—RIGHT OF REDEMPTION.

#### A. In General.

**40. General rule.**—All pledges are redeemable. —*BANK OF ENGLAND (GOVERNOR & CO.) v. GLOVER* (1702), 2 Ld. Raym. 753; 92 E. R. 3.

**41. — On tender—Right of action for refusal to deliver.**—*ISAACK v. CLARK* (1615), 2 Bulst. 306; *Moore*, K. B. 841; 1 Roll. Rep. 126; 80 E. R. 1143.

*Annotations*:—*Reid*, *Mason v. Farnoll* (1844), 1 Dow. & L. 576; *Cooper v. Willomatt* (1845), 1 O. B. 672; *Clements v. Flight* (1840), 1 New Fract. Cas. 567. *Mentid. Manby v. Scot* (1863), 1 Keb. 441; *Mires v. Solebay* (1878), 3 Mod. Rep. 242; *Oranoh v. White* (1835), 4 L. J. C. P. 113; *Garland v. Carlisle* (1837), 4 Scott. 537; *Whitehead v. Harrison* (1844), 6 Q. B. 423; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757.

**42. — — — — —**—*COGGS v. BERNARD*, No. 1, *ante*.

**43. — — — — —**—(1) There is a great difference in this respect between a pledge & a lien. The authorities are clear that a right of lien,

properly so called, is a mere personal right of detention; & that an unauthorised transfer of the thing does not transfer that personal right (*BLACKBURN, J.*).

(2) Till possession is given the intended pledgee has only a right of action on the contract, & no interest in the thing itself (*BLACKBURN, J.*).

(3) In general all that the pledgor requires is the personal contract of the pledgee that on bringing the money the pawn shall be given up to him, & that in the meantime the pledgee shall be responsible for due care being taken for its safe custody. This may very well be done though there has been a sub-pledge (*BLACKBURN, J.*).

(4) The assignment of the pawn for the purpose of raising money, so long at least as it purports to transfer no more than the pledgee's interest against the pledgor, is so far from being found in practice to be inconsistent with or repugnant to the contract, that it has been introduced into the Factors Acts (*BLACKBURN, J.*).

(5) I am of opinion that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action, for nominal damages if he has sustained no substantial damage; for substantial damages, if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged (*COCKBURN, C.J.*). — *DONALD v. SUCKLING* (1866), L. R. 1 Q. B. 585; 7 B. & S. 783; 35 L. J. Q. B. 232; 14 L. T. 772; 30 J. P. 565; 12 Jur. N. S. 795; 15 W. R. 13.

*Annotations*:—*As to* (1) *Reid*, *The Odessa, The Woolston*, [1916] 1 A. C. 145. *As to* (5) *Apprvd.* *Halliday v. Holgate* (1868), L. R. 3 Exch. 299. *Reid*, *Burdick v. Sewell* (1883), 10 Q. B. D. 363; *Cox v. Liddell* (1895), 2 Mans. 212. *Generally, Reid*, *Webb v. Whinney* (1868), 13 L. T. 523; *Mulliner v. Florence* (1878), 3 Q. B. D. 484; *Deverges v. Sandeman, Clark*, [1902] 1 Ch. 579; *Ponsford, Baker v. Union of London & Smiths Bank* (1906), 75 L. J. Ch. 724; *Whitely v. Hill*, [1918] 2 K. B. 808.

**44. — — — — —**—On Sept. 14, 1900, A. & co. pledged chattels with B. as security for a loan to be repaid on Oct. 26 following; & on Sept. 27 they pledged other chattels with B. as security for a further loan to be repaid on Nov. 11 following. On Oct. 26 B. delivered the chattels first pledged to C., who produced a written authority from A. & co. as purchaser, & paid him off; & on Nov. 11 C. came again to B. with a written authority from A. & co. as purchaser of the chattels under the second pledge, & by arrangement with B. extended the date of redemption to Jan. 11, 1901, when he paid off B. & took delivery of the chattels. B. acted in good faith, but when paid on Oct. 26 had notice of an available act of bkpcy. committed by A. & co. on the previous Oct. 6; & when paid on Jan. 11 knew that a receiving order had been made against A. & co. on Jan. 9. C. was in collusion with A. & co., & was fraudulent in all that he did: he sold the chattels & disposed of the proceeds. The title of the trustee in bkpcy. related back to the act of bkpcy. committed on the previous Oct. 6, & he claimed from B. the value of the pledged chattels less the loans:—*Held*: B. was not liable, for that, although not protected by Bkpcy. Act, 1883 (c. 52), s. 49, he was bound by his contract to deliver up the chattels when tendered on the date of redemption

### PART II. SECT. 2, SUB-SECT. 4.—A.

**40 i. General rule.**—Where property has been pledged for a certain sum, & pledged again by the pledgee for a debt of his own, the original pledgor is entitled to recover his property from the sub-pledgee, on

paying or tendering to him the amount due to the original pledgee.—*COLONIAL BANK OF AUSTRALASIA v. MITCHELL* (1877), 3 V. L. R. (L.) 12.—*AUS.*

**40 ii. — — — — —**—*LIVINGSTON v. WOOD* (1880), 27 Gr. 615.—*CAN.*

**40 iii. — — — — —**—*MYERS v. GEORGE*

(1917), 38 N. L. R. 124.—*S. AF.*

**1. Unauthorised pawning.**—A person, who had obtained possession of certain movable property belonging to a minor in the capacity of a trustee, & who had been allowed to retain possession of such property after the

**Sec. 2.—Rights and duties of pawner: Sub-sect. 4, A., B., C. & D.; sub-sect. 5, A.]**

the amount due to him.—*Re LAWFORD & LAWRENCE, Ex p. TRUSTEE*, [1902] 2 K. B. 445; *sub nom. Re LAWFORD & LAWRENCE, Ex p. TRUSTEE v. WARD*, 86 L. T. 693; 50 W. R. 592; 46 Sol. Jo. 588; *sub nom. Re LAWFORD & LAWRENCE, Ex p. NICHOLS*, 71 L. J. K. B. 786; 9 Mans. 254. *Annotation*.—*Consd. Ponsford, Baker v. Union of London & Smith's Bank*, [1906] 2 Ch. 444.

**Liability of pawnee after tender.**—*See Part II., Sect. 3, sub-sect. 2, post.*

**45. Necessity for tender.**—*ISAACK v. CLARK* (1815), 2 Bulst. 306; *Moore, K. B.* 841; 1 Roll. Rep. 126; 80 E. R. 1143.

*Annotations*.—*Reid, Mason v. Farnell* (1844), 1 Dow. & L. 578; *Cooper v. Willomatt* (1845), 1 C. B. 672; *Clements v. Flight* (1846), 1 New Pract. Cas. 567. *Mentd. Manby v. Scott* (1663), 1 Keb. 441; *Mires v. Solebay* (1678), 2 Mod. Rep. 242; *Cranch v. White* (1835), 4 L. J. C. P. 113; *Garland v. Carlisle* (1837), 4 Scott, 587; *Whitehead v. Harrison* (1844), 6 Q. B. 423; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757.

**46. — On bankruptcy of pledgee.**—*HALLIDAY v. HOLGATE*, No. 4, *ante*.

**47. — Claim of ownership by pledgee.**—A claim by the pledgee to be the absolute owner of the goods pledged does not excuse the pledgor from the necessity of tendering the amount due, & does not vest in the pledgor the right to the immediate possession of the goods without payment or tender of the amount due.—*YUNGMAN v. BRIEFEMANN* (1892), 67 L. T. 642; 41 W. R. 148; 4 R. 119, C. A. *Annotation*.—*Reid, Lord's Trustee v. G. E. Ry.*, [1908] 2 K. B. 54.

**48. What amounts to tender—Tender of more than sum due.**—The tender of more than is due, must be a tender of that which is due; though they did agree, a tender of less would not (*per Cur.*).—*ASTLEY v. REYNOLDS* (1731), 2 Barn. K. B. 40; 2 Stra. 915; 94 E. R. 343.

*Annotations*.—*Consd. Ashmole v. Wainwright* (1842), 2 Q. B. 837. *Reid, Smith v. Bromley* (1760), 2 Doug. K. B. 696, n.; *Fitzroy v. Gwillim* (1786), 1 Term Rep. 153; *Morgan v. Palmer* (1824), 4 Dow. & Ry. K. B. 283; *Oates v. Hudson* (1851), 20 L. J. Ex. 284; *Parker v. Bristol & Exeter Ry.* (1851), 6 Exch. 702. *Mentd. Neville v. Wilkinson* (1782), 1 Bro. C. C. 643; *De Cadaval v. Collins* (1836), 4 Ad. & El. 858; *Green v. Duckett* (1883), 11 Q. B. D. 275.

**49. — Tender of whole sum due.**—*ASTLEY v. REYNOLDS*, No. 48, *ante*.

**50. —**—Where a principal intrusts his agent with securities, & empowers him to raise money upon them to a limited amount, less than the value of the securities, & the agent in fraud of his principal pledges the securities with a *bond fide* lender, who has no notice or knowledge of the limitation of his powers, for an amount in excess of the sum authorised by the principal, & appropriates the balance to his own use, the principal cannot redeem the securities without paying the whole amount so advanced upon them.—*BROCKLESBY v. TEMPERANCE BUILDING SOCIETY*, [1895] A. C. 173; 64 L. J. Ch. 433; 72 L. T. 477; 59 J. P. 676; 43 W. R. 606; 11 T. L. R. 297; 11 R. 159, H. L.

*Annotations*.—*Apld. Lloyds Bank v. Cooke*, [1907] 1 K. B. 794. *Consd. Truman v. Attenborough* (1910), 103 L. T. 318. *Apld. Fry v. Smellie*, [1912] 3 K. B. 282. *Reid, Lloyds Bank v. Bullock*, [1896] 2 Ch. 192; *Farquharson v. King*, [1902] A. C. 325; *Herdman v. Wheeler*, [1902] 1 K. B. 361; *Jared v. Walke* (1902), 18 T. L. R. 569; *Rimmer v. Webster*, [1902] 2 Ch. 163; *Thurstan v. Nottingham Permanent Bldg. Soc.*, [1902] 1 Ch. 1; *Lloyd v. Grace, Smith*, [1911] 2 K. B. 489; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *Jones v. Waring & Gillow*, [1920] A. C. 670.

minor came of age, pawned some of it to persons, who were found to have acted, negligently perhaps, but honestly

& in good faith:—*Held*: the pledge was valid but the owner was entitled to a declaration of

**51. Effect of refusal of amount tendered—Right of action for conversion—Debt not discharged.**—*RATCLIFF v. DAVIS*, No. 75, *post*.

**52. Right to identical thing pledged.**—*LANGTON v. WAITE*, No. 109, *post*.

**B. Who may Redeem.**

**53. Married woman—Pledge by husband of paraphernalia—Right to redemption out of personal estate of husband.**—If a husband pledges the wife's paraphernalia, & leaves a sufficient estate to redeem the pledge, she is entitled to have it redeemed out of his personal estates.

I am of opinion the act Lord L. did amounted not to an alienation. The diamond necklace was pledged as a collateral security for £1,000 borrowed by Lord L., of Mr. M., & a bond given at the same time, which shows it was intended as a personal security from himself; a power likewise was given to Mr. M., whilst Lord L. was out of England, to sell the necklace for £1,500. This does not amount to a sale, but only a necessary power in order to reimburse Mr. M., when sold, his principal & interest. But it was not sold, & therefore at his death stood only as a pledge (*LORD HARDWICKE, C.*).—*GRAHAM v. LONDON-DERRY* (1746), 3 Atk. 393; 26 E. R. 1026, L. C.

*Annotations*.—*Mentd. Teynham v. Webb* (1751), 2 Ves. Sen. 198; *Loder v. Loder* (1754), 2 Ves. Sen. 530; *White v. White* (1804), 9 Ves. 554; *Windham v. Graham* (1826), 1 Russ. 331; *Williams v. Mercer* (1882), 61 L. J. Q. B. 594; *Tasker v. Tasker*, [1895] P. 1; *Masson, Tompler v. De Fries*, [1909] 2 K. B. 831; *Re Stawell's Trust, Poole v. Riversdale* (1909), 101 L. T. 49.

**54. Assignee of pawner.**—*KEMP v. WESTBROOK*, No. 60, *post*.

**55. —**—The pawner of a chattel still retains his property in it, though qualified by the right existing in the pawnee, which he has a right to sell, & by the sale to transfer that property to the buyer; &, if the pawnee, on the buyer's tendering him the amount due, refuses to deliver it up, the buyer may maintain trover to recover it.—*FRANKLIN v. NEATE* (1844), 13 M. & W. 481; 14 L. J. Ex. 59; 4 L. T. O. S. 214; 153 E. R. 200.

*Annotations*.—*Reid, Flory v. Denny* (1852), 7 Exch. 581; *Martin v. Reid* (1862), 11 C. B. N. S. 730. *Mentd. Re Attenborough & I. R. Comrs.* (1855), 11 Exch. 461.

**56. Co-owners—Redemption by assignee of interest of others.**—Four partners pledged goods with debt., with a power of sale, as security for repayment of advance made by debt. to them. Afterwards the partnership was dissolved, & the property of three of the four partners vested in pltf. under several deeds of assignment. Pltf., without authority from the fourth partner, tendered to debt. the amount for which the goods were a security, & demanded the whole of the goods. Debt. refused to deliver the goods to pltf. :—*Held*: the refusal by debt. was not such a conversion of the goods as would entitle pltf. to maintain an action of trover against debt.

The effect of the transaction was, that the four partners had the general property, & debt., the pawnee, had a special property in the goods (*BLACKBURN, J.*).—*HARPER v. GODSELL* (1870), L. R. 5 Q. B. 422; 39 L. J. Q. B. 185; 18 W. R. 954.

*Annotations*.—*Mentd. Hawksley v. Outram*, [1892] 3 Ch. 359; *Jacobs v. Morris*, [1901] 1 Ch. 261.

**Executors.**—*See EXECUTORS, Vol. XXIII., p. 289, No. 3551; Vol. XXIV., p. 605, Nos. 6359, 6360.*

the articles so pawned.—*SUNDAR DEO v. BHAGWAN DAS* (1908), 1 L. R. 30 All. 166.—*IND.*



*C. Time for Redemption.*

57. Time fixed for redemption—Effect of death of party.]—RATCLIFF *v.* DAVIS, No. 75, *post*.

58. — Right subject to Statute of Limitations, 1623 (c. 16).]—A. borrows a sum of money from B. with whom he deposits govt. securities as a pledge, upon condition not to sell them until failure of payment at a certain day. This is such a transaction as may be affected by Stat. Limitations. A person beyond sea, & so within the saving of Stat. Limitations, need not return to enable him to commence a suit.—GAGE *v.* BULKELEY (1745), *Ridg. temp.* H. 278; 27 E. R. 829.

*Annotation* :—*Reid*. Story *v.* Fry (1842), 1 Y. & C. Ch. Cas. 603.

59. No time fixed for redemption — Right to redeem at any time.]—RATCLIFF *v.* DAVIS, No. 75, *post*.

60. — During life of pawner—Statute of Limitations, 1623 (c. 16), no bar.]—Bill lies by assignee of bkpt. for delivery of goods pledged by the bkpt., notwithstanding Stat. Limitations. Pawner has time during life, where no time given for redemption.—KEMP *v.* WESTBROOK (1749), 1 Ves. Sen. 278; 27 E. R. 1030, L. C.

*Annotations* :—*Reid*. Banner *v.* Berridge (1881), 18 Ch. D. 254. *Mentd.* Leeds *v.* Amherst (1846), 2 Ph. 117.

*D. Consolidation of Securities.*

61. Whether right to consolidate—Pledge for specific debt—Subsequent sums borrowed without reference to pledge.]—A. borrows £200 on the pawn of some jewels; afterward he borrows three several sums, for each of which he gives his note, without taking notice of the jewels; his exors. shall not redeem the jewels without paying the money due on the notes.—DEMANDRAY *v.* METCALF (1715), *Prec. Ch.* 419; 2 Vern. 698; 1 Eq. Cas. Abr. 324; 24 E. R. 188; *sub nom.* DEMARY *v.* METCALF, *Gilb. Ch.* 104.

*Annotations* :—*Distd.* Melloruch *v.* Royal Exchange Assee. (1728), 1 Eq. Cas. Abr. 8. *Apld.* *Ex p.* Deuze (1748), 1 Atk. 228. *Reid.* *Re* Mathews, *Ex p.* Ockenden (1754), 1 Atk. 235; Jones *v.* Smith (1794), 2 Ves. 372; Olive *v.* Smith (1813), 5 Taunt. 56; Young *v.* Bank of Bengal (1836), 1 Decc. 622; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585. *Mentd.* Archer *d.* Hankey *v.* Snapp (1738), *Andr.* 341; Adams *v.* Claxton (1801), 6 Ves. 228.

62. — Debt in excess of amount secured — On same securities along with others.]—JONES *v.* SMITH (1794), 2 Ves. 372; 30 E. R. 679; *reversd.* (1798), 2 Ves. 380, n., H. L.

*Annotations* :—*Reid.* *Re* Newton, *Ex p.* Bignolds (1836), 3 Mont. & A. 9; *Re* Loosemore, *Ex p.* Berridge (1843), 3 Mont. D. & De G. 464; Cummins *v.* Fletcher (1879), 28 W. R. 272; Jennings *v.* Jordan (1881), 6 App. Cas. 698; Harter *v.* Colman (1882), 19 Ch. D. 630. *Mentd.* *Re* Morritt, *Ex p.* Official Receiver (1886), 56 L. T. 42.

— — — — —]—*See, further*, BANKERS, Vol. III., pp. 287, 288, Nos. 889, 890.

## SUB-SECT. 5.—REMEDIES OF PAWNER—TROVER.

*A. When Action lies.*

63. Refusal of amount tendered.]—RATCLIFF *v.* DAVIS, No. 75, *post*.

64. — — — — —]—COGGS *v.* BERNARD, No. 1, *ante*.

65. Refusal to deliver—Right of assignee of pawner to sue.]—FRANKLIN *v.* NEATE, No. 55, *ante*.

66. — *Bona fide* doubt as to title to goods.]—

On July 24, goods were pledged with deft., a pawnbroker, in the name of Mary Warne, & the duplicate was made out accordingly, she was, in fact, the wife of pltf. Vaughan, but it did not appear that this fact was then known to deft. A few days afterwards, the same person applied to deft. for a copy of the duplicate, & a form of declaration of the loss of it, pursuant to 39 & 40 Geo. 3, c. 99, s. 16, & Statutory Declarations Act, 1835 (c. 62), s. 12. On Aug. 6 pltf. produced the duplicate to deft., & demanded the goods, tendering the money advanced on them & the interest, but deft. refused to deliver them, on the ground of the declaration having been obtained. Pltf. applied to a magistrate to compel him, & deft. then, on Aug. 9, learnt that the party who pledged the goods was pltf.'s wife :—*Held* : upon these facts, the judge at the trial was wrong in directing the jury that the detention of the goods was in point of law a conversion, & he ought to have left it to them to say whether deft. had a *bona fide* doubt as to the title to the goods, & if so, whether a reasonable time for that doubt to be cleared up, by the party's going before a magistrate & verifying the declaration, pursuant to 39 & 40 Geo. 3, c. 99, s. 16, & elapsed on Aug. 6, & if it had, the refusal then to deliver them to pltf. amounted to a conversion.—VAUGHAN *v.* WATT (1840), 6 M. & W. 492; 9 L. J. Ex. 272; 151 E. R. 508.

*Annotations* :—*Apld.* Pillott *v.* Wilkinson (1864), 3 H. & C. 345; Burslem *v.* Attenborough (1873), L. R. 8 C. P. 122. *Reid.* Hollins *v.* Fowler (1875), L. R. 7 H. L. 757. *Mentd.* Charrinton *v.* Johnson (1846), 13 M. & W. 856; Dalton *v.* Angus (1881), 6 App. Cas. 740.

67. — — — — — Stolen goods.]—Pltf.'s watch, which had been bought some years previously at deft.'s shop, was stolen from pltf., who gave information of the theft to deft. The watch was pledged with a pawnbroker, & eventually, together with a large number of other unredeemed pledges, was sold by auction in a room on the first floor of a building in the city of London, which room was used solely for the sale by auction of the goods of third persons. Shortly afterwards the watch was purchased in a jeweller's shop in the country by one B., who sent it to deft. for an opinion as to whether it was a genuine antique watch. Deft. wrote both to pltf. & to B., telling them that it was the watch which had been stolen, & inquiring as to their wishes in the matter. No answer was sent by pltf. to deft.'s letter, but a few days afterwards a clerk of pltf.'s solrs. called at deft.'s shop &, on being shown the watch, demanded that it should be then & there handed over to him, & on this request being refused, at once served deft. with a writ in detinue which he had taken out on behalf of pltf. about two hours previously :—*Held* : upon the facts given in evidence there had been no wrongful refusal on the part of deft. to return the watch to pltf. before the date of the issue of the writ, & pltf. had no cause of action against deft. either in detinue or in trover.—CLAYTON *v.* LE ROY, [1911] 2 K. B. 1031; 81 L. J. K. B. 49; 105 L. T. 430; 75 J. P. 521; 27 T. L. R. 479, C. A.

*Annotations* :—*Mentd.* Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197; *Aksionarnoye Obschestvo A. M., Luther v. Sagor*, [1921] 1 K. B. 456.

68. Wrongful sale.]—But if instead of keeping the thing pledged he sells it or enables any other person to sell it, by concurring in the sale he is

## PART II. SECT. 2, SUB-SECT. 4.—C.

59.1. No time fixed for redemption—Right to redeem at any time.]—A pledges cannot, of his own accord, without judicial decree, make time of the essence of a contract as against a right

to redeem.—WALKER *v.* JOHNSTON (B. C.) (1916), 34 W. L. R. 817; 10 W. W. R. 938; 23 B. C. R. 60.—CAN.

PART II. SECT. 2, SUB-SECT. 5.—A.  
g. Alteration of pledge.]—Taking

the stones from the rings & resetting them into a tie-pin & another ring was held not to be such a conversion by the pledgee as to make him liable for the full value thereof; but to give to the pledgor only a claim for damages

**Sect. 2.—Rights and duties of pawner: Sub-sect. 5, A. & B. Sect. 3: Sub-sects. 1 & 2, A.]**

guilty of a direct conversion (TINDAL, C.J.).—CLARK v. GILBERT (1885), 2 Bing. N. C. 343; 2 Scott, 520; 1 Hodg. 347; 5 L. J. C. P. 61; 132 E. R. 135.

**Annotations:—**Reid, Chinery v. Viall (1860), 5 H. & N. 288; Cox v. Liddell (1895), 2 Mans. 212.

**69. — Sale before day conditioned.]—A., as security for the repayment of a loan from B., deposited with B. brandy lying in a dock, by delivering to him the dock warrant, & authorised him to sell if the loan were not repaid on Jan. 29. B. sold the brandy on the 28th, & on the 29th handed over the dock warrant to the purchaser, who on the 30th took actual possession. The loan was never repaid. In an action of trover by the assignee under the bkpcy. of A. against B. for the conversion of the brandy:—**Held:** (1) the wrongful sale on the 28th, followed on the 29th by the delivery of the dock warrant in pursuance thereof, was a conversion; (2) in measuring the damages the interest of debt in the goods at the time of the conversion is to be taken into account, & the amount is to be, not the value of the goods, but the amount of the loss pltf. has actually sustained, which in this case was nominal, as pltf. had no intention of redeeming the pledge.—JOHNSON (ASSIGNEE OF CUMMING) v. STEAR (1863), 15 C. B. N. S. 330; 3 New Rep. 425; 33 L. J. C. P. 130; 9 L. T. 538; 10 Jur. N. S. 99; 12 W. R. 347; 143 E. R. 812.**

**Annotations:—**As to (1) Reid, Pigot v. Cullley (1864), 15 C. B. N. S. 701. As to (2) Dist. Swire v. Leach (1865), 18 C. B. N. S. 479. **Apld.** Halliday v. Holgate (1868), L. R. 3 Exch. 299. **Consd.** Mulliner v. Florence (1878), 3 Q. B. D. 484. **Apld.** Cox v. Liddell (1895), 2 Mans. 212; Belsize Motor Supply Co. v. Cox, [1914] 1 K. B. 244. **Reid.** Edmonson v. Nuttall (1864), 17 C. B. N. S. 280; Langmead v. Maple (1865), 12 L. T. 143; Johnson v. L. & Y. Ry. (1878), 3 C. P. D. 499. **Generally, Consd.** Donald v. Suckling (1866), L. R. 1 Q. B. 585.

**70. — Sale other than by express contract.]—**LANGTON v. WAITE, No. 109, *post*.

**71. Sub-pledge.]—**DONALD v. SUCKLING, No. 43, *ante*.

—**See, also,** No. 105, *post*.

**72. Conversion with knowledge of pawner—Action against executrix of pawnee.]—**In Sept. 1889 pltf. pledged a piano with the husband of debt. The same year he converted it to the knowledge of pltf. In Mar. 1897 he died, & pltf. then tendered the money to the present debt., his extrix. & widow, & demanded the return of the piano:—**Held:** debt. could not be liable, & as she never had possession of or any property in the piano, no action of conversion would lie against her.—HINCHCLIFFE v. SHARPE (1898), 77 L. T. 714, D. C.

**Pledgor having no title.]—See** Part II., Sect. 2, sub-sect. 2, *ante*.

### B. Measure of Damages.

**73. Actual loss sustained.]—**JOHNSON (ASSIGNEE OF CUMMING) v. STEAR, No. 69, *ante*.

for any reduction in value by reason of the alteration.—ZESS v. SMITH (Sask.), [1920] 3 W. W. R. 836; 55 D. L. R. 116; 13 Sask. L. R. 501.—CAN.

### PART II. SECT. 2, SUB-SECT. 5.—B.

**b. Value of pledge.]—Prima facie** the value of an instrument held in pledge & improperly surrendered by the pledgee is the measure of damages of the party suffering from such improper surrender, but that value may be considerably less than face value.—UNION BANK FARMER, (Alta.), [1917] 1 W. W. R. 1361.—CAN.

**k. — Less amount lent.]—**In an action for damages for the detention of ornaments pledged with debt. which debt. has wrongfully converted to his own use, the measure of damages is the value of ornaments, less than the sum for which they have been pledged.—HASAM KARAM v. GOMA JADAVJI (1868), 5 Bom. O. C. 140.—IND.

### PART II. SECT. 3, SUB-SECT. 1.

**75 i. Right of possession in pawnee—Till repayment.]—**A deposit of title deeds to secure payment of a debt entitles the pledgee to hold the deeds until

**74. Difference in value on sale.]—**LANGTON v. WAITE, No. 109, *post*.

## SECT. 3.—RIGHTS AND LIABILITIES OF PAWNEE.

### SUB-SECT. 1.—POSSESSION AND PROPERTY.

**75. Right of possession in pawnee—Till repayment.]—**(1) If goods be pawned, & no particular day of redemption agreed, the owner may redeem them at any time.

(2) The delivery of goods pledged by the wife of a pawnee to a stranger, passes no interest in them, though done with her husband's consent.

(3) Tender of the money to the extrix. of a pawnee, & her refusal to restore the goods, revests them in the owner.

(4) If one do pawn, or mortgage goods, & a time certain is limited for the redeeming of them, there the death of any of the parties, shall not be prejudicial, the one way or the other (CROKE, J.).

(5) He which pawns goods, & no time appointed for the redemption, he hath liberty during his life, to tender & redeem them, & the death of the party to whom, shall not hinder the redemption, but if the party himself which pawned the goods dies before redemption, his exor. cannot redeem, & so the time of redemption is not determined by the death of him to whom the goods were pawned, but by the death of him which pawned the goods (YELVETON, J.).

(6) He to whom goods are pledged, hath a special property in them until the money be paid, & he which pawns the goods hath the general property in them; he to whom they were pawned hath a property to detain them until the money be paid, but without all question, the general property remains in him which pawned the goods, & he is not to lose this his property by the death of the other, but that he may well redoem the same (FLEMING, C.J.).

(7) If the pawn be of a perishable nature, as corn, oil, etc., & no time of redemption limited, & the party stays till it is perished in nature & spoilt forasmuch as there is no default in him who took the pledge. he shall have debt for his money & the other no remedy for his pawn, for the law of this part hath dissolved the contract; for things in their nature perishable cannot be preserved (FLEMING, C.J.).—RATCLIFF v. DAVIS (1810), 1 Bulst. 29; Cro. Jac. 244; Yelv. 178; Noy, 137; 80 E. R. 733.

**Annotations:—**As to (5) Reid, Kinsey v. Heyward (1699), 1 Ld. Raym. 432. As to (6) Reid, Donald v. Suckling (1866), L. R. 1 Q. B. 585. **Generally, Reid.** Ryall v. Rowles (1750), 1 Ves. Sen. 348.

**76. — Pledge implies possession.]—**GILBERTSON & Co. v. ANDERSON & COLTMAN, LTD., No. 5, *ante*.

**77. Effect of failure to take possession—On rights of pawnee as against assignee of bankrupt pawner.]—**RYALL v. ROWLES, No. 12, *ante*.

**78. Special property in pawnee—General property in pawner.]—**RATCLIFF v. DAVIS, No. 75, *ante*.

payment.—HARE v. TIPPEN, 2 J. R. N. S. 263.—N.Z.

**76 i. — Pledge implies possession.]—**DUNDAS HAMILTON v. WESTERN BANK (1857), 28 L. T. O. S. 376.—SCOT.

**76 ii. — —.]—**LANGE v. ABEL (1906), 23 S. C. 765; 16 C. T. R. 1117.—S. AF.

**78 i. Special property in pawnee—General property in pawner.]—**A pledgee of movables has no right to cede them to another without the owner's con-

79. ———.]—If a citizen do pledge wines, he now hath in them the general property, & the other the special property (DODDERIDGE, J.).—*R. v. HANGER* (1702), 3 Bulst. 17; 81 E. R. 13.

80. ———.]—*HARPER v. GODSELL*, No. 56, *ante*.

81. ———.]—(1) *Semble*: a mtgee., as distinguished from a pledgee, of chattles has, in the absence of statute, no implied power to sell them on default by the mtgor., even if he has taken possession of them.

A pawnee has a power of sale on default in payment at a time fixed (*FRY, L.J.*).

(2) A pawn conveys only a special property, leaving the general property in the pawnor (*FRY, L.J.*).—*Re MORRITT, Ex p. OFFICIAL RECEIVER* (1886), 18 Q. B. D. 222; 56 L. J. Q. B. 139; 56 L. T. 42; 35 W. R. 277; 3 T. L. R. 266, C. A.

*Annotations*:—*As to* (1) *Consd. Deverges v. Sandeman, Clark*, [1902] 1 Ch. 579. *Reid, Re Cleaver, Ex p. Rawlings* (1887), 19 Q. B. D. 499; *Watkins v. Evans* (1887), 18 Q. B. D. 386; *The Ningchow*, [1916] P. 221. *Generally, Reid, Calvert v. Thomas* (1887), 19 Q. B. D. 204. *Mentd. Lumley v. Simmons* (1887), 34 Ch. D. 698.

82. ———.]—Advances against deposit of goods are probably some of the most ordinary transactions either of common or commercial life, & if there is delivery, & there are no terms expressed either verbally or in writing giving any larger effect to the contract, the latter is known as a contract by way of "pawn or pledge," the legal effect of which is that only a special property passes from the borrower to the lender, although coupled with the power of selling the pledge & transferring the whole property in it on default in payment at the stipulated time, if there be any, or at a reasonable time after demand & non-payment, if no time for repayment be agreed upon (*FIELD, J.*).—*BURDICK v. SEWELL* (1883), 10 Q. B. D. 363; 52 L. J. Q. B. 428; 48 L. T. 705; 31 W. R. 796; 5 Asp. M. L. C. 79; *on appeal, sub nom. SEWELL v. BURDICK* (1884), 10 App. Cas. 74, H. L.

*Annotations*:—*Reid, Bristol & West of England Bank v. Mid. Ry.*, [1891] 2 Q. B. 653; *Ingis v. Robertson*, [1898] A. C. 616; *The Odessa, The Woolston*, [1916] 1 A. C. 145; *Brandt v. Liverpool, Brazil & River Plate Steam Navigation Co.*, [1924] 1 K. B. 575. *Mentd. Allent v. Coltart* (1883), 11 Q. B. D. 782; *The Rona* (1884), 51 L. T. 28; *Rov v. Payne, Douthwaite* (1885), 53 L. T. 932; *Rodocanachi v. Milburn* (1886), 18 Q. B. D. 67; *Rimmer v. Webster*, [1902] 2 Ch. 163; *Montgomery v. Hutchins* (1905), 94 L. T. 207; *Temperley Steam Shipping Co. v. Smyth*, [1905] 2 K. B. 791; *Burgos v. Nascimento* (1907), 100 L. T. 71; *Calcutta S.S. Co. v. Weir*, [1910] 1 K. B. 759; *Armour v. Leopold Walford* (London), [1921] 3 K. B. 473.

83. ———.]—A special property in the goods passes to the pledgee in order that he may be able, if his right to sell arises, to sell them. In all such cases there is at common law an authority to the pledgee to sell the goods on the default of the pledgor to repay the money, either at the time originally appointed, or after notice by the pledgee (*BOWEN, L.J.*).—*Re HARDWICK, Ex p. HUBBARD* (1886), 17 Q. B. D. 690; 55 L. J. Q. B. 490; 59 L. T. 172, n.; 35 W. R. 2; 2 T. L. R. 904; 3 Morr. 246, C. A.

*Annotations*:—*Appld. Charlesworth v. Mills*, [1892] A. C. 231. *Distd. Dublin City Distillery v. Doherty*, [1914] A. C. 828. *Reid, Hilton v. Tucker* (1888), 39 Ch. D. 669; *Bowker v. Williamson* (1889), 5 T. L. R. 382; *Grigg v. National Guardian Assoc.*, [1891] 3 Ch. 206; *Wilkinson v. Girard* (1891), 7 T. L. R. 266; *London & Yorkshire Bank v. White* (1895), 11 T. L. R. 570; *Deverges v. Sandeman, Clark*, [1902] 1 Ch. 579; *G. E. Ry. v. Lord's Trustees*, [1909] A. C. 109; *Re Alister*, [1922] 2 Ch. 211. *Mentd. North Central Wagon Co. v. M. S. & L. Ry.* (1886), 56 L. T. 755; *Newlove v. Shrewsbury* (1888), 21 Q. B. D. 41; *Re Standard Manufacturing Co.*, [1891]

1 Ch. 627; *Morris v. Delobel-Filipo*, [1892] 2 Ch. 352; *Ramsay v. Margrett*, [1894] 2 Q. B. 18; *Spencer v. Mid. Ry.* (1895), 11 T. L. R. 408; *Withers v. Berry* (1895), 39 Sol. Jo. 559; *Saunders v. White*, [1902] 1 K. B. 472; *Wrightson v. McArthur & Hutchisons* (1919), Ltd., [1921] 2 K. B. 807.

84. ———.]—It is plain that a pledgee is in a different position from an ordinary mtgee. He has only a special property in the thing pledged. He may obtain a sale but he cannot obtain a foreclosure (*COZENS-HARDY, J.*).—*HARROLD v. PLENTY*, [1901] 2 Ch. 314; 70 L. J. Ch. 562; 85 L. T. 45; 49 W. R. 646; 17 T. L. R. 545; 8 Mans. 304.

*Annotations*:—*Reid, Stubbs v. Slater*, [1910] 1 Ch. 632; *London County & Westminster Bank v. Tompkins*, [1918] 1 K. B. 515; *Ellis's Trustees v. Dixon-Johnson*, [1924] 2 Ch. 451.

— Pledge by indorsement of bill of lading.]—*See SHIPPING.*

85. Attributes of pawnee's special property.—Property as security for repayment.]—*COGGS v. BERNARD*, No. 1, *ante*.

86. ———.]—More than mere personal right of detention.]—*DONALD v. SUCKLING*, No. 43, *ante*.

87. ———.]—Property to enable sale on default of payment.]—*Re HARDWICK, Ex p. HUBBARD*, No. 83, *ante*.

88. ———.]—The very expression "special property" seems to exclude the notion of that general property which is the badge of ownership. If the pledgee sells he does so by virtue & to the extent of the pledgor's ownership, & not with a new title of his own. He must appropriate the proceeds of the sale to the payment of the pledgor's debt, for the money resulting from the sale is the pledgor's money to be so applied. The pledgee must account to the pledgor for any surplus after paying the debt. He must take care that the sale is a provident sale, & if the goods are in bulk he must not sell more than is reasonably sufficient to pay off the debt, for he only holds possession for the purpose of securing himself the advance which he has made. He cannot use the goods as his own. These considerations show that the right of sale is exercisable by virtue of an implied authority from the pledgor & for the benefit of both parties. It creates no *jus in re* in favour of the pledgee; it gives him no more than a *jus in rem* such as a lienholder possesses, but with this added incident, that he can sell the property *motu proprio* & without any assistance from the ct. (*per CUR.*).—*THE ODESSA, THE WOOLSTON*, [1916] 1 A. C. 145; 85 L. J. P. C. 49; 114 L. T. 10; 32 T. L. R. 103; 60 Sol. Jo. 292; 13 Asp. M. L. C. 215, P. C.; *affg. S. C. sub nom. THE ODESSA, THE CAPE CORSO*, [1915] P. 52.

*Annotations*:—*Reid, The Eumaeus* (1915), 85 L. J. P. 130. *Mentd. The Clan Grant* (1915), 31 T. L. R. 321; *The Linaria* (1915), 31 T. L. R. 396; *The Sortareron* (1915), 85 L. J. P. 121; *The Zamora*, [1916] 2 A. C. 77; *The Derflinger* (No. 2) (1918), 87 L. J. P. C. 195; *The Lützow* (1918) A. C. 435; *The Parchim*, [1918] A. C. 157; *The Dirigo, The Hallingdal*, [1919] P. 204; *The Palm Branch*, [1919] A. C. 272; *The Hilding* (1920), 37 T. L. R. 199; *The Orterio*, [1920] A. C. 724; *The Urna*, [1920] A. C. 899; *The Kronprinzessin Margareta, The Parana*, [1921] 1 A. C. 486.

89. Time when property passes.—On delivery of possession.]—*DONALD v. SUCKLING*, No. 43, *ante*.

## SUB-SECT. 2.—CARE OF PAWN.

### A. In General.

90. Pawnee to use ordinary care.]—*COGGS v. BERNARD*, No. 1, *ante*.

*sent. DEUTSCHMANN v. MPETA*, [1917] C. P. D. 79.—S. AF.

1. Attributes of pawnee's special pro-

perty.—Right to maintain replevin.]—A pawnee may maintain replevin against the pawnor for a wrongful

taking of the goods pledged.—*GIBSON v. BOYD* (1839), 3 N. B. R. (1 Kerr) 160.—CAN.

**Sect. 3.—Rights and liabilities of pawnee: Sub-sect. 2, B. & C.; sub-sects. 3 & 4, A.]**

**B. Loss of Pawn.**

**91. Liability of pawnee—Loss after tender by pawnor.]—(1)** It is no plea to a declaration in detinue averring that pltf. had delivered certain goods to deft. to be kept safe, that after the delivery S. stole them out of his possession. To be kept & to be kept safely is all one.

(2) If goods are accepted to be kept as the bailee would keep his own proper goods, if the goods are stolen, the bailee shall not answer for them.

So if goods are pawned for money, unless the pawnor tendered the money before the stealing & the pawnee refused it.—*SOUTHCOTE'S CASE* (1601), 4 Co. Rep. 83 b; 70 E. R. 1061; *sub nom.* *SOUTHCOT v. BENNET*, Cro. Eliz. 815.

*Annotations:—As to (1) Consd. Coggs v. Bernard* (1703), 1 Com. 135. *Reid. Lane v. Cotton* (1702), 11 Mod. Rep. 12. *As to (2) Reid. Goldman v. Hill*, [1919] 1 K. B. 443. *Generally, Reid. Kettle v. Bromsall* (1735), Willes, 118; *Horton v. Hoare* (1743), 3 Atk. 44; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585. *Mentl. Symons v. Darknoll* (1829), Palm. 523. *Nicholls v. More* (1661), 1 Sid. 36; *Boson v. Sandford* (1689), 1 Show. 101; *Harris v. Perry*, [1903] 2 K. B. 219; *Shrimpton v. Hertfordshire County Council* (1910), 74 J. P. 305; *Pratt v. Patrick*, [1924] 1 K. B. 488.

**92. — Loss by robbery.]—***COGGS v. BERNARD*, No. 1, *ante*.

**93. — Theft by servant.]—**In the absence of negligence a pawnbroker is not liable for the theft of a pledge by his servant.—*ARMFIELD v. MERCER* (1886), 2 T. L. R. 764, D. C.

**94. — Loss by servant.]—***JONE v. HART* (1698), Holt, K. B. 642; 1 Ld. Raym. 738; 2 Salk. 441; 90 E. R. 1255.

**95. — Loss by fire.]—***Semble*: a pawnbroker is not liable to make compensation where the goods pledged have been destroyed by fire without his negligence or default.—*R. v. CORDING* (1832), 1 Nev. & M. K. B. 35; 1 Nev. & M. M. C. 24; 2 L. J. M. C. 9; *sub nom. Ex p. CORDING*, 4 B. & Ad. 198; 110 F. R. 430.

*Annotation:—Reid. Shackell v. West* (1859), 2 E. & E. 326.

**96. — Right of pawnee to deduct debt.—**From value recovered by pawnor.]—Creditor who loses or disposes of a pledge loses his lien, & the pledgor can recover its value without deducting the debt due.—*COOKE v. HADDON* (1862), 3 F. & F. 229, N. P.

**C. Use of Pawn by Pawnee.**

**97. What may be used—Pawns entailing expense to pawnee—Animals.]—**He who has goods at pawn has a special property in them, so that he may work such pawn, if it be a horse or ox, or may take the cow's milk, & may use it in such manner as the owner would: but if he misuses the pawn, an action lies, also he has such interest in the pawn as he may assign over, & the assignee shall be subject to a detinue, if he detains it upon payment of the money by the owner (*per CUR.*).—*MORES v. CONHAM* (1610), Owen, 128; 74 E. R. 946.

*Annotations:—Consd. Donald v. Suckling* (1866), L. R. 1 Q. B. 585. *Reid. Coggs v. Bernard* (1703), 2 Ld. Raym. 909; *Ryall v. Howles* (1750), 1 Ves. Sen. 348; *R. v. Cotton* (1751), Park. 112; *The Odessa, The Woolston*, [1916] 1 A. C. 145.

**PART II. SECT. 3, SUB-SECT. 2.—B.**

**951. Liability of pawnee—Loss by fire.]—**Where goods have been left in pledge with a pawnbroker for an advance of money, & are destroyed by fire or lost in consequence thereof, the pawnbroker's liability is that of an ordinary pawnee at common law. The fact of a fire having taken place raises a *prima facie* presumption of negligence which must be displaced by proof that ordinary care was used in

the custody of the goods.—*FOLLEY v. O'HARA* (1920), 54 1. L. T. 167.—*IR.*

**PART II. SECT. 3, SUB-SECT. 2.—C.**

**971. What may be used—Pawns entailing expense to pawnee—Animals.]—***SINGU v. MAGXA*, [1919] E. D. L. 35.—*S. AF.*

*m. Profits arising from use—Liability of pawnee to account.]—*Profits realised during currency of the pledge by the pledgee from the property

**98. — — — — —.]—***COGGS v. BERNARD*, No. 1, *ante*.

**99. — Only things no worse for use—At pawnee's peril.]—***COGGS v. BERNARD*, No. 1, *ante*.

**100. Liability of pawnee for misuse.]—***MORES v. CONHAM*, No. 97, *ante*.

**SUB-SECT. 3.—TRANSFER OF PAWNEE'S RIGHTS.**

**101. Assignability of pawnee's interest.]—***MORES v. CONHAM*, No. 97, *ante*.

**102. — Pawnee agent of pawnor—Broker.]—**A., the owner of certain chattels, pledged them to B., who was a broker, to secure advances made on his behalf by B.; & B. afterwards, in his own name, & unknown to A., repledged the same chattels to C., to secure advances made by C. to B., but of which, unknown to C., A. was to have the benefit. C. having subsequently applied in vain to B. for payment of his advances, threatened to realise his security by a sale, which, however, he was from time to time induced to postpone, by the solicitations of B., & his assurances of speedy payment; & this was communicated by B. to A., his principal. In a suit by A. against B. & C., praying to redeem the property in pledge on payment of any balance found due on the account between himself & B.:—*Held*: A. had no equity to restrain C. from proceeding to an immediate sale.—*NICHOLSON v. HOOPER* (1838), 4 My. & Cr. 179; 41 E. R. 70, L. C.

**103. Rights of pawnor on assignment—Right to redeem.]—***MORES v. CONHAM*, No. 97, *ante*.

**104. — — — — —.]—***DONALD v. SUCKLING*, No. 43, *ante*.

**105. — — — — —.]—**On application by the trustee in bkpcy. for a declaration that the handing over of certain wines to resp. by a creditor of bkpt. with whom they had been deposited as security for a loan, was a mere transfer of a pledge & that the trustee was entitled to redeem the wine on paying off the security:—*Held*: upon the evidence the transaction was a mere substitution of resp. in place of the original creditor as pledgee of the wine in question & was not a purchase by resp. out & out: an account must be taken of the sums due to resp. on the security of the wines taken over by him, credit being given by resp. for moneys received from the sale of certain of the wines; & the trustee would be entitled to redeem on payment of the balance due.—*Re TILLET, Ex p. HARPER* (1890), 7 Morr. 286.

**106. — Right to safe custody of pawn.]—***DONALD v. SUCKLING*, No. 43, *ante*.

**107. — Right to damages for injury to pawn in hands of assignee.]—***DONALD v. SUCKLING*, No. 43, *ante*.

**SUB-SECT. 4.—REMEDIES OF PAWNEE.**

**A. Sale.**

**108. Whether power of sale implied.]—**If goods are deposited as a security for a loan of money, such deposit constitutes something more than the right of lien; & it is to be inferred that the contract

pledged must be immediately credited by the pledgee to the account of the pledgor although the latter's debt is not then due.—*FREEMAN COHEN'S CONSOLIDATED, LTD. v. GENERAL MINING & FINANCE CORPN., LTD.*, [1907] T. S. 224.—*S. AF.*

**PART II. SECT. 3, SUB-SECT. 4.—A.**

**1081. Whether power of sale implied.]—***MCDONALD v. MCKAY* (1871), 13 Gr. 98.—*CAN.*

between the parties is, that if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit.—*POTHONIER & HODGSON v. DAWSON* (1816), Holt, N. P. 383, N. P.

*Annotations*.—*Consd. Martin v. Reid* (1862), 11 C. B. N. S. 730; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585. *Ratd. Smart v. Sandars* (1846), 3 C. B. 380; *Burdick v. Sewell* (1883), 10 Q. B. D. 363.

109. —[Where money is lent upon the security of stock for a fixed period, the lender has no right during that period to deal with the stock, but by the custom of the Stock Exchange is bound to return the identical security pledged, when the time for paying off the loan arrives. A principal may sue, although he has dealt with the party sued through an agent, & the principal's name was not disclosed.

A pawnee cannot sell except by express contract, & if he does, the owner can charge him with any difference of value.—*LANGTON v. WAITE* (1868), L. R. 6 Eq. 165; 37 L. J. Ch. 345; 18 L. T. 80; 16 W. R. 508; *on appeal* (1869), 4 Ch. App. 402, L. J.

110. —[*Re HARDWICK, Ex p. HUBBARD*, No. 83, *ante*.

111. —Deposit with power to hold.]—*LICKLETHWAITE v. MERRILL* (1852), 19 L. T. O. S. 31.

112. —No date fixed for repayment.]—*MARTIN v. REID*, No. 10, *ante*.

113. —[*BURDICK v. SEWELL*, No. 32, *ante*.

114. —Proper demand & notice—Necessity for.]—(1) Where goods are deposited as security for the repayment of a loan of money on a future day certain, though without any express stipulation that the pawnee shall have power to sell in default of payment on the day:—*Semble*: such a power of sale is implied by law from the nature of the transaction.

(2) Where there is no stipulated day for payment, or where the stipulated time has been rendered indefinite by a subsequent agreement between the parties, it is not competent to the pawnee to sell without a proper demand & notice.

(3) A notice that he will sell unless an excessive sum be paid immediately, is not such a notice as will justify the sale.—*PIGOT v. CUBLEY* (1864), 15 J. B. N. S. 701; 3 New Rep. 607; 33 L. J. C. P. 134; 9 L. T. 804; 10 Jur. N. S. 318; 12 W. R. 467; 143 E. R. 960.

*Annotations*.—*As to (1) Reid, Donald v. Suckling* (1866), L. R. 1 Q. B. 585. *As to (3) Consd. Deverges v. Sandeman, Clark*, [1902] 1 Ch. 579. *Expld. Stubbs v. Slater*, [1910] 1 Ch. 632. *Generally, Mentd. Cox v. Liddell* (1895), 2 Mans. 212.

115. —[The registered holder of shares in a co. whose arts. of assocn. did not require that a transfer of shares should be made by deed, deposited the certificates of his shares accompanied by a transfer executed by himself but with the name of the transferee & the

date of execution left in blank, with a person who advanced him money as security for the loan. No time was fixed for the repayment of the loan & nothing was said as to the object of the transfer:—*Held*: the deposit was had no authority, without previous demand for repayment of the loan, to sell or sub-mtge. the shares & fill in the name of the purchaser or sub-mtgee. as transferee.—*FRANCE v. CLARK* (1883), 22 Ch. D. 830; 52 L. J. Ch. 362; 48 L. T. 185; 31 W. R. 374; *affd.* (1884), 28 Ch. D. 257; 53 L. J. Ch. 585; 50 L. T. 1; 32 W. R. 466, C. A.

*Annotations*.—*Consd. Montagu v. Weston, Clevedon & Portland Light Ry.* (1903), 19 T. L. R. 272. *Distd. Fry v. Smellie*, [1912] 3 K. B. 282. *Ratd. Easton v. London Joint Stock Bank* (1886), 55 L. T. 678; *Hutchinson v. Colorado United Mining Co. & Hamill, Hamill v. Lilley* (1886), 3 T. L. R. 265; *Williams v. Colonial Bank, Williams v. London Chartered Bank of Australia* (1888), 38 Ch. D. 388; *Simmons v. London Joint Stock Bank, Little v. London Joint Stock Bank* (1890), 39 W. R. 449; *Moore v. North-Western Bank* (1891), 64 L. T. 456; *Fox v. Martin* (1895), 64 L. J. Ch. 473; *London & Midland Bank v. Mitchell*, [1899] 2 Ch. 161; *Stubbs v. Slater & Bond* (1910), 102 L. T. 444. *Mentd. Faulks v. Atkins* (1893), 10 T. L. R. 178; *Powell v. London & Provincial Bank*, [1893] 2 Ch. 555; *Watkin v. Lamb* (1901), 85 L. T. 483; *Herdman v. Wheeler*, [1902] 1 K. B. 361; *Lloyd's Bank v. Cooke*, [1907] 1 K. B. 794; *Macmillan v. London Joint Stock Bank*, [1917] 2 K. B. 439.

116. —Sufficiency of.]—*PIGOT v. CUBLEY*, No. 114, *ante*.

117. —[In the case of a mtge. of shares by deposit of the share certificate together with a blank transfer, the fact that the mtgee. in giving notice requiring payment makes a mistake as to the amount due on the mtge. & demands too much is not a ground for invalidating the exercise of his implied power of sale. *Semble*: the same principle applies to the case of a pledge.—*STUBBS v. SLATER*, [1910] 1 Ch. 632; 79 L. J. Ch. 420; 102 L. T. 444, C. A.

*Annotations*.—*Ratd. Mills's Trustee v. Dixon-Johnson*, [1924] 1 Ch. 342. *Mentd. Aston v. Kelsey*, [1913] 3 K. B. 314; *Blaker v. Hawes & Brown* (1913), 109 L. T. 320; *London County & Westminster Bank v. Tompkins*, [1918] 1 K. B. 515.

118. —Where date of repayment fixed.]—*PIGOT v. CUBLEY*, No. 114, *ante*.

119. —[*BURDICK v. SEWELL*, No. 82, *ante*.

120. —[*Re MORRITT, Ex p. OFFICIAL RECEIVER*, No. 81, *ante*.

121. —Without authority of court.]—*THE ODESSA, THE WOOLSTON*, No. 88, *ante*.

122. Duty of pawnee on sale.—To account for proceeds.]—An account was directed for all moneys received on the sale of stock pledged, notwithstanding the day of redemption was past; it not appearing that deft. had sufficient stock at the day.—*HARRISON v. HART & FRANKS* (1726), 1 Com. 393; 2 Eq. Cas. Abr. 6; 92 E. R. 1126.

123. —Surplus proceeds.]—*THE ODESSA, THE WOOLSTON*, No. 88, *ante*.

124. —To see that sale provident.]—*THE ODESSA, THE WOOLSTON*, No. 88, *ante*.

108 ii. —[*NOVA SCOTIA CENTRAL RY. CO. v. HALIFAX BANKING CO.* (1892), 21 S. C. R. 536.—CAN.

108 iii. —[A pledgee is not entitled to sell the goods pledged with him without obtaining authority to do so.—*WILSON v. SHAW* (1891), 1 C. T. R. 299.—S. AF.

108 iv. —[*Ex p. MARAIS*, [1902] T. H. 87.—S. AF.

114 i. —No date fixed for repayment—Proper demand & notice—Necessity for.]—Generally a pledgee of chattels has a right to reimburse himself by a sale; which should be preceded by notice to the pledgor if practicable, & should not be to the pledgor or a trustee for him.—*RYAN*

*v. MACINTOSH* (1867), 4 W. W. & A'B. (Eq.) 8.—AUS.

114 ii. —[A pledgee may convert the chattel where his debt is unsatisfied, but, if no time is set for payment, he must demand payment of the pledgor before conversion, otherwise his conversion will be wrongful.—*PRETE v. LAUZON & FENSON*, [1923] 3 D. L. R. 1152; 52 O. L. R. 334.—CAN.

122 i. Duty of pawnee on sale.—To account for proceeds.]—*MOORE v. SIBBALD* (1869), 29 U. C. R. 437.—CAN.

122 ii. —[Deft., who was mtgee. of certain shares in a co., sold them by auction. Plt., who was entitled to the shares subject to deft.'s

claim, knew of & ratified the sale. The purchaser refused to carry out the sale, & no attempt was made by deft. to compel completion. The shares fell very much in value:—*Held*: there was no duty upon deft. to take proceedings against the purchaser to compel completion, & he was not liable to account for the shares at the price that would have been realised had the sale been completed.—*DANIELS v. NOXON* (1889), 17 A. R. 208.—CAN.

124 i. —To see that sale provident.]—If a pledgee, to realise his money, exercises his power of sale in good faith & not "fraudulently, wilfully or recklessly," he is not liable for

**Sect. 3.—Rights and liabilities of pawnee: Sub-sect. 4, A. & B. (a), (b) & (c), & C. Sect. 4: Sub-sects. 1 & 2.]**

**125. — To sell only sufficient to satisfy debt—Pledge of goods in bulk.]—THE ODESSA, THE WOOLSTON, No. 88, ante.**

**126. Warranty of title to purchaser on sale.]—**A pawnbroker, who sells a chattel as a forfeited pledge, merely undertakes that the subject of the sale is a pledge, & irredeemable, & that he is not cognisant of any defect of title to it.—**MORLEY v. ATTENBOROUGH** (1849), 3 Exch. 500; 18 L. J. Ex. 148; 12 L. T. O. S. 532; 13 J. P. 427; 13 Jur. 282; 154 E. R. 942.

**Annotations:—**Fold. *Richardson v. Crosbie* (1876), cited in *Turner on the Pawnbrokers' Act*, 1872, 3rd ed. 66, n. *Reid*, *Elpholts v. Bannister* (1864), 17 C. B. N. S. 708. *Mentl. Sims v. Maryatt* (1851), 17 Q. B. 281; *Bandy v. Cartwright* (1853), 8 Exch. 913; *Alken v. Short* (1856), 1 H. & N. 210; *Buddle v. Green* (1857), 27 L. J. Ex. 33; *Collen v. Wright* (1857), 8 E. & B. 647; *Hall v. Conder* (1857), 2 C. B. N. S. 22; *Smith v. Neale* (1857), 2 C. B. N. S. 67; *Emmerton v. Mathews* (1862), 7 H. & N. 586; *Baguley v. Hawley* (1867), L. R. 2 C. P. 625; *Wood v. Baxtor* (1883), 49 L. T. 45; *Raphael v. Burt* (1884), Cab. & El. 325; *Baylis v. London (Bp.)*, [1913] 1 Ch. 127; *Re Thelluson, Ex p. Abdy* (1919), 88 L. J. K. B. 1210; *Benton v. Campbell, Parker*, [1925] 2 K. B. 410.

**127. —.]—RICHARDSON v. CROSBIE** (1876), cited in *Turner on the Pawnbrokers' Act*, 1872, 3rd ed. 66, n.

**128. Effect of sale—Loss of right to redeem.]—**A British steamship, before the outbreak of war between Great Britain & Germany, left Hankow with sundry packages of tallow, shipped by a German, & consigned to a British firm. On arrival at Liverpool, after the outbreak of war, the consignees declined to take delivery of the goods from enemy subjects. Thereupon a Japanese bank, which, at the time of shipment had made advances in respect of which the shippers were in default, exercised, as indorsees & holders of the bill of lading, their power of sale, by entering into a contract to sell the goods to a British firm. On the seizure of the tallow by the Customs authorities as prize:—**Held:** the goods must be released to the purchasers, for, when the contract of sale was made, the enemy pledgors lost their right to redeem, & thereby ceased to be owners. The goods were, therefore, not subject to seizure as enemy property.—**THE NINGCHOW**, [1916] P. 221; 115 L. T. 554; 31 T. L. R. 470; 13 Asp. M. L. C. 509.

#### B. Action.

##### (a) For Whole Debt.

**129. Perishable pawn — After pledge has perished.]—RATCLIFF v. DAVIS**, No. 75, ante.

**130. Action notwithstanding deposit of pawn.]—**If I pawn goods to A. for such a sum, A. may have debt for the money, notwithstanding his having a pawn (**HOLT, C. J.**).—**ANON.** (1701), 12 Mod. Rep. 564; 88 E. R. 1522, N. P.

selling at a price lower than the value of the articles. In deciding whether he has exercised his power in good faith the general circumstances should be considered.—**ZESS v. SMITH** (Sask.), [1920] 3 W. W. R. 836.—CAN.

**n. Express power of sale — Necessity for proper exercise.]—BARTHAM v. GRICE** (1912), 22 O. W. R. 191; 3 O. W. N. 1296; 4 D. L. R. 682.—CAN.

**c. —.]—**Where a pledgee, having power to sell for default, takes over, as if upon a sale to himself, the property pledged without the authority of the pledgor, but crediting its value in account with him, this act, though an unauthorised conversion, does not put an end to the contract of pledge, so as to entitle the pledgor to have the property back without

payment.—**NECKHAM DOBAY v. BANK OF BENGAL** (1891), L. L. R. 19 Calc. 322; L. R. 19 Ind. App. 60.—IND.

**p. Right to sue for sale.]—**Pitt. lent money on the pledge of jewels, & sued more than three years & less than six years from the date of the pledge, to recover the amount lent, by sale of the jewels & from deft. personally.—**Held:** Pitt. was entitled to sue for the sale of the property pledged to him notwithstanding that he was also entitled to sell the property without reference to the ct.—**MABALINGA NADAR v. GANAPATHI SUBBIEN** (1902), L. L. R. 27 Mad. 525.—IND.

**PART II. SECT. 3, SUB-SECT. 4.—**  
B. (a).

**130 i. Action notwithstanding deposit**

**131. — Unless agreement to contrary.]—**Where money is lent on a pledge the borrower is liable, without there is an agreement to the contrary.—**SOUTH-SRA CO. v. DUNCOMB** (1731), 2 Stra. 919; 2 Barn. K. B. 48; 93 E. R. 942.

**132. — Before returning pawn.]—**A. lends money to B. & receives a gun as a security for the repayment, A. may recover the amount without first returning the gun.—**LAWTON v. NEWLAND** (1817), 2 Stark. 72, N. P.

**133. — Defence of pawner—Pawnee unable to return pledge—Wrongful sale.]—**Deft. opened a speculative account with a firm of stockbrokers & deposited with them as security for any debit balance which might from time to time be owing by him on that account the indicia of title to various bonds & shares, including certain rubber shares. In 1920 the firm sold the rubber shares without the knowledge or authority of deft., who was kept in ignorance of the sale till after the bkpcy. of the firm.

In both cts. below this transaction has been spoken of as an equitable mtge. In practice & I think in a good many decisions, very similar, if not identical, transactions have been spoken of as pledges. I express no opinion upon the question, which this deposit of security really was, because it appears to me that on either view the inability of the mtgee., or the pledgee, as the case may be, to return the security against payment of the debt equally constituted a defence to the debtor under the circumstances (**LORD SUMNER**).—**ELLIS & CO.'S TRUSTEE v. DIXON-JOHNSON**, [1925] A. C. 489; 94 L. J. Ch. 221; 133 L. T. 60; 41 T. L. R. 336; 69 Sol. Jo. 395, H. L.

##### (b) For Deficit on Sale.

**134. Whether action lies.]—**A special contract pawn ticket given under Pawnbrokers Act, 1872 (c. 93), s. 24, in Form 7, of sched. 3, on a loan does not exclude the common law right of the pawnbroker to recover the balance due to him after sale of the pledge for less than the amount of the debt.—**JONES v. MARSHALL** (1889), 24 Q. B. D. 269; 59 L. J. Q. B. 123; 61 L. T. 721; 54 J. P. 279; 38 W. R. 269; 6 T. L. R. 108, D. C.

##### (c) For Recovery of Possession.

**135. Action against third parties — Joinder of owner.]—SAVILLE v. TANKRED** (1748), 1 Ves. Sen. 101; 3 Swan. 148, n.; 27 E. R. 918.

**136. — Pledge of goods obtained by fraud—Pawnee without notice of fraud.]—**If goods be obtained from A. by fraud, & pawned to B. without notice, & A. prosecute the offender to conviction, & get possession of his goods, B. may maintain trover for them.—**PARKER v. PATRICK** (1793), 5 Term Rep. 175; 101 E. R. 99.

**Annotations:—***Distd.* *Hooper v. Ramsbottom* (1815), 6 Taunt. 12. *Dbtd.* *Peer v. Humphrey* (1835), 2 Ad. & El.

*of pawn.]—TRUMPOUR v. CRANDALL* (1871), 31 U. C. R. 9.—CAN.

**q. — Period of limitation.]—**A suit for the recovery of money secured by a pledge is a suit for money lent. The period of limitation is three years from the time the loan is made.—**YELLAPA v. DESAYAPPA** (1905), L. L. R. 30 Bom. 218.—IND.

**PART II. SECT. 3, SUB-SECT. 4.—**  
B. (c).

**r. Pledge of warehouse receipt for wheat — Wheat converted into flour & sold—Right of pledgee to follow proceeds of sale.]—Re GOODFELLOW, TRADERS' BANK v. GOODFELLOW** (1890), 19 O. R. 299.—CAN.



495. *Consol. Loan v. Green* (1846), 15 M. & W. 216; *White v. Gardner* (1851), 10 C. B. 910. *Ridd. Noble v. Adams* (1816), 3 Marsh. 366; *Irving v. Mobly* (1831), 7 Bing. 643; *Higgins v. Burton* (1857), 26 L. J. Ex. 342; *Whitehorn v. Davison*, [1911] 1 K. B. 463. *Mentd. Ferguson v. Carrington* (1829), 7 L. J. O. S. K. B. 139; *Granger v. Hill* (1838), 4 Bing. N. C. 212; *Stevenson v. Newnham* (1853), 13 C. B. 285; *Lindsay v. Cundy* (1876), 45 L. J. Q. B. 381.

137. —.] — In an action for wrongfully depriving *pltf.*s. of goods, it appeared that the goods had been consigned to England from a colony. The bills of lading provided that the goods were to be delivered to the order of the consignor or his assigns. The consignor drew bills of exchange on the consignee against the consignment, & sold the bills of exchange, with the bills of lading annexed, which he had indorsed in blank, to a colonial bank, who sent them to a bank in London, with a hypothecation note empowering the London bank to sell the goods if the bills of exchange were not accepted or not paid at maturity. The goods arrived in England, & were delivered to *defts.*, who were a railway co., to be delivered to the order of the shipowners. The consignee paid the freight & other shipping charges & accepted the bills of exchange, but before the bills became due, he induced *defts.* wrongfully to deliver the goods to him without producing a delivery order from the shipowners. When the bills became due the consignee requested *pltf.*s. to advance the money & take up the bills. They did so, & received the bills of exchange & the bills of lading from the London bank, & ultimately obtained delivery orders from the shipowners in exchange for the bills of lading. When they presented the delivery orders to *defts.* they found that the goods had been already given up to the consignee, & they thereupon commenced the present action:—*Held*: (1) *pltf.*s. must be taken to be pledgees of the goods, & had therefore a property sufficient to entitle them to maintain the action independently of 18 & 19 Vict. c. 111, s. 1; (2) *pltf.*s.' right of action was not affected by the fact that at the date of the wrongful delivery they had not acquired their title to the goods.—*BRISTOL & WEST OF ENGLAND BANK v. MIDLAND RY. CO.*, [1891] 2 Q. B. 653; 61 L. J. Q. B. 115; 65 L. T. 234; 40 W. R. 148; 7 T. L. R. 627; 7 Asp. M. L. C. 69, C. A. *Annotation*:—*Mentd. London Joint Stock Bank v. British Amsterdam Maritime Agency* (1910), 104 L. T. 143.

#### C. Foreclosure.

*Pledge distinguished from mortgage.*—*See MORTGAGE*, Vol. XXXV., pp. 247, 248, Nos. 72–82.

138. No right of foreclosure.]—In the year 1708, A. borrows of B. £2,000 & for security assigns to B. £2,500 East India stock, & gave his bond for the same sum payable. July following; B. signs a defeasance, by which he covenants, that if A. paid principal & interest in July he would re-transfer. The stock sinking in value, several calls were made, which B. paid, & upon the last call B. had paid £24 over & above the £2,500; & the stock afterwards increased in its value. B. continues in possession until the year 1715, & then sells out this £2,500 stock, & united it to other stock of his own, & died; & in 1729 a bill is brought to redeem, but was dismissed on account of the length of time; & this being a personal pledge, there was no occasion to foreclose.—*LOCKWOOD v. EWER (OR CHILD (LADY) v. CHANSTILER* (1742), 9 Mod. Rep. 275; 2 Atk. 303; 88 E. R. 448, L. C.

139. —.]—The doctrine that an equitable *mtgee.* by deposit of title deeds is entitled to foreclosure, does not extend to a pledgee of personal chattels. A. deposited with B. certain Canada

railway bonds as security for a debt. On bill filed by B. for foreclosure or sale:—*Held*: B. was entitled to an order for sale only.—*CARTER v. WAKE* (1877), 4 Ch. D. 605; 46 L. J. Ch. 841.

*Annotations*:—*Consol. Sadler v. Worley*, [1894] 2 Ch. 170. *Fold. Fraser v. Byas* (1895), 11 T. L. R. 481. *Consol. Harold v. Plenty*, [1901] 2 Ch. 314. *Ridd. Re Owen*, [1894] 3 Ch. 220; *London County & Westminster Bank v. Tompkins*, [1918] 1 K. B. 615.

140. —.]—*FRASER v. BYAS* (1895), 11 T. L. R. 481; 13 R. 452.

#### SECT. 4.—RIGHTS OF THIRD PARTIES.

##### SUB-SECT. 1.—ON EXECUTION OR DISTRESS.

*Execution.*—*See EXECUTION*, Vol. XXI., pp. 502 *et seq.*

*Distress.*—*See DISTRESS*, Vol. XVIII., p. 202, No. 279.

##### SUB-SECT. 2.—ON BANKRUPTCY.

*Bankruptcy of pledgor*—*Pledgee a secured creditor.*—*See BANKRUPTCY*, Vol. IV., p. 362, No. 3372; Vol. V., p. 641, No. 5760.

*As to secured creditors generally.*—*See BANKRUPTCY*, Vol. IV., pp. 356–363

*Pledgee's right to prove.*—*See BANKRUPTCY*, Vol. IV., pp. 285, No. 2069.

141. — *Pledgor's rights transferred to trustee.*—*Goods pledged (expressly) to secure by the produce of the sale acceptors who have taken up & paid bills drawn on them by the owner, are released from further charge as to other bills so taken up & paid subsequently, if the amount of the original sum paid on account of the owner, have been repaid to them without resorting to a sale. If while the goods remain in the possession of the acceptors, the owner becomes insolvent, & has committed acts of bkpcy. before the original pledge be entirely redeemed by repayment of the money secured by it, other advances be then made to him by them, it is not a case of mutual credit within 5 Geo. 2, c. 30, s. 28, & the assignees of bkpt. may recover the goods in trover. But the assignees under such circumstances having elected to bring trover cannot afterwards sue *deft.* to recover back the original sum for which the goods had been in the first instance pledged, although paid to them after the depositor had become bkpt.*—*BIRDWOOD v. RAPHAEL* (1818), 5 Price, 593; 146 E. R. 704.

*Annotation*:—*Consol. Lindon v. Sharp* (1843), 6 Man. & G. 895.

—.]—*See, also, BANKRUPTCY*, Vol. IV., p. 402, No. 3663; Vol. V., pp. 754, 911, Nos. 6501, 7459.

142. — *Sale to pledgee by bankrupt*—*Pledge unaffected.*—*If a man pledge goods, & afterwards becomes a bkpt., & then sells the goods to the person to whom he pledged them, although the right under the sale fails, the right to hold them in pledge remains (BEST, C.J.).*—*WHITE v. GAINER* (1824), 2 Bing. 23; 9 Moore, C. P. 41; 2 L. J. O. S. C. P. 101; 130 E. R. 212.

*Annotations*:—*Ridd. Yungmann v. Briesemann* (1892), 67 L. T. 642. *Mentd. Owen v. Knight* (1837), 4 Bing. N. C. 54.

*As to property in reputed ownership of bankrupt.*—*See BANKRUPTCY*, Vol. V., pp. 750–763.

*Bankruptcy of pledgee*—*Pledgee's rights transferred to trustee.*—*See BANKRUPTCY*, Vol. V., p. 968, No. 7925.

*Sect. 4.—Rights of third parties: Sub-sect. 3, A. & B. (a).]*

**SUB-SECT. 3.—RIGHTS OF TRUE OWNER.**

*A. In General.*

**143. Title conferred on pawnee in possession—Pledge by tenant for life—Plate.]**—A pawnbroker has no lien on plate after the death of the tenant for life, who pawned it with him, as against the remainderman, although the pawnee had no notice of the settlement.—*HOARE v. PARKER* (1788), 2 Term Rep. 376; 100 E. R. 202.

*Annotations:—*Consd. *Boyson v. Coles* (1817), 6 M. & S. 14. *Reid. Singer Manufacturing Co. v. Clark* (1879), 5 Ex. D. 37.

**144. — Pledge of title deeds by vendor of land—Purchase partly completed.]**—If the vendor of a leasehold estate delivers the conveyance as an escrow to take effect on payment of the residue of the purchase-money, the property in the title deeds of the estate is so vested in the vendee that the vendor obtaining possession of them, & pawning them confers on the pawnee no right to detain them after tender of the residue of the purchase-money.—*HOOPER v. RAMSBOTTOM* (1815), 6 Taunt. 12; 1 Marsh. 414; 128 E. R. 936.

*Annotations:—**Reid. Robertson v. Showler* (1845), 13 M. & W. 609; *Foundling Hospital v. Crane*, [1911] 2 K. B. 367.

**145. — Pledge by person other than true owner—Pledge of goods.]**—In a pledge of goods, the depositary can have no right, which the party pledging them did not possess. But it is different with negotiable securities, where a party, by putting his name on a bill or note, enables another to deal with it as his own property (*ERSKINE, C.J.*).—*Re CLAUGHTON, Ex p. BRITEN* (1833), 3 Deac. & Ch. 35.

**146. — — — — —.]**—In Apr. 1853, J. & Co., brokers, sold for pltf's., manufacturing chemists, two tons of tartaric acid, to be delivered in Nov. In Oct. 1853, G. & Co., brokers, sold for pltf's. two tons of tartaric acid, to be also delivered in Nov. J. & Co. & G. & Co. respectively sent to pltf's. sold notes, not disclosing any principal. In Nov., a clerk of one Anderson, a merchant, left at pltf's. counting house two delivery orders. One was from J. & Co., for delivery to T. Broomhall or order of one of the tons of acid; this order was indorsed by T. Broomhall, "Deliver to my order." The other delivery order was from G. & Co., for delivery to T. Broomhall or order of the two tons of acid; this order was indorsed, "T. Broomhall—Deliver to W. Leask: J. Ellis—Deliver at Custom House Quay to my sub-order. W. Leask." Anderson induced Leask to purchase from Ellis the acid for him, upon a false representation that he was acting on behalf of V. N. & Co. Ellis thereupon gave to Leask the delivery orders which he had received from Broomhall. Leask indorsed the orders specially deliverable to himself, & delivered them to Anderson for the purpose of enabling him to inspect the acid. On Nov. 28, Anderson went to pltf's. & stated that he had purchased from Leask the acid mentioned in the delivery orders, & he requested pltf's. to deliver it at the Custom House Quay for him. On the faith of this statement, pltf's. gave Anderson a delivery order & the acid was transferred into his name. Anderson then obtained warrants & pledged the acid with deft. for a *bond fide* advance:—*Held*: the relation of vendor & vendee did not subsist between pltf's. & Anderson, neither did the property in the acid pass to Anderson; & mere possession, with no further *indicia* of title than the delivery orders was not sufficient to entitle deft., though a *bond fide* pawnee, to resist the claim

of pltf's. in an action of trover.—*KINGSFORD v. MERRY* (1856), 1 H. & N. 503; 26 L. J. Ex. 83; 28 L. T. O. S. 236; 3 Jur. N. S. 68; 5 W. R. 151; 156 E. R. 1299, Ex. Ch.

*Annotations:—*Consd. *Higgins v. Burton* (1857), 26 L. J. Ex. 342; *Fuentes v. Montis* (1868), L. R. 3 C. P. 268; *Henderson v. Williams*, [1895] 1 Q. B. 521. *Reid. Gobind Chunder Sein v. Ryan* (1861), 9 Moo. Ind. App. 140; *Pease v. Gloahoc, The Marie Joseph* (1866), L. R. 1 P. C. 219; *Re Overend, Gurney, Ex p. Oakes & Peek* (1867), L. R. 3 Eq. 676; *Cole v. North Western Bank* (1875), L. R. 10 C. P. 354; *Johnson v. Credit Lyonnais Co.* (1877), 3 C. P. D. 32; *Joseph v. Webb, Joseph v. Lyons, Joseph v. Pidcock, Joseph v. Jones* (1884), Cab. & El. 262; *London & County Banking Co. v. London & River Plate Bank* (1887), 4 T. L. R. 179; *Farquharson v. King*, [1901] 2 K. B. 697; *Folkes v. King*, [1923] 1 K. B. 282. *Mentd. Kemp v. Covington* (1857), 28 L. T. O. S. 289; *Cornish v. Abington* (1859), 4 H. & N. 649; *Hardman v. Booth* (1863), 32 L. J. Ex. 105; *Lindsay v. Cundy* (1876), 45 L. J. Q. B. 381; *Stone v. City & County Bank* (1877), 3 C. P. D. 282; *Oppenheimer v. Fraser & Wyatt*, [1907] 2 K. B. 60.

**147. — — — — —.]**—(1) A warehouse keeper who has goods deposited with him as such is not "an agent entrusted with the possession" of them, within 5 & 6 Vict. c. 39, although he be also a broker, & is usually employed to sell the goods, but always upon specific instructions for that purpose received from the principal.

S. carried on the business of a sheep's wool broker in Liverpool, & also that of a warehouse keeper. In his capacity of warehouse keeper he was in the habit of receiving from pltf's. merchants in London, bills of lading for sheeps' wool & goats' wool to arrive in Liverpool, which when landed was deposited in his warehouses, under directions to send pltf's. a report & valuation, but he was not authorised to sell without specific instructions. The sheeps' wool so deposited with him was usually sold by S., & the proceeds received by him for pltf's. The goats' wool S. never sold, he not being a goats' wool broker. Having wools of pltf's. of both descriptions in his warehouse, but not having received any instructions as to the sale of either, S. professed to pledge the whole with defts., bankers in Liverpool, by a letter in which he undertook to hold them as trustee for defts., to secure the sum advanced:—*Held*: S. was not, as to any of the wools so agreed to be pledged, "an agent entrusted with the possession," within 5 & 6 Vict. c. 39.

The intention of 5 & 6 Vict. c. 39, was, that, where a third person has entrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges them, he should be deemed by that act to have misled any one who *bond fide* deals with the agent, & makes a purchase from or an advance to him without notice that he was not authorised to sell the goods or to procure the advance (*BLACKBURN, J.*).

(2) The statute [5 & 6 Vict. c. 39] was meant to apply to those cases where one person has given an apparent authority to another, & a third person has dealt with that other in the belief that the authority really existed (*BRAMWELL, B.*).

(3) At common law a person in possession of goods could not confer on another, either by sale or by pledge any better title to the goods than he himself had (*BLACKBURN, J.*).—*COLE v. NORTH WESTERN BANK* (1875), L. R. 10 C. P. 354; 44 L. J. C. P. 233; 32 L. T. 733, Ex. Ch.

*Annotations:—*As to (1) *Apld. Johnson v. Credit Lyonnais Co.* (1877), 3 C. P. D. 32. *Expld. City Bank v. Barrow* (1880), 5 App. Cas. 664. *Consd. Folkes v. King*, [1923] 1 K. B. 282. *Reid. Nähmaschinen Fabrik (vormals Frister & Rossmann) Act. v. Pickford & Lee & Harris* (1888), 4 T. L. R. 617; *Cahn v. Pockett's Bristol Channel Steam Packet Co.*, [1899] 1 Q. B. 643. As to (3) *Reid. Colonial Bank v. Whitney* (1886), 11 App. Cas. 426; *Williams v. Colonial Bank, Williams v. London Chartered Bank of Australia* (1888), 38 Ch. D. 358; *Farquharson v. King*, [1901] 2 K. B. 697. *Generally, Reid. Hellings v. Russell* (1876), 33



L. T. 380; London Joint Stock Bank v. Simmons, [1892] A. C. 301; Tremolle v. Christie (1893), 69 L. T. 338; Brocklebury v. Temperance Bldg. Soc., [1895] A. C. 173; Oppenheimer v. Fraser & Wyatt, [1907] 2 K. B. 60; Lowther v. Harris (1926), 43 T. L. R. 24. *Mentd.* Mildred v. Maspons (1883), 8 App. Cas. 874.

148. ————]—A merchant sold wine stored in the cellars of a warehouseman, & afterwards pledged the wine to the warehouseman for advances made in good faith without notice of the sale:—*Held*: the pledge conferred no title to the wine.—NICHOLSON v. HARPER, [1895] 2 Ch. 415; 64 L. J. Ch. 672; 73 L. T. 19; 59 J. P. 727; 43 W. R. 550; 11 T. L. R. 435; 39 Sol. Jo. 524; 13 R. 567.

Unauthorised pawning by agent.]

—See Sub-sect. 3, B. (a), *post*.

149. ————]—Pledge of negotiable securities.]—

Re CLAUGHTON, *Ex p.* BRITTEN, No. 145, *ante*.

See, also, AGENCY, Vol. I., pp. 330–336.

### B. Against Pawnee.

#### (a) Unauthorised Pawning.

See, generally, AGENCY, Vol. I., pp. 330–346, 562 *et seq.*

150. Right of action.]—A. & B. having, by their brokers, purchased cottons, warrants or orders for delivery were made out in the name of the brokers, & the cottons were left in their possession, as the brokers of A. Immediately after the purchase B. paid A. one-half the value. When considerable purchases had been made, the brokers were informed that B. had an interest in the goods purchased, & upon directions from A. & B., divided the goods held on their joint account, by appropriating specific warrants to each party: A. after this, directed the brokers to procure him a loan on the security of the warrants, & C. advanced money by discounting bills drawn by A. upon the brokers; as a security for which, the whole of the warrants were deposited with C. by the brokers. Before the bills became due, the brokers were directed by A. to get one-half renewed. C. having discounted fresh bills for this purpose, the brokers who had obtained the warrants from C. for the purpose of dividing them & returning him one-half, left in the hands of C., as a security, the warrants belonging to B., C. not knowing that B. had any interest in them:—*Held*: B. might recover from C. in respect of the goods thus pledged to him by A.

As the law now stands, if the pawner of goods has no authority to make the pledge the pawnee cannot hold them against the owner (BEST, C.J.).—WILLIAMS v. BARTON (1825), 3 Bing. 139; M'Cle. & Yo. 406; 10 Moore, C. P. 506; 130 E. R. 466, Ex. Ch.; *affg.* S. C. *sub nom.* BARTON v. WILLIAMS (1822), 5 B. & Ald. 395.

*Annotations*:—*Distd.* Nyburg v. Handelaar (1892), 8 T. L. R. 395. *Reid.* Henderson v. Williams, [1895] 1 Q. B. 521. *Mentd.* Farrar v. Boswick (1836), 1 M. & W. 682; Mayhew v. Horrick (1849), 7 C. B. 229; Kingsford v. Merry (1856), 11 Exch. 577; Farquharson v. King, [1901] 2 K. B. 697.

151. ————]—Pltf. abroad consigned sugars to R. P. in London, directing him to sell same, & place the net proceeds to the credit of J. G., to whom pltf. was indebted, & who drew bills on R. P. to the probable amount of the sugars. The invoice stated pltf. to be the shipper, & was accompanied with a letter from him to R. P., directing him to sell the sugars on pltf.'s account.

R. P., however, pledged them with defts. for a certain sum advanced to him by them. R. P. having absconded, pltf. authorised an agent to demand the sugars from defts., but they proceeded to sell them; & the proceeds were also demanded after the sale by the agent, with the authority of pltf.:—*Held*: (1) pltf. had a sufficient title in the sugars to maintain trover, although it was insisted that the right of possession was in J. G.; (2) no demand by pltf. was necessary, as R. P., had no authority to pledge the sugars to defts.; (3) the demand of the proceeds after the sale not having been complied with, the proper remedy was by an action of trover, & not for money had & received.—SELLECK v. SMITH (1826), 3 Bing. 603; 11 Moore, C. P. 469; 4 L. J. O. S. C. P. 194; 130 E. R. 646.

*Annotation*:—*Generally*, *Mentd.* Palmer v. Grand Junction Ry. (1839), 3 Jur. 559.

152. ————]—If A., without the authority of B., pledges his property with C., a joint action of detinue is maintainable by B. against both A. & C. *Qu.*: whether in such an action a verdict may be taken against one defendant only.—GARTH v. HOWARD (1832), 5 C. & P. 346, N. P.; *subsequent proceedings*, 8 Bing. 451; 5 C. & P. 350, N. P.

153. ————]—C. let cabs on hire to P., who pledged them with R., an auctioneer, for a sum advanced. R., without notice of C.'s property in the cabs, by P.'s instructions sold them by auction, & after repaying his own advances, handed over the balance to P.:—*Held*: C. was entitled to recover damages from R. for the wrongful conversion of C.'s goods.—COCHRANE v. RYMILL (1879), 40 L. T. 744; 43 J. P. 572; 27 W. R. 776, C. A.

*Annotations*:—*Consd.* National Mercantile Bank v. Rymill (1881), 44 L. T. 767; Turner v. Hockey (1887), 56 L. J. Q. B. 301; Consolidated Co. v. Curtis, [1892] 1 Q. B. 495. *Reid.* National Mercantile Bank v. Hampson (1880), 28 W. R. 424; Barker v. Furlong, [1891] 2 Ch. 172.

154. ————]—Right unaffected by Pawnbrokers Act, 1872 (c. 93)—Delivery to pawner after notice by true owner.]—SINGER MANUFACTURING Co. v. CLARK, No. 37, *ante*.

155. ————]—Pledge by joint owner.]—N., the owner of a chattel sold a half share in it to F., it being agreed that N. should retain possession of it until it was sold. After a time N. gave it to F. to take to an auction room to be sold. F., instead of so doing, pledged it with a creditor as security for a debt:—*Held*: N. had a special property in the chattel & a right of immediate possession arising out of it, & could maintain an action of detinue against the pledge.—NYBERG v. HANDELAAR, [1892] 2 Q. B. 202; 56 J. P. 694; *sub nom.* NYBURG v. HANDELAAR, 61 L. J. Q. B. 709; 67 L. T. 361; 40 W. R. 545; 8 T. L. R. 549; 36 Sol. Jo. 485, C. A.

156. Right to return of pawn.]—CHEESMAN v. EXALL, No. 36, *ante*.

157. ————]—Lack of authority known to pawnee—Mortgages.]—Mtges. were put into B.'s hands to receive the principal & interest, who pawned them to deft. S. for £100. The Lord Chancellor held that as the pawner must, by the deeds, appear to have no property, he could not avoid decreeing S. to deliver the deeds to pltf., & leave the pawnee to his remedy at law against B.—JACKSON v. BUTLER (1742), 2 Atk. 306; 9 Mod. Rep. 297; 26 E. R. 587, L. C.

#### PART II. SECT. 4, SUB-SECT. 3.—B. (a).

150 i. Right of action.]—The owner of a jewel lent it on hire to first deft. who pledged it with third deft., the latter acting in good faith. In a suit by the owner against the hirer & the

pledgee to recover the jewel:—*Held*: the pledgee was liable to pay the owner the value of the jewel.—NAGUNADA DAVAY v. BAPPU CHETTIAR (1904), 1 L. R. 27 Mad. 424.—IND.

156 i. Right to return of pawn.]—A pledgee who accepts the pledged

property with knowledge that the pledgor's title is disputed cannot, as against the true owner, not being the pledgor, rely on the contract of pledge; his position is that of a *mala fide* possessor.—ACTON v. MOTAN, [1909] T. S. 841.—S. AF.

**Sect. 4.—Rights of third parties: Sub-sect. 3, B. (a) & (b).]**

**158. ——— Bill of exchange.]**—To trover for a bill of exchange deft., having pleaded, that pltf. indorsed the bill in blank; that R. became the holder; & that deft. believing that R. had authority to dispose of the bill, took it from him as a pledge to secure the payment of a debt. Replication that at the time of taking the bill from R., deft. knew he had not authority to pledge it:—**Held:** sufficient.—*HILTON v. SWAN* (1839), 5 Bing. N. C. 413; 7 Dowl. 417; 7 Scott, 398; 8 L. J. C. P. 257; 3 Jur. 342; 123 E. R. 1158.

**159. ——— Securities deposited by solicitor.]**—On Sept. 29, 1904, pltf. was a customer of the Union Bank of London, where she had a current account & a loan account. On the loan account £1,900 was advanced, & there were certain securities deposited to secure that amount. Pltf., being anxious to change her account for family reasons, consulted her solr., C., who had acted for her for many years. As a result, C. informed pltf. that he had arranged with deft. bank to grant the loan on the same terms as she had with the Union Bank of London, & asked her to sign certain documents in connection with the transaction. The material document was on the common printed form of deft. bank & was as follows: "At the request of Messrs. Rose Innes, Son, & Crick I have transferred or caused to be transferred . . ."—then the shares were mentioned & the names of the manager & sub-manager of deft. bank—"or their nominees as trustees for you to be held as collateral security for your advance to Rose Innes, Son, & Crick." With this document C. went to deft. bank after the securities were transferred, obtained an addition to the loan of £1,900, & effected the transfer of their securities in such a way as to make them available to secure his general indebtedness to deft. bank, which amounted to some £16,000 which he had from time to time obtained upon other securities. In 1911 pltf. required the return of her securities from C., which he promised to do, but they were never in fact returned, as C. absconded. In these circumstances pltf. brought this action to have her securities delivered to her by deft. bank subject to her paying the £1,900 which she admitted having received. It appeared that the general nature of the transactions between C. & deft. bank were that advances were made by deft. bank to C. upon securities which belonged to third parties who were clients of C. in the ordinary sense, & that this was known to deft. bank, though in a number of cases it might be that the clients were clients in respect of a mere financial business carried on by C. independent of his solr.'s business. It was contended for pltf. (*inter alia*) that deft. bank had such notice of the fiduciary relationship of C. to pltf. as to prevent their acting on the document:—**Held:** there was here sufficient notice of the relationship existing or that probably existed between pltf. & C. to have put deft. bank upon inquiry, & accordingly they could not claim to be in a better position than they would have been if they had made inquiries, & therefore pltf. was entitled to redeem the securities upon payment of £1,900.—*JAMESON v. UNION BANK OF SCOTLAND* (1913), 109 L. T. 850.

**160. ——— Pawnee holder without notice—Negotiable securities.]**—*Re CLAUGHTON, Ex p. BRITTEN*, No. 145, *ante*.

**161. ——— Securities deposited with bank.]**—B.'s brokers held bonds & stocks of his as security for advances. The securities comprised, first,

bonds payable to bearer; secondly, securities transferable by written instrument & registration. The brokers deposited the securities with the deft. bank as security for larger advances made to the brokers by the bank. The registered securities had been transferred to & registered in the names of trustees for the bank, in some cases the transfers being executed by B. for a nominal consideration, & in other cases by the brokers or other persons for full value expressed. The securities had been so deposited, together with securities of other persons, to secure an entire sum. B. admitted that the brokers had authority from him to transfer the benefit of their own security to the extent of their advances to him, but claimed to redeem on payment to the bank of what was due from him to the brokers. It was proved that by far the greater part of the business of the Stock Exchange is on the system called "contango." The bank contended that they were entitled to assume, & did assume, without enquiry, that all the securities were the property of the brokers. B. died before trial, & the action was continued by his exors.:—**Held:** (1) as to the registered securities, the *onus* lay upon pltf. to prove that the brokers had exceeded the authority given to them by B., & as they had not produced evidence to displace the legal title of the bank, the action must fail on that ground alone; (2) considering the prevalence of "contango" transactions, the bank were entitled to assume that the securities pledged to them were the property of the brokers; as regards the securities transferred to the bank trustees by B. himself, pltf. were estopped from denying the title of the bank.—*BENTINCK v. LONDON JOINT STOCK BANK*, [1893] 2 Ch. 120; 62 L. J. Ch. 358; 68 L. T. 315; 42 W. R. 140; 9 T. L. R. 262; 3 R. 120.

*See, further, BANKERS, Vol. III., pp. 267 et seq.*

**162. Right of entry to remove pawn—Liability of owner for trespass.]**—*MILLER v. STROHMENGER* (1887), 4 T. L. R. 133.

**163. Agent borrowing less than directed.]**—The registered holder of shares in a public co. handed to an agent the indicia of title together with a transfer of the shares signed in blank, & instructed him to borrow not less than a certain sum on the security of the shares. The agent, in defiance of his instructions, borrowed upon the shares a less sum than the stipulated amount:—**Held:** as against the principal, the lender was entitled to retain the indicia of title to the shares until repayment of the amount of his loan.—*FRY v. SMELLIE*, [1912] 3 K. B. 282; 81 L. J. K. B. 1003; 106 L. T. 404, C. A.

*Annotation:—Reid, Fuller v. Glyn, Mills, Currie* (1913), 83 L. J. K. B. 764.

**164. Evidence of want of authority—High rate of interest.]**—Where a mercantile agent in the jewellery trade raises money by pledging goods with a pawnbroker, he is not acting beyond the ordinary course of his business. Regard must be had to the actual disposition of the goods & not the circumstances attending such disposition when considering whether a particular transaction is within the ordinary course of the mercantile agent's business.

A pledge at an unusual rate of interest could be evidence from which an inference may be drawn that the pledgee had notice that the pledgor had no authority to make the pledge.—*JANESICH v. ATTENBOROUGH (GEORGE) & SON* (1910), 102 L. T. 605; 26 T. L. R. 278.

As to principal's right to marshalling of assets, *see* *EQUIT, Vol. XX., pp. 501, 502, Nos. 2322-2324.*

(b) *Pawning Goods obtained by Fraud.*

165. *Pawnee without knowledge of fraud.*—*DAVIS v. MORRISON* (1773), *Lofft*, 185; 98 E. R. 601.

*Annotation*:—*Mentd. White v. Garden* (1851), 10 C. B. 919.

166. —[Where the owner of goods suffers another to have possession of them, or of the documents which are the evidence of property therein, on a sale to him, obtained by means of fraudulent representation, & avoidable at the option of the owner, a sale or pledge by such party, before the owner has exercised his option, & without notice to the subsequent purchaser, is binding; but this is not so when a party has merely obtained the goods by means of false pretences, without any contract of sale to himself; as when he falsely & fraudulently represents that another person has authorised him to purchase the goods. In such case, the original owner can recover the goods from a party to whom they have been sold or pledged by the person who fraudulently obtained them, before any notice of the fraud, or any disaffirmance of the transaction by the real owner.—*HIGGONS v. BURTON* (1857), 26 L. J. Ex. 342; 29 L. T. O. S. 165; 5 W. R. 683.

*Annotations*:—*Consd. Johnson v. Credit Lyonnais Co.* (1877), 3 C. P. D. 32; *Lindsay v. Cundy* (1878), 47 L. J. Q. B. 481. *Refd. Richards v. Johnson* (1859), 33 L. T. O. S. 206; *Gobind Chunder Sein v. Ryan* (1861), 15 Moo. P. C. C. 230; *Hardman v. Booth* (1863), 32 L. J. Ex. 105. *Mentd. Cundy v. Lindsay* (1878), 3 App. Cas. 459; *R. v. Central Criminal Court JJ.* (1886), 55 L. T. 486; *G. W. Ry. v. London & County Banking Co.*, [1901] A. C. 414.

167. —[S. was the agent of L., a wine merchant in Spain, & was induced by the fraudulent representations of three persons acting in collusion to enter into separate contracts with them for the sale of wine. S. transmitted the orders for the wine to L., who shipped the wines, & sent the bills of lading to S.: the bills of lading were handed by S. to the three persons respectively on account of the contracts entered into with them. The wine so obtained was deposited with depts., a dock co., who issued warrants for the same; some of the wine therein mentioned was made deliverable to the order of one of the three persons, & the rest to the order of another of them. The warrants were then pledged with pltfs. to secure advances. L. afterwards served notice upon depts. not to part with the wine; thereupon depts. refused to give up the wine when it was demanded of them by pltfs., who commenced actions claiming damages in addition to the value of the wines:—*Held*: as the wine had been obtained by fraud from S., the agent of L., with a power to sell, the property in it passed to the three persons, who before the fraudulent contract was annulled could confer a title upon pltfs., & L. must be barred upon pltfs. undertaking to account to him for the value of the wine after deducting their advances.—*ATTENBOROUGH v. ST. KATHARINE'S DOCK CO.* (1878), 3 C. P. D. 450; 47 L. J. Q. B. 763; 38 L. T. 404; 26 W. R. 583, C. A.

*Annotations*:—*Consd. Ex p. Mersey Docks & Harbour Board*, [1899] 1 Q. B. 546. *Refd. R. v. Central Criminal Court JJ.* (1886), 18 Q. B. D. 314. *Mentd. Wright v. Freeman* (1879), 40 L. T. 134; *De Rothschild Frères v. Morrison, Kekewich, La Banque de Paris et des Pays Bas v. Same, La Banque de France v. Same* (1890), 24 Q. B. D. 750; *Robinson v. Jenkins* (1890), 24 Q. B. D. 275; *Rogers v. Lambert*, [1891] 1 Q. B. 318; *Henderson v. Williams*, [1895] 1 Q. B. 521.

168. —[If A., fraudulently assuming the name of a person of credit & stability, buys, in

person, & obtains delivery of, goods from B., the property in the goods passes to A., & he can therefore give a good title thereto to a third party who, acting *bona fide* & without notice, has given value therefor, unless in the meantime B. has taken steps to disaffirm the contract with A.—*PHILLIPS v. BROOKS, LTD.*, [1919] 2 K. B. 243; 88 L. J. K. B. 953; 121 L. T. 249; 35 T. L. R. 470; 24 Com. Cas. 263.

*Annotation*:—*Mentd. Said v. Butt*, [1920] 3 K. B. 497.

169. — *Onus of proof of knowledge.*—Where the contract for sale of a chattel is voidable by the seller as against the buyer on account of fraud practised by the buyer upon the seller, & before any election to avoid the sale by the seller, the buyer pledges the chattel to secure an advance, the *onus* lies on the seller who seeks to avoid the sale, & recover the chattel from the pledgee, of proving that the pledgee took the chattel with notice of the fraud or otherwise than in good faith.—*WHITEHORN BROTHERS v. DAVISON*, [1911] 1 K. B. 463; 80 L. J. K. B. 425; 104 L. T. 234, C. A.

*Annotations*:—*Refd. Mehta v. Sutton* (1913), 108 L. T. 214; *Blundell-Leigh v. Attenborough*, [1921] 3 K. B. 235. *Mentd. Talbot v. Von Boris*, [1911] 1 K. B. 854; *Bradley & Cohn v. Ramsay* (1912), 106 L. T. 771; *Folkes v. King*, [1923] 1 K. B. 282; *Heap v. Motorists' Advisory Agency*, [1923] 1 K. B. 577; *Lake v. Simmons* (1926), 95 L. J. K. B. 586; *Lowther v. Harris* (1926), 43 T. L. R. 24.

— *Negotiable securities deposited with bank.*—*See BANKERS*, Vol. III., p. 271, Nos. 844–846.

170. *Fraud by pawnee's servant.*—In trover for wool, which pltfs. alleged that depts. had obtained by fraud, it appeared, that it had been purchased of pltfs. by one D., as agent for Messrs. W. & co., & that they pledged it two days afterwards to depts., for an advance made by them to W. & co., through the intervention of D., who acted as the agent of depts. as well as of W. & co. Pltfs., in order to show that W. & co. had obtained the wool without intending to pay for it, they being insolvent at the time of the purchase, & which D. was aware of, offered certain contracts in evidence, signed by D.; & his handwriting to them having been proved:—*Held*: such contracts were admissible, without calling D. as a witness. The jury having found that the transaction between D. & W. & co. was fraudulent, but that depts. were not cognisant of the fraud, & that D. was their agent, as well as the agent of W. & co., & pltfs. obtained a verdict, the ct. refused to grant a new trial, as depts. were liable for the fraudulent acts & misconduct of their own agent.—*IRVING v. MOTLEY* (1831), 7 Bing. 543; 5 Moo. & P. 380; 9 L. J. O. S. C. P. 161; 131 E. R. 210.

*Annotation*:—*Mentd. Dantec v. Ashworth* (1866), 14 L. T. 488.

171. *No contract of sale by owner.*—Pltf., having had no previous dealings with the firm, & knowing them only by reputation, applied at the place of business of "Gandell & co." for orders for goods: the firm then consisting of Thomas Gandell only, & being managed by Edward Gandell, a clerk. On pltf. asking to see Messrs. Gandell, Edward Gandell presented himself, & so conducted himself as to lead pltf. to suppose that he was one of the firm of Gandell & co. & had authority to order goods on their behalf, which was not the fact. Pltf. sent goods, according to Edward Gandell's order, to the place of business of Gandell & co., an invoice being made out, by Edward Gandell's direction, to the name of

PART II. SECT. 4, SUB-SECT. 3.—  
B. (b).

165 i. *Pawnee without knowledge of fraud.*—G. having obtained jewellery

from pltf. by fraud, took it to K. & pledged it. In a suit brought against G. & K. to recover the jewellery or its value, G. did not appear, & K. alone defended the suit:—*Held*: pltf. was

entitled to recover the jewellery from K., G. having obtained it from pltf. by fraud.—*KARTICK CHURN SERTY v. GOPALKISTO PAULIT* (1877), 1 L. R. 3 Calo. 264.—*IND.*

**Sect. 4.—Rights of third parties: Sub-sect. 3, B. (b) & (c). & C. Part III. Sects. 1 & 2: Sub-sects. 1 & 2. Sect. 8.]**

"Edward Gandell & co." Edward Gandell, unknown to pltf., carried on business with one Todd at another place; & the goods were, within three or four days of their delivery, pledged with deft., with a power of sale, to secure advances *bond fide* made by him to Gandell & Todd, & he sold them under the power without notice from pltf.:—*Held*: there was no contract of sale, inasmuch as pltf. intended to contract with Gandell & co., & not with Edward Gandell personally, & Gandell & co. were not contracting parties; no property therefore passed, & pltf. was entitled to recover the value of the goods from deft.—*HARDMAN v. BOOTH* (1863), 1 H. & C. 803; 1 New Rep. 240; 32 L. J. Ex. 105; 7 L. T. 638; 9 Jur. N. S. 81; 11 W. R. 239; 158 E. R. 1107.

*Annotations*:—*Reid*, *Cole v. North Western Bank* (1875), L. R. 10 C. P. 354; *Cundy v. Lindsay* (1878), 3 App. Cas. 459; *Whitehorn v. Davison*, [1911] 1 K. B. 463; *Phillips v. Brooks*, [1919] 2 K. B. 243. *Mentd.* *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; *Arnold v. Choque Bank*, Same v. City Bank (1876), 1 C. P. D. 578; *G. W. Ry. v. London & County Bank* (1901), 85 L. T. 152; *Oppenheimer v. Frazer & Wyatt*, [1907] 2 K. B. 50; *Folkes v. King*, [1923] 1 K. B. 282; *Lake v. Simmons* (1926), 95 L. J. K. B. 586.

**172. Goods redeemed before fraud discovered.]**—N., after fraudulently obtaining tobacco, had pledged it with deft. bank as security for an advance, & before the fraud was discovered had repaid the advance & recovered possession of the

tobacco:—*Held*: no action for conversion would lie against deft. bank, since N.'s dealing with it had been concluded before pltf. discovered the fraud.—*UNION CREDIT BANK v. MERSEY DOCKS & HARBOUR BOARD*, SAME v. SAME & NORTH & SOUTH WALES BANK, [1899] 2 Q. B. 205; 68 L. J. Q. B. 842; 81 L. T. 44; 4 Com. Cas. 227.

*Annotations*:—*Mentd.* *Colonial Bank of Australasia v. Marshall*, [1906] A. C. 559; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777.

*See, also*, SALE OF GOODS.

**(c) Pawning Stolen Goods.**

**173. Right of action.]**—*PACKER v. GILLIES* (1806), 2 Camp. 336, n., N. P.

*Annotation*:—*Reid*, *Singer Manufacturing Co. v. Clark* (1879), 5 Ex. 37.

—*See, also*, CRIMINAL LAW, Vol. XV., p. 622, No. 6513.

**Restitution order.]**—*See* CRIMINAL LAW, Vol. XV., pp. 617 *et seq.*; Metropolitan Police Act, 1839 (c. 47), s. 66; City of London Police Act, 1839 (c. 94), s. 48; Metropolitan Police Courts Act, 1839 (c. 71), ss. 27, 28, 40; Pawnbrokers Act, 1872 (c. 93), s. 34; Police Property Act, 1897 (c. 30), s. 1 (1); Larceny Act, 1916 (c. 50), s. 45 (1).

**As to reversion of property in stolen goods.]**—*See* Sale of Goods Act, 1893 (c. 71), s. 24.

**C. Against Pawner.**

**174. Unauthorised pawning—Right of action.]**—*GARTH v. HOWARD*, No. 152, *ante*.

## Part III.—Pawns under Pawnbrokers Acts.

### SECT. 1.—IN GENERAL.

*See, generally*, Pawnbrokers Act, 1872 (c. 93); 56 & 57 Vict., c. 54; Pawnbrokers Act, 1922 (c. 5).

**Regulation of pawnbroker's business under Money-lenders Acts.]**—*See* Money-lenders Act, 1927 (c. 21), s. 14; MONEY & MONEY-LENDING, Vol. XXXV., p. 203, No. 291.

### SECT. 2.—REGULATION OF PAWNBROKER'S BUSINESS.

#### SUB-SECT. 1.—PAWNBROKER'S LICENCE.

*See, generally*, Pawnbrokers Act, 1872 (c. 93), ss. 37–44 & sched. VI.

**Magistrate's certificate.—By whom granted.]**—*See* Pawnbrokers Act, 1872 (c. 93), ss. 40, 42; Local Government Act, 1894 (c. 73), s. 27.

**175. —Exemption.—Extent of exemption.]**—By Pawnbrokers Act, 1872 (c. 93), s. 39, a pawnbroker's licence is only to be granted to appt. upon the production of a magistrate's certificate, "save that it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his exors., administrators, assigns, or successors, to obtain such a certificate":—*Held*: the exemption in favour of a pawnbroker licensed at the commencement of Pawnbrokers Act, 1872 (c. 93), was not confined to the business

which was then actually carried on by such pawnbrokers, but was a general exemption of favour of all persons who were then licensed pawnbrokers, & therefore after the commencement of the Act such a licensed pawnbroker, his exors., administrators, assigns, or successors, could open a new business upon payment of the licence duty without the production of a magistrate's certificate.—*R. v. INLAND REVENUE COMRS., OHLSON'S CASE, GARLAND'S CASE*, [1891] 1 Q. B. 485; 55 J. P. 117; 39 W. R. 317, *sub nom.* *R. v. INLAND REVENUE COMRS., Ex p. OHLSON, Ex p. GARLAND, R. v. INLAND REVENUE COMRS., Ex p. OHLSON, R. v. INLAND REVENUE COMRS., Ex p. GARLAND*, 60 L. J. Q. B. 376; 64 L. T. 57; *sub nom.* *Re OHLSON & GARLAND (PAWNBROKERS) & INLAND REVENUE COMRS.*, 7 T. L. R. 121, D. C.

*Annotations*:—*Consd.* *R. v. I. R. Comrs., Ex p. Silvester*, [1907] 1 K. B. 108. *Mentd.* *Goldsmiths' Co. v. Wyatt*, [1907] 1 K. B. 95.

**176. —**—*By* Pawnbrokers Act, 1872 (c. 93), s. 39, a pawnbroker's licence is only to be granted to appt. upon the production of a certificate granted under the Act, "save that" it shall not be necessary for any person being at the commencement of this Act a licensed pawnbroker, or for his exors., administrators, assigns, or successors, to obtain such a certificate":—*Held*: the exemption in favour of a successor only enabled him to carry on without obtaining a certificate the actual business in which he had succeeded a

#### PART III. SECT. 2, SUB-SECT. 1.

**a. Magistrate's certificate.]**—*R. v. DARLEY* (1829), 2 Hud. & B. 486; 3 Ir. L. Rec. 1st ser. 485.—*IR.*

**a. —.]**—*R. (McGUINNESS) v. DUB-*

*LIN JJ.* (1883), 12 L. R. Ir. 178.—*IR.*

**b. Grant of licence.—Duty of justices.]**—If the justices are satisfied that appt. for a pawnbroker's licence is of good character, they are bound to grant the licence; & if they deter-

mine not to do so, although so satisfied, *mandamus* will lie to compel them to hear & determine according to law.—*Re NICHOLSON, Ex p. NYBERG* (1882), 8 V. L. R. L. 292.—*AUS.*

**c. — Who may apply.]**—*A*

pawnbroker printed at the foot & issued by his servant with his authority, contains the signature of such pawnbroker, so as to satisfy Pawn-

**Sect. 3.—Pawning and redemption of pledges. Sects. 4, 5, 6 & 7: Sub-sect. 1.]**

**184. Pawn ticket—Subject of larceny—Warrant for delivery of goods.]—**Stealing a pawnbroker's duplicate is larceny. It may be described, in an indictment for larceny, as a warrant for the delivery of goods; since the Pawnbrokers Act, 1800 (c. 99), authorises & requires the pawnbroker to deliver the goods to the person producing the ticket. It may also be alleged to be a pawnbroker's ticket, or a piece of paper; for it is evidence of title to a specific chattel, the property in possession of the pawner, & consequently does not come within the common law rule, that larceny cannot be committed of documents concerning title to land or mere choses in action.—*R. v. MORRISON* (1859), *Bell*, C. C. 158; 28 L. J. M. C. 210; 33 L. T. O. S. 228; 5 Jur. N. S. 604; 7 W. R. 554; 8 Cox, C. C. 194; 169 E. R. 1210, C. C. R.

**Annotations:—***Mentd. R. v. Kay* (1870), L. R. 1 C. C. R. 257; *R. v. Chapman* (1910), 74 J. P. 360.

**185. — Presumption in favour of holder—Rights of real owner.]—***SINGER MANUFACTURING CO. v. CLARK*, No. 37, *ante*.

**186. — Entry of profit in excess of amount allowed—No excess taken.]—**A pawnbroker who enters on the pawn ticket a profit charge in respect of a pledge in excess of the amount allowed under Pawnbrokers Act, 1872, sched. IV., does not commit an offence under Pawnbrokers Act, 1872 (c. 93), s. 15, if he does not, in fact, take from the pledgor more than the correct amount.—*LEVINSON v. REES* (1918), 88 L. J. K. B. 583; 120 L. T. 442; 83 J. P. 51; 63 Sol. Jo. 214; 26 Cox, C. C. 384, D. C.

**Special contract for loan over forty shillings.]—**See Pawnbrokers Act, 1872 (c. 93), ss. 10, 24.

**187. — Right of pawnbroker to recover deficit.]—***JONES v. MARSHALL*, No. 134, *ante*.

**188. Time for redemption—After expiration of year from pawning—Before sale.]—**Pawnbrokers Act, 1800 (c. 99), s. 17, declares that goods, etc., which are pledged & are not redeemed within a year after the day of pledging, shall be forfeited & may be sold by the pawnbroker:—*Held*: where pltf. had pawned a watch, etc., & after the year had expired, tendered to the pawnbroker the money lent, & interest, & the pawnbroker refused to deliver, he might maintain trover, not having forfeited his title to the goods by reason of Pawnbrokers Act, 1800 (c. 99), s. 17.—*WALTER v. SMITH* (1822), 5 B. & Ald. 439; 1 Dow. & Ry. K. B. 1; 106 E. R. 1251.

**SECT. 4.—SALE OF PLEDGES.**

See Pawnbrokers Act, 1872 (c. 93), ss. 19–23.

**189. When unredeemed pawn may be sold—Whether after tender of payment—More than one year from date of pawning.]—***WALTER v. SMITH*, No. 188, *ante*.

**Purchase of pledge by pawnbroker.]—**See Pawnbrokers Act, 1872 (c. 93), s. 19.

**190. — Rights of purchaser as against true owner.]—**By Pawnbrokers Act, 1872 (c. 93), s. 19: "A pledge pawned for above 10s. shall, when disposed of by the pawnbroker, be disposed of by sale by public auction, & not otherwise. . . . A pawnbroker may bid for & purchase at a sale by auction, made or purporting to be made under this

Act, a pledge pawned with him; & on such purchase he shall be deemed the absolute owner of the pledge purchased":—*Held*: no property was given to the pawnbroker by Pawnbrokers Act, 1872 (c. 93), s. 19, as against the true owner of the pledge.—*BURROWS v. BARNES* (1900), 82 L. T. 721, D. C.

**Deficit on sale by pawnbroker—Right of pawnbroker to sue for deficit—At common law.]—**See No. 134, *ante*.

**SECT. 5.—REDELIVERY OF PLEDGES.**

See Pawnbrokers Act, 1872 (c. 93), ss. 25, 26, 29; sched. III.; Commissioners for Oaths Act, 1891 (c. 50), s. 1; Perjury Act, 1911 (c. 6), s. 17; Pawnbrokers Act, 1922 (c. 5), ss. 1, 2.

**191. Production of pawn ticket—Necessity for—By true owner—Unauthorised pawn.]—**One employed to sell goods by commission pawns them; the owners of the goods may maintain trover against the pawnbroker after a demand & refusal, although the duplicate has not been tendered according to Pawnbrokers Act, 1800 (c. 99), s. 5.—*PERT v. BAXTER* (1816), 1 Stark. 472.

**Annotation:—***Reid, Singer Manufacturing Co. v. Clark* (1879), 5 Ex. D. 37.

**192. Property returned to ticket holder—True owner's right of action.]—***SINGER MANUFACTURING CO. v. CLARK*, No. 37, *ante*.

**193. Redemption when ticket lost or stolen—Declaration of loss—Presentation of original ticket—Refusal of delivery.]—***VAUGHAN v. WATT*, No. 66, *ante*.

**194. — — — Delivery to ticket holder.]—**Pawnbrokers Act, 1800 (c. 99), s. 16, provided that in case the pawn ticket for goods pledged were lost, mislaid, destroyed, or fraudulently obtained from the owner thereof, & the goods remained unredeemed, the pawnbroker should, at the request of the person claiming to be the owner of the goods, deliver to such person a copy of the ticket & a form of affidavit, now a declaration, stating the circumstances, & the person having obtained such a copy & form of affidavit should thereupon prove his property in such goods to the satisfaction of a justice of the peace, & should verify on oath or affirmation before said justice the truth of the particular circumstances attending the case mentioned in the said affidavit, "whereupon" the pawnbroker should suffer the person so proving such property to the satisfaction of such justice as aforesaid, & making such affidavit or affirmation as aforesaid, on leaving the copy of the ticket & the affidavit with the pawnbroker, to redeem such goods & chattels:—*Held*: where a person having lost the ticket for goods pledged by him had, in accordance with the sect., procured from the pawnbroker a copy of the original ticket & a form of declaration, proceeded with the same before the magistrate, & having proved his title before him, straightway returned to the pawnbroker, & showed him the declaration which he had made, he was not bound to redeem the goods immediately, but might redeem them at any time at which he might have redeemed them if he still held the original ticket, & the pawnbroker was not justified in the meanwhile in delivering the goods to a person producing the original ticket.—*BURSLEM v. ATTENBOROUGH* (1873), L. R. 8 C. P.

brokers Statute, 1865, No. 248, s. 21.—*R. v. MOORE, Ex p. MYERS* (1884), 10 V. L. R. 322.—AUS.

**e. Interest.]—**Under Pawnbrokers Act, 1890, s. 17, a pawnbroker may charge by way of interest on a loan

over £10 the sum of 1s. 2d. per pound per month upon the first £10 & in addition fifty per cent. *per annum* on the amount of the loan above £10.—*VANDERSPAN v. VISBORD*, [1907] V. L. R. 591.—AUS.

**f. —.]—**A pawnbroker, under C. S. C. c. 61, may legally charge any rate of interest that may be agreed upon between him & the pledgor.—*R. v. ADAMS* (1881), 8 P. R. 462.—CAN.



122; 42 L. J. C. P. 102; 28 L. T. 115; 37 J. P. 327; 21 W. R. 406.

*Annotation*.—*Reid*, *Singer Manufacturing Co. v. Clark* (1879), 41 L. T. 591.

195. ——— False declaration.—How proved.]—(1) To prove the making of a false declaration under Pawnbrokers Act, 1800 (c. 99), it is not absolutely necessary to call the magistrate before whom it was made, or some one present at the time. It is sufficient to show such facts as necessarily lead to the conclusion that debt. made it, & had a knowledge of the contents.

(2) To prove that such a declaration is false in fact, it is necessary to negative debt.'s statement by the oath of two witnesses, in the same manner & to the same extent as the proof of an assignment for perjury.—*R. v. BROWNING* (1849), 3 Cox, C. C. 437.

196. ——— Pledge over ten pounds.]—Making a false declaration with reference to a pledge above the value of £10 is not an offence within Pawnbrokers Act, 1872 (c. 93), s. 29.—*R. v. TREGONING* (1899), 63 J. P. 504.

197. ——— Time for redemption.]—*BURSE-LEM v. ATTENBOROUGH*, No. 194, *ante*.

*Loss of pawn.*]—*See* Nos. 201–203, *post*.

#### SECT. 6.—LOSS, EMBEZZLEMENT, DAMAGE TO PLEDGES, ETC.

*See* Pawnbrokers Act, 1872 (c. 93), ss. 30, 31; Larceny Act, 1916 (c. 50), s. 103.

*Restitution orders.*]—*See* Part II., Sect. 4, subsect. 3, B., *ante*; & generally, CRIMINAL LAW, Vol. XV., pp. 617–622.

198. Power to commit in default of satisfaction.]—(1) Pawnbrokers Act, 1800 (c. 99), s. 24, enables justices in case it shall be proved before them that any goods pawned have been sold contrary to the Act, or have been embezzled or lost, or are become or have been rendered of less value than at the time of pawning through the default neglect or wilful misbehaviour of the person with whom the same were pawned, to award satisfaction to the owner as there specified:—*Held*: justices have no power in the above cases to commit in default of such satisfaction being made.

(2) *Qu.*: whether a pawnbroker is answerable for pledges destroyed by accidental fire as goods "lost" within Pawnbrokers Act, 1800 (c. 99), s. 24.

(3) *Semble*: the words "through the default," etc., apply to all the cases previously mentioned & not only to that of the goods pawned having become of less value.—*Ex p. CORDING* (1832), 4 B. & Ad. 198; 110 E. R. 430; *sub nom. R. v. CORDING*, 1 Nev. & M. K. B. 35; 1 Nev. & M. M. C. 24; 2 L. J. M. C. 9.

*Annotation*.—*As to* (3) *Reid*, *Shackell v. West* (1859), 2 E. & E. 326.

199. Damage by fire—Refusal of pawnbroker to satisfy—No power to commit.]—*Ex p. CORDING*, No. 198, *ante*.

200. ——— Necessity for proof of actual neglect—As condition precedent to satisfaction.]—Under Pawnbrokers Act, 1800 (c. 99), s. 24, the injury done to goods pawned, by an accidental fire on the premises of a pawnbroker, not affirmatively shown to have occurred through the default, neglect or

wilful misbehaviour of the pawnbroker, does not authorise a justice to give satisfaction to the pawner; there being no *prima facie* presumption that such fire is owing to the default, etc., of the owner of the premises.—*SYRED v. CARRUTHERS* (1858), E. B. & E. 469; 27 L. J. M. C. 273; 31 L. T. O. S. 178; 23 J. P. 37; 4 Jur. N. S. 949; 6 W. R. 595; 120 E. R. 584.

*Annotations*.—*Mentd. Hill v. Wright* (1896), 60 J. P. 312; *Anderson v. Reid* (1902), 18 T. L. R. 463; *Foss v. Best*, [1906] 2 K. B. 105; *Wills v. McSherry*, [1913] 1 K. B. 20; *Godman v. Crofton*, [1914] 3 K. B. 803.

—.]—*See, now*, Pawnbrokers Act, 1872 (c. 93), s. 27.

Damage by neglect.]—*See* Pawnbrokers Act, 1872 (c. 93), s. 28.

201. Loss of pawn—Reasonable cause of refusal to deliver.]—Goods pledged with a pawnbroker were lost through a burglary on his premises, caused by his negligence. The owner laid a complaint before justices, under Pawnbrokers Act, 1800 (c. 99), s. 14, against the pawnbroker for refusing, without reasonable cause, to deliver up the goods upon tender of the proper amount. The justices made an order that the pawnbroker, not having shown reasonable cause to their satisfaction to the contrary, should deliver up the goods, or, in default, compensate the owner. On a case stated:—*Held*: the order was bad; Pawnbrokers Act, 1800 (c. 99), s. 14, under which the order was made in effect, applying only to cases of wilful refusal by a pawnbroker to deliver up goods actually in his possession; & the justices should have made an order under Pawnbrokers Act, 1800 (c. 99), s. 24, which empowers them to award compensation to the owner if, "in the course of any proceedings" under the Act, they shall find that the goods were lost "through the default, neglect, or wilful misbehaviour" of the pawnbroker.—*SHACKELL v. WEST* (1859), 2 E. & E. 326; 29 L. J. M. C. 45; 1 L. T. 28; 24 J. P. 22; 6 Jur. N. S. 95; 8 W. R. 22; 121 E. R. 123.

202. ———]—Where a pawnbroker has lost an article pledged to him, & is therefore not in possession of it at the time the person entitled to have delivery seeks to redeem it, the loss of the article constitutes, in the absence of dishonesty, a reasonable cause within the meaning of Pawnbrokers Act, 1872 (c. 93), s. 31, for neglecting to deliver the pledge to the person entitled to have delivery thereof. The pawnbroker is therefore not liable to be convicted of an offence under that sect.—*ALLWORTHY & WALKER v. CLAYTON*, [1907] 2 K. B. 685; 76 L. J. K. B. 934; 96 L. T. 31; 71 J. P. 20; 21 Cox, C. C. 352, D. C.

203. ——— By default or neglect of pawnbroker.]—A pawnbroker placed a gold watch pledged, with other valuable property, in a strong room, on premises left at night without any guard or person to sleep on them. The premises were broken into & the watch stolen:—*Held*: a loss by default or neglect in the pawnbroker within Pawnbrokers Act, 1800 (c. 99), s. 24.—*HEALING v. CATBRELL* (1859), 1 L. T. 7; 23 J. P. 742; 6 Jur. N. S. 96, n. *Annotation*.—*Expld. Shackell v. West* (1859), 29 L. J. M. C. 45.

#### SECT. 7.—OFFENCES.

##### SUB-SECT. 1.—BY PAWNBROKERS.

*See* Pawnbrokers Act, 1872 (c. 93), ss. 23, 32, 35, 36, 50, 51; Children Act, 1908 (c. 87), s. 117.

##### PART III. SECT. 7, SUB-SECT. 1.

*g. Larceny by pawnbroker of property pawned.*]—H. pawned a watch with F. F. absconded with the watch.

The judge stated a case on a question reserved whether F. as a licenced pawnbroker having a lien on the property for the sum advanced payment of

which was never tendered could be convicted of stealing from H.:—*Held*: he could.—*R. v. FISCHER* (1865), 2 W. W. & A. B. (L.) 11.—*AUS.*

**Sect. 7.—Offences: Sub-sects. 1 & 2. Sect. 8.]**

**204. Filling in pawn ticket from information supplied by pawnor—False information—No offence by pawnbroker.]—ATTENBOROUGH v. LONDON, No. 188, ante.**

**Entry of profit on pawn ticket—In excess of statutory amount.]—See No. 186, ante.**

**Forgery of ticket by pawnbroker—Accountable receipt.]—See CRIMINAL LAW, Vol. XV., p. 1069, No. 12097.**

**SUB-SECT. 2.—BY PAWNERS.**

*See Pawnbrokers Act, 1872 (c. 93), ss. 33, 34, 49.*

**205. Pawning stolen article — Detention of pawnor on suspicion—Reasonableness of suspicion a question for judge—Moment of reasonable suspicion.]—It is a question for the judge to decide as to the reasonableness of a pawnbroker's suspicion, under Pawnbrokers Act, 1872 (c. 93), s. 34, which enables a pawnbroker to give into custody a person offering in pawn an article which the pawnbroker reasonably suspects has been stolen; & in an action for false imprisonment against the pawnbroker, before *pltf.* can recover, he must show an absence of reasonable suspicion on the part of the pawnbroker.**

A notice had been circulated by the police, describing several articles which had been stolen, & amongst them were two articles described as a gold horseshoe pin, set with seven diamonds, massive, & a gent's gold ring, set with three diamonds. This notice had been sent to *deft.*, who was a pawnbroker. Some days after, *pltf.*, a man of good character, entered *deft.*'s shop & offered in pawn a gold horseshoe pin, set with seven diamonds, & a gold diamond ring. *Deft.*, after referring to the notice, asked *pltf.* if he was a dealer; *pltf.* said he was not. He then asked him where he got the articles, & he replied from a Mr. N. for the purpose of pawning, giving at the time Mr. N.'s address & his own name & address, which statements were correct. *Deft.*, believing that the pin offered by *pltf.* was the stolen pin, sent for a constable, & gave *pltf.* into custody. In an action for false imprisonment against the pawnbroker:—*Held*: the question of the reasonableness of the pawnbroker's suspicion was a question for the judge & not for the jury, & there must be some evidence of the absence of reasonable suspicion, & as there was no such evidence in the present case *deft.* was not liable.

The moment for reasonable suspicion is the moment when the article is offered to the pawnbroker (SMITH, J.).—HOWARD v. CLARKE (1888), 20 Q. B. D. 558; 58 L. T. 401; 52 J. P. 310; 4 T. L. R. 261, D. C.

*Annotation*:—*Reid*. Carter v. Kimbell (1894), 10 T. L. R. 554.

**206. — — — — —.]—CARTER v. KIMBELL (1894), 10 T. L. R. 554, C. A.**

**Illegal pawning—Previous conviction for larceny—Whether prosecution barred.]—See CRIMINAL LAW, Vol. XIV., p. 343, No. 3610.**

**SECT. 8.—PENALTIES AND PROSECUTION.**

As to penalties, generally, *see* Pawnbrokers Act, 1872 (c. 93), ss. 33, 45–48.

**207. Action against pawnbroker—Charging excessive rate of interest—General penalty.]—Pawnbrokers Act, 1800 (c. 99), having enacted that they shall & may take, by way of profit, a certain rate of interest on pledges, & no more; the taking of more is an offence within the Act, cognisable by a justice of peace on summary information within Pawnbrokers Act, 1800 (c. 99), s. 20, which, after providing specific penalties for specific offences says that "for every other offence against this Act, where no forfeiture or penalty is provided or imposed on any particular or specific offence against any part of this Act," the pawnbroker offending against this Act shall forfeit not less than 40s. nor more than £10 in the discretion of the justice.—R. v. BEARD (1810), 12 East, 673; 104 E. R. 263.**

**208. — Adjournment of hearing for re-examination—& committal of accused—Jurisdiction of magistrates.]—Qu.:** whether a magistrate has power under Pawnbrokers Act, 1800 (c. 99), or any other Act which gives him authority to impose a pecuniary penalty, to adjourn a case for further examination, & in the meantime to commit the party charged.—TATE v. CHAMBERS (1834), 3 Nev. & M. K. B. 523; 2 Nev. & M. M. C. 302; 2 L. J. M. C. 88.

**209. — Who may commence proceedings — Common informer.]—A common informer may lay an information against a pawnbroker, for an offence under Pawnbrokers Act, 1800 (c. 99), & is entitled, under sect. 26 of that Act, to a moiety of the penalty imposed upon the offender.—CASWELL v. MORGAN (1859), 1 E. & E. 809; 28 L. J. M. C. 208; 33 L. T. O. S. 120; 23 J. P. 678; 5 Jur. N. S. 1252; 120 E. R. 1114; *sub nom.* R. v. MORGAN, 7 W. R. 463.**

*Annotations*:—Mentl. Cole v. Coulton (1860), 24 J. P. 596; R. v. Stewart (1896), 65 L. J. M. C. 83.

**210. Action against pawnee — Right of pawnbroker to prosecute—Loss following unauthorised pledge.]—FANCETT v. BIERMAN (1897), 14 T. L. R. 148; 42 Sol. Jo. 134, D. C.**

**Whether prosecution barred by previous conviction for larceny.]—See CRIMINAL LAW, Vol. XIV., p. 343, No. 3610.**

**Restitution orders.]—See CRIMINAL LAW, Vol. XV., p. 622, Nos. 6513, 6514.**

**Action for restitution—Pledges of stolen property.]—See CRIMINAL LAW, Vol. XV., p. 622, No. 6513.**

**Appeals.]—See Pawnbrokers Act, 1872 (c. 93), ss. 52, 53.**

**Intervening rights of third parties—Rights of true owner.]—See Part II., Sect. 4, ante.**

**PART III. SECT. 8.**

*h. Pawnbroker neglecting to have sign over door.]—A conviction under*

*Pawnbrokers Act, C. S. C. c. 61, for neglecting to have a sign over the door, as directed by sect. 7, was held not to be sustained by evidence of one trans-*

*action alone; for the penalty attaches only on persons "exercising the trade of a pawnbroker."—R. v. ANDREWS (1866), 25 U. C. R. 196.—CAN.*



## PAYMASTER-GENERAL.

*See* REVENUE.

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## PAYMENT AND TENDER.

*See* CONTRACT; LIMITATION OF ACTIONS; MONEY AND MONEY-LENDING; SALE OF GOODS.

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## PAYMENT INTO COURT.

*See* ADMIRALTY; AUCTION AND AUCTIONEERS; BANKRUPTCY AND INSOLVENCY; COMPULSORY PURCHASE OF LAND AND COMPENSATION; CONFLICT OF LAWS; CONTEMPT OF COURT, ATTACHMENT, AND COMMITTAL; COUNTY COURTS; DAMAGES; RECEIVERS; TRUSTS AND TRUSTEES; AND TITLES *passim*.

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## PEACE, ARTICLES OF THE.

*See* MAGISTRATES.

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## PEACE, CLERK OF THE.

*See* LOCAL GOVERNMENT; MAGISTRATES.

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## PEDIGREE.

*See* EVIDENCE.

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## PEDLARS.

*See* MARKETS AND FAIRS; STREET AND AERIAL TRAFFIC.

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# PEERAGES AND DIGNITIES.

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## Part I.—Peerage.

### SECT. 1.—IN GENERAL.

1. Nature of peerage.]—(1) Nobility is not of nature, but of the King's creation.

(2) So as the man, that is not *de jure* a peer, or one of the nobility, to serve in the Upper House of the Parliament of England, is not in the legal proceedings of law accounted noble within England: & therefore if a countee of France or Spain, or any other foreign kingdom, should come into England, he should not here sue, or be sued by the name of countee, etc., for that he is none of the nobles that are members of the Upper House of the Parliament of England.

(3) But yet there is a diversity in our books worthy of observation; for the highest & lowest dignities are universal; for if a King of a foreign nation come into England, by the leave of the King of this realm, as it ought to be, in this case he shall sue & be sued by the name of a King.

Though the King be in a foreign Kingdom, yet he is judged in law a King there.—CALVIN'S CASE (1608), 7 Co. Rep. 1 a; 77 E. R. 377; *sub nom.* POSTNATI CASE, UNION OF SCOTLAND & ENGLAND CASE, 2 State Tr. 559; Moore, K. B. 790, Ex. Ch.

*Annotations:—As to (3) Consd. Brunswick v. King of Hanover (1844), 6 Beav. 1. Refd. Ex p. Brown (1864), 5 H. & S. 280. Generally, Refd. R. v. Knowles (1894), 12 Mod. Rep. 55. Mentd. Parliament in Ireland Case (1613), 12 Co. Rep. 110; R. v. Hampden (1637), 3 State Tr. 825; Collingwood v. Pace (1661), 1 Vent. 413; Manby v. Scott (1682), 1 Keb. 361; Thomas v. Sorrell (1673), 3 Keb. 143; Anon. (1678), Freem. K. B. 249; R. v. Tucker (1694), 1 Ld. Raym. 1; Loddington v. Kime (1695), 3 Lev. 431; Owen v. Saunders (1697), 1 Ld. Raym. 158; Clayton v. Kinaston (1698), 1 Ld. Raym. 419; Scott v. Schawrtz (1739), 2 Com. 677; Omichund v. Barker (1745), Willes, 538; R. v. Cowle (1759), 2 Burr. 834; Campbell v. Hall (1774), 1 Cowp. 204; Ruding v. Smith (1821), 2 Hag. Con. 371; Jephson v. Riera (1835), 3 Knapp, 130; Lane v. Bennett (1836), 1 M. & W. 70; Lyons v. East India Co. (1838), 1 Moo. P. C. C. 175; Birtwhistle v. Vardill (1840), 7 Cl. & Fin. 895; Taylor v. Best (1854), 14 C. B. 487; Rittson v. Sturdy (1855), 3 Sm. & G. 230; Ex p. Anderson (1861), 3 E. & E. 487; Low v. Roulledge (1865), 1 Ch. App. 42; R. v. Keyn (1876), 2 Ex. D. 63; De Geer v. Stone (1882), 22 Ch. D. 243; Re Stepney Patn., Isaacson v. Durant (1886), 17 Q. B. D. 64; Re Johnson, Roberts v. A.-G. (1903) 1 Ch. 821; Gavin Gibson v. Gibson, [1913] 3 K. B. 379; R. v. Speyer, [1916] 2 K. B. 858; Bowman v. Secular Soc., [1917] A. C. 406; Tingley v. Müller, [1917] 2 Ch. 144; R. v. Francis, Ex p. Markwald, [1918] 1 K. B. 617; Rodriguez v. Speyer, [1919] A. C. 59; Markwald v. A.-G., [1920] 1 Ch. 348; Johnstone v. Pedlar, [1921] 2 A. C. 262; The Terrae, [1922] P. 197.*

2. —.]—BEAUMONT (PEERAGE) CASE (1795), Cruise on Dignities, 2nd ed. 214, H. L.

—.]—*See, also, Sect. 5, sub-sect. 3, post.*

3. Right & duties dependent entirely on custom.]—BERKELEY (PEERAGE) CASE, No. 13, *post.*

4. Territorial limit of dignity.]—DOUGLAS v. MILFORD (1480), Y. B. 20 Edw. 4, fo. 6, pl. 6.

*Annotations:—Refd. Calvin's Case (1608), 7 Co. Rep. 1 a; Lord Advocate v. Walker Trustees, [1912] A. C. 95. Mentd. Trilist v. Morris (or Morrison) (1611), 1 Bulst. 134.*

5. —.]—CALVIN'S CASE, No. 1, *ante.*

6. Whether dignity can be refused.]—QUEENSBERRY'S (DUKE) CASE (1719), 1 P. Wms. 582; 21 Lords Journals, 196; 24 E. R. 527, H. L.

*Annotation:—Refd. Egerton v. Brownlow (1853), 4 H. L. Cas. 1.*

7. —.]—*Qu.*: whether a subject can refuse a peerage, created either by patent or by writ.—EGERTON v. BROWNLOW (EARL) (1853), 4 H. L. Cas. 1; 8 State Tr. N. S. 193; 23 L. J. Ch. 348; 21 L. T. O. S. 306; 18 Jur. 71; 10 E. R. 359, H. L.

*Annotations:—Mentd. Kerkin v. Kerkin (1854), 3 E. & B. 399; Bean v. Griffiths (1855), 1 Jur. N. S. 1045; Hilton v. Eekersley (1855), 6 E. & B. 47; Kiallmark v. Kiallmark (1856), 26 L. J. Ch. 1; Scott v. Avery (1856), 5 H. L. Cas. 811; H. v. W. (1857), 3 K. & J. 382; Clavering v. Ellison (1859), 7 H. L. Cas. 707; Shrewsbury v. Scott (1859), 6 C. B. N. S. 1; Wright v. Wilkin (1860), 2 B. & S. 232; Tatham v. Vernon (1861), 29 Beav. 604; Gosling v. Gosling (1863), 32 Beav. 58; Christie v. Gosling (1866), L. R. 1 H. L. 279; Elliott v. Richardson (1870), L. R. 5 O. P. 744; Re Harrison's Estate (1870), 5 Ch. App. 408; Sackville-West v. Holmesdale (1870), L. R. 4 H. L. 543; Thompson v. Fisher (1870), L. R. 10 Eq. 207; Re Exmouth, Exmouth v. Prad (1883), 23 Ch. D. 158; Davies v. Davies (1887), 36 Ch. D. 359; Lound v. Grimwade (1888), 39 Ch. D. 605; Windhill v. B. of Health v. Vint (1890), 45 Ch. D. 351; Maxim Nordenfolt Guns & Ammunition Co. v. Nordenfolt, [1893] 1 Ch. 630; Savill v. Langman (1898), 79 L. T. 44; Re Kelcey, Tyson v. Kelcey, [1899] 2 Ch. 530; Marlborough v. Marlborough (1900), 83 L. T. 578; Jeffreys v. Jeffreys (1901), 84 L. T. 417; Re Greenwood, Goodhart v. Woodhead, [1902] 2 Ch. 198; Janson v. Driefontein Consolidated Mines, [1902] A. C. 484; Re Hope Johnstone, Hope Johnstone v. Hope Johnstone, [1904] 1 Ch. 470; Wilson v. Camley, [1908] 1 K. B. 729; R. v. L. G. Board, Ex p. Arlidge, [1913] 1 K. B. 463; Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co., Same v. Tilling, [1915] 1 K. B. 893; Montefiore v. Monday Motor Components Co., [1918] 2 K. B. 241; Rodriguez v. Speyer, [1919] A. C. 59; Kemp v. Glasgow Corpn., [1920] A. C. 836; Re Wallace, Champion v. Wallace, [1920] 2 Ch. 274.*

Crown as the fountain of honour.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 556, Nos. 561–563.

Whether peer can acquire foreign domicile.]—*See* CONFLICT OF LAWS, Vol. XI., p. 316, No. 59.

Grant of criminal information for libel.—At suit of person in public office.—Not available in private affairs of peer.]—*See* CRIMINAL LAW, Vol. XIV., p. 351, No. 3692.

### SECT. 2.—DEGREES OF PEERAGE.

#### SUB-SECT. 1.—IN GENERAL.

8. No particular rank conferred.—By writ of summons.]—A peer cannot surrender his peerage to the Sovereign in any manner; & this law must be applied to a surrender made in 1302.

In 1302 Roger le Bygod, Earl of Norfolk, surrendered the earldom to Edward I. In 1312 Edward II. granted to Thomas de Brotherton &

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to the heirs of his body the earldom so surrendered. Thomas de Brotherton was frequently summoned by writ to Parliament & sat there. Lord Mowbray, having proved his pedigree as senior co-heir of Thomas de Brotherton, alleged that the earldom had fallen into abeyance, & claimed that the abeyance should be determined in his favour as senior co-heir:—*Held*: (1) the surrender by Roger le Bygod was invalid; the charter of 1312 was consequently invalid; the sitting in Parliament under the King's writ could not create an earldom; & Lord Mowbray had not made out his claim.

The King's writ, followed by a sitting in Parliament, of itself created a peerage, but assuming it did, it would not of itself create an earldom. An earldom was an office as well as a dignity . . . & the rank of an earl could not be conferred merely by the Sovereign addressing the peer by that title (LORD HALSBURY).

(2) Assuming the pedigree of the claimant to be established, & it is not disputed, & that there is no constitutional or legal difficulty in applying the practice of calling out of abeyance to earldoms as well as to baronies, which it is not now necessary to discuss (LORD ASHBORNE).

(3) There is no doubt that a man cannot alien a title of honour either by surrender to the Crown or by grant to a subject. This is now settled law, & the reason is this, that it is a personal dignity which descends to his posterity & is fixed in the blood. In other words, he cannot by his own act alter or affect the status of his descendants or the other persons in the succession (LORD DAVEY).

(4) Another argument has been used which appears to me to involve a confusion between a right of peerage & a title of honour conferring a particular rank in the peerage, which is a matter merely collateral (LORD DAVEY).—**NORFOLK (EARLDOM) CASE**, [1907] A. C. 10; 76 L. J. P. C. 9; 95 L. T. 682; 23 T. L. R. 114, H. L.

**SUB-SECT. 2.—DUKES.**

**9. Course of inheritance against common law — Duchy of Cornwall — Necessity for Act of Parliament.]—**(1) The instrument made 1338, to Prince Edward, by which the Prince was created Duke of Cornwall & the possessions of the dukedom of Cornwall given to him, with special limitations, & the possessions annexed to the said duchy so as they shall not be severed, with a special clause of revivification if the special limitations at any time should cease, etc., is a charter made by authority of Parliament.

(2) There are many examples of Acts of Parliament in the form of the King's charter.

(3) Course of inheritance against rules of common law cannot be created without an Act of Parliament.—**PRINCE'S CASE** (1606), 8 Co. Rep. 13 b; 77 E. R. 496, L. C.

*Annotations:—As to* (2) *Conrad. G. E. Ry. v. Goldsmid* (1884), 9 App. Cas. 927. *Reid. Needler v. Winchester* (Bp.) (1814), Hob. 220; *Hutchins v. Player* (1663), O. Bridge. 272; *A.-G. v. Plymouth Corp.* (1754), Wight. 131; *Clayton v. A.-G.* (1834), 1 Coop. temp. Cott. 97. *As to* (3) *Conrad. Thorby v. Fleetwood* (1720), 1 Stra. 318. *Reid. Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479. *Generally, Reid. Dublin's Corp. Case* (1619), Palm. 1; *Grand Opinion for the Prerogative concerning the Royal Family* (1717), Fortes. Rep. 401; *Jewison v. Dyson* (1842), 9 M. & W. 540; *Buckhurst (Peerage) Case* (1876), 2 App. Cas. 1. *Mentd. Gesseries (Bp.) Case* (1619), Palm. 22; *A.-G. v. London.* (Bp.) *Lancaster & Birch* (1693), 4 Mod. Rep. 200; *R. v. Warden of the Fleet* (1700), 1 Eq. Cas. Abr. 129; *Basset v. Basset* (1744), 3 Atk. 203; *Lomax v. Holmden* (1749), 1 Ves. Sen. 290;

*A.-G. to Prince of Wales v. St. Aubyn* (1811), Wight. 167; *Tolson v. Kaye* (1843), 6 Man. & G. 538; *Beauchamp v. Winn* (1869), 4 Ch. App. 562; *Penryn Corp. v. Holm* (1877), 2 Ex. D. 328.

**SUB-SECT. 3.—EARLS.**

**10. Office as well as dignity—For defence of realm.]—**Misnomer abates an indictment. A peer indicted for murder by his Christian & surname as a commoner may plead the misnomer in abatement. In such plea deft. need not aver that the place from whence he takes his title is in England. Nor, if he shows that his creation was by patent, that he is one of the peers of England. Nor, particularly, if he claims by descent conclude to the record. An order of the House of Lords upon a petition for a trial by his peers disallowing his peerage, & directing that he should be tried at common law, is no answer to such plea.

(1) Earls were always created by letters patent (HOLT, C.J.).

(2) An earldom consisted in office for the defence of the King & realm . . . earls (*comites*) had not their denomination from the county, but a *comitatus regem* (HOLT, C.J.).

(3) The place from whence the patentee takes his title is not necessarily to be in England, nor in reality is there any necessity, that there be any place (HOLT, C.J.).

(4) As a peer cannot divest himself of his own honour or the privilege of it so his peerage can by no law of this kingdom, as I know, be taken from him but by Act of Parliament, attainder of his person or by *sci. fa.* to repeal his patent (HOLT, C.J.).

(5) The House of Peers have jurisdiction over their own members in matters of privilege, precedence & for any other thing relating to Parliament. They can do in that supreme ct. no more than what by law they may do: & if they exceed that power by holding plea, of which the common law hath not given a jurisdiction, what they do will be void: . . . & no such judgment or proceeding can bind any inferior ct. from examining of it, or declaring it to be void in law (HOLT, C.J.).—*R. v. KNOLLYS* (1694), 1 Ld. Raym. 10; 2 Salk. 509; 91 E. R. 904; *sub nom. R. v. KNOWLES*, 12 Mod. Rep. 55; Comb. 273; 12 State Tr. 1167; *sub nom. R. v. BANBURY* (EARL), Skin. 517.

*Annotations:—As to* (3) *Reid. Ferrers' Case* (1760), 2 Eden, 373. *As to* (4) *Reid. Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *Bradlaugh v. Gossett* (1884), 50 L. T. 620. *Generally, Reid. Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479; *Re Rivett-Carnac's Will* (1885), 30 Ch. D. 136; *Cowley v. Cowley*, [1900] P. 305. *Mentd. Pridesaux v. Morris* (1709), 7 Mod. Rep. 13; *R. v. Paty* (1705), 2 Ld. Raym. 1105; *Burdett v. Abbot* (1811), 14 East, 1; *Digby v. Alexander* (1832), 8 Bing. 416; *Fenton v. Hampton* (1858), 11 Moo. P. C. C. 347.

**11. —.]—NORFOLK (EARLDOM) CASE**, No. 8, *ante*.

**12. Always created by letters patent.]—R. v. KNOLLYS**, No. 10, *ante*.

**SUB-SECT. 4.—BARONS.**

**13. Barony by tenure—Not assignable.]—**

(1) The peerage of England depends entirely on usage, both as to the power of the Crown, & as to any claim that may be made by a subject. Therefore whether or not barony by tenure ever existed, that is to say, a barony running with & inherent in certain lands, & transferable by deed or will with the lands to strangers, a dignity of such nature has long been discontinued, & would now lead to absurd consequences, for it would

render dignities matter of sale or capricious, as well as compulsory alienation on the part of a subject.

(2) The Committee for Privileges will in its discretion permit documents to be proved by printed minutes of proceedings before a former Committee on the same peerages, but as a rule will require the production of the original documents.—**BERKELEY (PEERAGE) CASE** (1861), 8 H. L. Cas. 21; 4 L. T. 686; 8 Jur. N. S. 21; 11 E. R. 333, H. L.

*Annotations:—As to* (1) **Reid, Wensleydale (Peerage) Case** (1856), 8 State Tr. N. S. 479; **Buckhurst (Peerage) Case** (1876), 2 App. Cas. 1.

*See, further, Sect. 5, sub-sect. 4, post.*

### SECT. 3.—CREATION.

#### SUB-SECT. 1.—IN GENERAL.

14. **By Crown—With assent of Parliament.]—BUCKINGHAMSHIRE'S (EARL) CASE** (1391), cited 8 State Tr. N. S. at p. 536, H. L.

*Annotation:—Consd. Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479.

15. ————(1) The Rescissory Act of the Scottish Parliament, Oct. 17, 1488, destroyed the Dukedom of Montrose, created by James III., & the Dukedom of Montrose, created by James IV., was only for the life of the grantee.

(2) When a peerage is rescinded by Parliament, it cannot be restored by the Crown. To effect restoration another Act of Parliament will be necessary.

(3) *Qu.*: mere lapse of time is no bar to a peerage claim, although whether it may not be fit to prescribe some limitation.

(4) Peerages were often, for greater solemnity, created by the Crown in full Parliament, but the Parliament had no share in the act done. Thus, the creations by Richard II., in his last Parliament, continued valid & effectual, although the Parliament itself, & all its proceedings, were subsequently annulled.—**MONTROSE'S (DUKE) CASE** (1853), 1 Macq. 401; 8 State Tr. N. S. App. A., 1082; Lord Lindsay's Report, 3, II. L.

*Annotations:—Generally, Reid, Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479; *Horries (Peerage) Case* (1858), L. R. 2 Sc. & Div. 258. *Mentid. Shrewsbury (Peerage) Case* (1858.), 7 H. L. Cas. 1.

16. **By charter—Granted by Parliament.]—DE VERE'S CASE** (1385), 8 State Tr. N. S. 646, H. L.

*Annotation:—Reid, Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479.

17. ————[**PRINCE'S CASE**, No. 9, *ante*.

18. **By writ of summons—& sitting in Parliament.]—The delivery of the writ does not make a man a baron or noble, until he comes to Parliament, & there sits, according to the command of the writ. But if the King creates any baron by letters patent under the Great Seal, to him & his heirs, or to him & to his heirs of his body, or for life, etc., he is a nobleman presently.—**ABERGAVENNY'S (LORD) CASE** (1610), 12 Co. Rep. 70; 3 Cru. Dig. 172; 77 E. R. 1348, H. L.**

*Annotations:—Consd. Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479. *Reid, R. v. Knowles* (1694), 12 Mod. Rep. 55; *Queensberry's Case* (1719), 1 P. Wms. 582; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1.

19. ————[**CLIFTON (BARONY) CASE** (1673), *Collins's Baronies by Writ*, 291, H. L.

*Annotations:—Reid, Devon (Peerage) Case* (1831), 2 State Tr. N. S. 659; *Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479.

20. ————[**CLIFFORD (BARONY) CASE** (1691), *Collins's Baronies by Writ*, 306, H. L.

21. ————[**WILLOUGHBY DE BROKE (BARONY) CASE** (1695), *Cruise on Dignities*, 196;

*Collins's Baronies by Writ*, 321; *sub nom. VERNY'S CASE*, *Skin*, 432; 90 E. R. 191, H. L.

*Annotation:—Reid, Wiltes (Peerage) Case* (1869), L. R. 4 H. L. 126.

22. ————[**HASTINGS (PEERAGE) CASE**, No. 241, *post*.

23. ————[**Sitting must be proved.]—FRESCEVILLE (PEERAGE) CASE** (1677), *Reports on the Dignity of a Peer*, vol. 2, p. 29.

24. ————[**L'ISLE (BARONY) CASE** (1826), *Nicolas' Special Report*.

*Annotation:—Consd. Buckhurst (Peerage) Case* (1876), 2 App. Cas. 1.

25. ————[**DE WAHULL (PEERAGE) CASE** (1892), cited in [1915] A. C. at p. 291.

*Annotation:—Consd. St. John (Peerage) Case*, [1915] A. C. 282.

26. ————[**Sitting in Parliament to which Commons & Peers summoned.]—DE WAHULL (PEERAGE) CASE** (1892), cited in [1915] A. C. at p. 291.

*Annotation:—Consd. St. John (Peerage) Case*, [1915] A. C. 282.

27. ————[**The use of the term "plenum parlamentum" is not conclusive to show that the assembly to which it is applied is a Parliament for peerage purposes. To constitute a Parliament for peerage purposes it is essential that the Commons should be represented thereat & that it should conform in its more essential characteristics to the Model Parliament of 1295.**

Upon a claim for an ancient barony claimant proved by an entry in the Parliament Roll of 1290 that on May 29, 1290, the ancestor from whom he traced his title sat in an assembly held at Westminster of bishops, earls, & barons, who, assembled "*in pleno parlamento*" & for themselves &, "*quantum in ipsis est*," for the whole community, granted to the King an extraordinary aid of 40s. per knight's fee to marry his eldest daughter. A fortnight later the King issued writs to the sheriffs for the election & return of two or three knights for each shire, who arrived on July 15. Before the arrival of the knights this Parliament passed Statute Quia Emptores:—*Held*: (1) the assembly of May 29 was not a Parliament so constituted as that a sitting therein in pursuance of a writ could form the foundation for a claim to a hereditary peerage; (2) it was impossible to presume from the presence of claimant's ancestor at that assembly on May 29 that he continued to sit therein after the arrival of the knights of the shire; therefore, claimant had failed to prove the existence of the alleged barony.—**ST. JOHN (PEERAGE) CASE**, [1915] A. C. 282; 30 T. L. R. 640, H. L.

*Annotation:—As to* (1) **Consd. Beauchamp (Barony) Case**, [1925] A. C. 163.

28. ————[**Claimant to an ancient barony which had long been in abeyance proved that an ancestor received a writ of summons in 1283 to the Parliament of Shrewsbury, the primary business of which was to deal with the traitor David of Wales. This assembly was admittedly not a properly constituted Parliament for peerage purposes owing to the absence of the clergy, but claimant contended that, on the construction of a grant made by the King in 1277 to David & his brother Owen, David was thereby created a peer, that this Parliament was summoned for the trial of a peer by his brother peers, & that the fact that claimant's ancestor had been summoned by name to this Parliament afforded a presumption that he was himself a peer. Claimant further proved that another ancestor had been summoned in 1300 to the Parliament of Lincoln,**

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at which a claim by Pope Boniface VIII. to rights of superiority over Scotland was considered, & that he sealed the Barons' letter of protest to the Pope. Claimant further proved that this ancestor was summoned by a writ dated Dec. 3, 1326, to attend the prorogation of a Parliament of Westminster on the morrow of the following Epiphany, Jan. 7, 1327, & produced a Charter Roll, Feb. 20, 1327, from which it appeared that he was a witness to an *inspeximus* & confirmation by the King of a charter granted by his father to a college of the University of Oxford, & that this confirmation was expressed to be "with the assent of the prelates, earls, barons, & commonalty of our kingdom being in our present Parliament assembled at Westminster":—*Held*: (1) as to the so-called Parliament of Shrewsbury, claimant's contention that this assembly was summoned for the trial of a peer by his brother peers failed, there being no adequate proof that David was created a peer, & having regard to the anomalous nature of the assembly & to the absence of all proof that claimant's ancestor took part in its proceedings. In fact, as a peer, the mere attendance of the latter in obedience to the writ was not sufficient to justify the inference that he was thereby created a peer; (2), as to the so-called Parliament of Lincoln, it was not so duly constituted as a Parliament that the composition, adoption, signature & sealing of the letter addressed to the Pope was a proceeding properly so called in Parliament, & the service of the writ of summons upon claimant's ancestor, plus his subsequent attendance, his participation in the adoption of the letter, & his sealing of it, did not afford sufficient evidence that he was then created or had theretofore become a peer of the realm; (3) as to the Parliament of Westminster, the King, in confirming the charter, was not carrying out a transaction, participation in which would have the same effect in proving a person to be entitled to a peerage as would a sitting as a peer in Parliament duly summoned to transact the business of the State; therefore, the claim failed.—**BEAUCHAMP (BARONY) CASE**, [1925] A. C. 153; 94 L. J. P. C. 35; 40 T. L. R. 862, H. L.

**29. ——— Writ may be presumed.]—**

(1) On the consideration of a claim to an ancient barony, which has been long in abeyance, if claimant proves that his ancestor sat as a peer in Parliament, & no patent or charter of creation can be discovered, it is now the established rule to hold that the barony was created by writ of summons & sitting, although the original writ of summons, or enrolment of it, is not produced.

Where it is proved, after a careful search of all the depositories in which a patent of peerage would have been likely to have been found, that there is no trace of any patent, the writ of summons, to sitting in Parliament by the ancestor under it, shall be evidence of the title to the peerage descending to the heirs of the body, including females.

(2) A claimant of a barony as co-heir is required not only to give notice to the other co-heirs, but also to give *prima facie* proofs of the pedigree of such of them as decline to claim the barony, to enable the House to make a satisfactory report to the Crown.

(3) The proper course for a co-heir claiming a peerage in abeyance, is to petition the Crown to terminate the abeyance in his favour; but if he does not claim the dignity, & it appears from the case of claimant that he has an interest, the House will, on his petition, allow him to appear

before the Committee of Privileges, & present a case to protect his interest in the peerage.

(4) The minutes of evidence & proceedings before the Committee of Privileges in one case, are not necessarily receivable as evidence in another case.

(5) One of the co-heirs to a barony in abeyance was attainted of treason, & his heir & descendants were restored in blood by Act of Parliament:—*Held*: it is competent to the Crown to terminate the abeyance in favour of the heir of the person so attainted, or of the heir of any of the other co-heirs.—**BRAYE (PEERAGE) CASE** (1839), 6 Cl. & Fin. 757; 3 State Tr. N. S. App. A., 1282; West, 1; 7 E. R. 882, H. L.; *subsequent proceedings, sub nom.* CAMOYS (PEERAGE) CASE, 6 Cl. & Fin. 789, H. L.

*Annotations*:—As to (1) **Consd. Beauchamp (Barony) Case**, [1925] A. C. 153. **Reid. Hastings (Peerage) Case** (1841), 8 Cl. & Fin. 144; **Donoughmore (Peerage) Case** (1853), 3 H. L. Cas. 823; **St. John (Peerage) Case**, [1915] A. C. 282.

30. ——— ——— ———.]—(1) On a claim by co-heirs to the dignity of a baron, created in the reign of Henry VIII., & in abeyance from the reign of Charles II., they proved that their ancestor sat among the peers in Parliament in 1533; that he was duly summoned to & sat in the Parliament of 1536, & that he & his heirs male, who were also his heirs general, were summoned to & sat in several succeeding Parliaments, by the style & title of Lord Vaux. To account for the want of evidence of a writ of summons prior to the sitting in 1533, they showed that there were no Lords Journals extant from 1515 to 1533; that the enrolments of writs during that period were very imperfect; & that, although the Patent Rolls were complete, no patent or charter of creation of a barony of Vaux, nor any record or trace of such patent, was discovered, after the most diligent searches in all the offices for records:—*Held*: the barony of Vaux was created by writ of summons & sitting in Parliament, & was therefore descendible to heirs general.

(2) Where there are several co-heirs to a dignity, & some only claim it, they must give notice to the others.

(3) The statements of chroniclers or contemporary historians are not admissible as evidence of the creation of a peerage.

(4) The admission of an inscription in a churchyard by a former Committee of Privileges, does not make a copy from their minutes necessarily admissible in another case.

(5) A paper writing found among an ancestor's papers, in the custody of a stranger in blood, & not signed by the ancestor, nor by any of his family, is not admissible to show the state of the family.

(6) A funeral certificate from a manuscript book, entitled, "Funeral Certificates of the Nobility," produced from the Heralds' College, is admissible evidence of the state of deceased's family, & of other statements contained in it.—**VAUX (PEERAGE) CASE** (1837), 5 Cl. & Fin. 526; 3 State Tr. N. S. App. A., 1283; 7 E. R. 505, H. L.

*Annotations*:—As to (1) **Fold. Braye (Peerage) Case** (1839), 6 Cl. & Fin. 757. **Consd. Beauchamp (Barony) Case**, [1925] A. C. 153. **Reid. Hastings (Peerage) Case** (1841), 8 Cl. & Fin. 144; **St. John (Peerage) Case**, [1915] A. C. 282. As to (6) **Reid. Sturla v. Freccia** (1880), 50 L. J. Ch. 86.

31. ——— ——— ———.]—**Proof that no writs issued at time of proved sitting.]—HASTINGS (PEERAGE) CASE**, No. 241, *post*.

32. ——— **Issued to child in parent's lifetime.]—**The grandchild & heir of a person summoned to,

& sitting in, Parliament as a baron & peer of the realm by writ, in his father's, a peer's, lifetime is not entitled to the barony for which his grand-father was so summoned.—*Ex p. PERRY* (1782), 5 Bro. Parl. Cas. 509; 2 E. R. 829, H. L.

33. ——— [What rank created.]—**NORFOLK (EARLDOM) CASE**, No. 8, *ante*.

34. By prescription.]—A man may have an honour, a barony, or an earldom by prescription; but this is to be held of the King (*per Cur.*).—*R. v. LEVET* (1612), 1 Bulst. 194; 80 E. R. 882.

35. Place of title unnecessary.]—*R. v. KNOLLYS*, No. 10, *ante*.

36. Scottish peer created peer of Great Britain—Effect.]—Since the Union a Scottish peer made an English peer, cannot by virtue thereof sit & vote in Parliament.—**QUEENSBERRY'S (DUKE) CASE** (1719), 1 P. Wms. 582; 2 Eq. Cas. Abr. 707, pl. 1; 21 Lords Journals, 196; 24 E. R. 527, H. L.

Annotation:—*Reid. Egerton v. Brownlow* (1853), 4 H. L. Cas. 1.

37. ———.]—**BRANDON'S (DUKE) CASE** (1782), 8 State Tr. N. S. 66; 36 Lords Journals, 516; Cruise on Dignities, 2nd ed. 94, H. L.

Annotations:—*Consd. Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479. *Reid. Wilton (Peerage) Case* (1869), L. R. 4 H. L. 126.

#### SUB-SECT. 2.—IRISH PEERAGES.

See Union with Ireland Act, 1800 (c. 67), art. 4.

38. What amounts to extinction of peerage.]—The word "peerage" in the fifth clause of the fourth art. in Union with Ireland Act, 1800 (c. 67), means the status & condition of a peer, & therefore where one person held many titles, by any one of which he could sit in the Irish House of Peers, so long as any one of those titles remained in him or his descendants the loss of any of the others did not constitute an extinction of a peerage.

A., before the Union with Ireland, was a peer of Ireland, by the title of Earl M. That title had descended to him from an ancestor, to whom it was granted with the usual limitation to the heirs male of his body. Before the Union took effect, A. received a new patent, creating him Baron of M., remainder to the heirs male of his body, failing whom to B., & the heirs male of his body: A. died without leaving male heirs of his body, & the Earldom of M. was left without a successor, & the Barony of M. passed to B.:—*Held*: this was not such an extinction of a peerage as was contemplated by the Union with Ireland Act, 1800 (c. 67), & consequently could not be taken as one of three extinctions, on the happening of which, the Crown could create a new Irish peerage.

*Qu.*: whether when the validity of an existing grant of a peerage is questioned, the A.-G. is bound to appear to support it.—**FERMOY (PEERAGE) CASE** (1856), 5 H. L. Cas. 716; 8 State Tr. N. S. 723; 23 L. T. O. S. 15; 10 E. R. 1084, H. L.

Annotations:—*Reid. Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479. *Mentd. Pochin v. Duncombe* (1857), 1 H. & N. 842.

39. ——— [Effect of subsequent revival.]—Where three Irish peerages are considered extinct, & a new creation takes place, after which one of these peerages is revived, the new creation is valid under Union with Ireland Act, 1800 (c. 67), but the Crown's right again to create a new peerage will be suspended till the full number of vacancies has occurred.—**BLOOMFIELD (PEERAGE) CASE** (1831), 2 Dow. & Cl. 344; 2 State Tr. N. S. 905; 6 E. R. 755, H. L.

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#### SUB-SECT. 3.—LIMITATION OF GRANT.

40. Not regulated by law as to grant of land.]—

On Sept. 3, 1553, Sir Edward Courtenay was created Earl of Devon by a patent containing the following words: "*Habendum et tenendum nomen statum stitum titulum honorem et dignitatem Comitis Devonie predictas cum omnibus et singulis preeminenciis honoribus et ceteris quibuscunque hujusmodi statui Comitis Devonie pertinentibus sive spectantibus prefato Edwardo et heredibus suis masculis imperpetuum.*" The grantee of the peerage died on Sept. 10, 1556, & no one assumed the title until this century. In June, 1830, Viscount Courtenay presented a petition to the King, claiming the Earldom of Devon as heir male of Sir Edward Courtenay. The A.-G. reported that claimant had proved his descent as alleged, but that the question whether under the patent a title was established to the dignity of Earl of Devon should be referred to the House of Peers. The Crown referred the question to the House of Lords, & the House of Lords referred it to the Committee for Privileges:—*Held*: (1) a grant by the Crown of honours & titles is not regulated by the same law as a grant of lands; (2) Statute De Donis, 1285 (c. 1), does not apply to honours & titles; (3) the grant of a peerage to the grantee & his heirs male is valid, although a grant of land by the Crown with the same limitation is void; (4) under such a grant the peerage descends not only to heirs male of the body, but also to collateral heirs male, i.e. to males claiming entirely through a male descent, but does not descend to heirs general, as would be the case in a grant of land by a common person to the grantee & his heirs male; (5) the Crown may grant a peerage for life, & not only for the life of the grantee but *pur autre vie*.—**DEVON (PEERAGE) CASE** (1831), 2 State Tr. N. S. 659; 5 Bl. N. S. 220; 2 Dow. & Cl. 200; 5 E. R. 293, H. L.

Annotations:—*As to* (3) *N.E. Wilton (Peerage) Case* (1869), L. R. 4 H. L. 126. *Reid. Perth (Earldom) Case* (1843), 2 H. L. Cas. 865. *As to* (5) *Reid. Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479. *Generally, Reid. Herries (Peerage) Case* (1858), L. R. 2 Sc. & Div. 258. *Rhondda's Case*, [1922] 2 A. C. 339.

41. ——— [Whether limitation to heirs male valid.]—(1) The decision of the Committee for Privileges as to the advice it shall give Her Majesty upon one particular claim of peerage, does not resemble the decision of the House sitting as the tribunal of ultimate appeal upon a question of law in a suit between two adverse parties; it is in no sense a judgment, & cannot, therefore, be treated as a binding authority in another claim of peerage, even though the terms of the patents in the two cases may be like each other.

(2) The Crown cannot give to the grant of a dignity or honour a quality of descent unknown to the law.

(3) A limitation to heirs in the grant of a peerage may be incapable of taking effect, & yet the patent, so far as the grantee himself is concerned, may not be void. In the reign of Richard II., an earldom was created *habendum*, etc., "*A. et heredibus suis masculis imperpetuum.*" The grantee sat in Parliament as earl under this creation:—*Held*: it did not create a dignity descendible to his heirs male general.—**WILTONS (PEERAGE) CASE** (1869), L. R. 4 H. L. 126.

Annotations:—*As to* (1) *Consd. Rhondda's Case*, [1922] 2 A. C. 339. *As to* (3) *Consd. Buckhurst (Peerage) Case* (1878), 3 App. Cas. 1. *Reid. Rhondda's Case*, [1922] 2 A. C. 339.

42. ———.]—**DEVON (PEERAGE) CASE**, No. 40, *ante*.

43. Where created by Act of Parliament.]—**PRINCE'S CASE**, No. 9, *ante*.

*Sect. 3.—Creation: Sub-sect. 3.]*

44. *Estate tail.*—NEVIL'S CASE, No. 183, *post*.

45. —.]—A title of nobility, limited by patent in tail, is an estate within the protection of Statute de Donis, 1285 (c. 1), whether it be conferred from any place or not, & consequently not forfeited by an attainder of felony.—FERRERS' (EARL) CASE (1760), 2 Eden, 373; 28 E. R. 942. *Annotation.*—*Consd. Re Rivett-Carnac's Will* (1885), 30 Ch. D. 136.

46. *Shifting clause.*—(1) By letters patent the barony of B. was conferred on E. for life, with successive remainders to her second & other sons & the heirs male of their respective bodies. The patent contained a proviso that if the second son of E. or any other person taking under the letters patent should succeed to the earldom of D., the "succession to" the dignity of B. should "devolve upon" the son of E. or the heir who should be next entitled to succeed to the barony of B., if the person so succeeding to the earldom of D. was dead, without issue male. Lands having been devised by testatrix to trustees & their heirs, upon trust "to convey, settle, & assure" same "in a course of entail to correspond as nearly as may be with the limitations of" the barony of B., " & the provisos affecting the same contained in the letters patent " a settlement was executed in which was inserted a clause providing that, if the second son of E., who had then by the death of E. become Baron B., or any other person taking under the limitations therein contained should succeed to the earldom of D., the "succession to" the lands thereby settled should "devolve upon" the son of E. or the heir who would be next entitled to succeed to the barony of B., if the person so succeeding to the earldom of D. was dead without issue male. The second son of E. afterwards succeeded to the earldom of D. He had issue male:—*Held*: upon the second son of E. succeeding to the earldom of D. the third son of E. became entitled in possession to the settled estates.

(2) *Qu.*: whether the Crown has any power to make a conditional limitation of a peerage.—COPE v. DE LA WARR (EARL) (1873), 8 Ch. App. 982; 42 L. J. Ch. 870; 29 L. T. 565, L. J. J. *Annotation.*—*Generally, Mentd. Cogan v. Duffield* (1876), 34 L. T. 593.

47. —.]—(1) Where the Crown has pleased to refer to the House of Lords the consideration of a patent of peerage, it becomes the duty of the House to inform the Crown what is the construction to be put upon the terms of any clause in the patent.

(2) There can be no use or trust in the case of a peerage. Therefore where, in a patent of peerage, there were successive limitations of the peerage in the ordinary form of descent, & then a clause was introduced which, on the happening of a collateral event, would transfer the enjoyment of the peerage from the existing peer & his heirs to a new holder, such clause was held to be invalid. A patent granted the dignity of Baroness Buckhurst to a lady for her life, then to R. W., her second son & his heirs male, in default, to M. S., her third son & his heirs male, & so on to the other younger sons of the same lady. The patent then went on with this proviso: " & we will that if R. W., or any other person taken under this patent shall succeed to the Earldom of D. I. W., & there shall, upon, or at any time after, the occurrence of such event, be any other younger son, or any heir male of the body of any such other son, then, & as often as the same shall happen, the succession to the honours & dignities

hereby created shall devolve upon the son of Elizabeth," etc., or the heir who would be next entitled to succeed to the dignity of Baron Buckhurst if the person so succeeding to the Earldom of D. I. W. was dead without issue male:—*Held*: this proviso was invalid, & R. W., the first baron under the patent, who, as such baron, had sat & voted in the House of Lords, though he succeeded to the Earldom of D. I. W., continued to hold the barony as before.

(3) *Semble*: if R. W. had become Earl D. I. W. during the life of his mother, & before he himself succeeded to the barony, it might have gone to his next brother, but it having once vested in R. W. it could not be divested by the effect of the proviso.

(4) The fountain of source of all dignities cannot hold a dignity from himself. The dignity, therefore, as a dignity to be held by the sovereign terminates, not by virtue of any provision in its creation, but from the absolute incapacity of the sovereign to hold a dignity (LORD CAIRNS, C.).—BUCKHURST (PEERAGE) CASE (1876), 2 App. Cas. 1, H. L.

*Annotations.*—As to (2) *Consd. Rhondda's Case*, [1922] 2 A. C. 339. *Generally, Mentd. Cope v. De la Warr* (1877), 5 Ch. D. 666. *Mentd. Cooper v. Stuart* (1889), 14 App. Cas. 286.

48. Cannot be subject of a trust.]—BUCKHURST (PEERAGE) CASE, No. 47, *ante*.

49. *Baronies by writ—Limitation to heirs general presumed.*—A baron by writ being created an earl to him & the heirs male of his body has issue two sons by several *ventres*, the eldest of whom had issue a daughter; the barony shall go to the daughter, & the earldom to the second son.—GREY'S (LORD) CASE (1640), Cro. Car. 601; COLLINS'S BARONIES BY WRIT, 195, 256; 79 E. R. 1117, H. L.

50. —.]—VAUX (PEERAGE) CASE, No. 30, *ante*.

51. —.]—BRAYE (PEERAGE) CASE, No. 29, *ante*.

52. —.]—HASTINGS (PEERAGE) CASE, No. 241, *post*.

53. —.]—(1) It appeared by the Parliamentary pawns of 1544 & 1547, that a writ had been directed to "Thomas, Lord Wharton" for each of these Parliaments; but there was no evidence of his sitting in either of them or of the writ itself. The Journals of the House of Lords showed that he was summoned to, & sat in, the Parliament of 1548, & subsequent Parliaments. Creation of baronies by patent was not then unusual; but no patent or record or other trace of a patent, creating the barony of Wharton could be found:—*Held*: the barony was created by writ & sitting in 1548, & was descendible to heirs general of the body.

(2) A decretal order in Chancery, reciting the substance of the bill & answer, is admissible, on proof of pedigree, to establish the identity of parties to the suit: but an answer alone, though sworn but not filed, is not admissible.

(3) Scottish wills, registered in the Ct. of Session, are retained there, & if it is necessary to prove any such wills in England, a certified copy is given out, & is admitted to probate in the English Ecclesiastical Cts. The Lords Committees for Privileges will not, on claims of peerage, receive such copy, unless it is shown that the original will cannot be produced.

(4) If a judgment of outlawry stand in the way of a claim to a barony in abeyance, although it is clearly erroneous, the committee of privileges cannot overlook it or reverse it; but claimant must apply to the proper tribunal for its reversal,



& produce the judgment of reversal to the committee.

(5) It is the well-known practice of this House not to allow the insertion of such a statement [a declaration of the relation between members of the family] in the recitals of a private Act of Parliament, unless the truth of that statement has been previously proved to the satisfaction of the judges, to whom the bill has been referred (LORD LYNTHURST, C.).—WHARTON (PEERAGE) CASE (1845), 12 Cl. & Fin. 295; 6 State Tr. N. S. 1104; 8 E. R. 1419, H. L.

*Annotation* :—*As to* (5) *Consd.* Polini v. Gray, Sturla v. Froccia (1879), 12 Ch. D. 411.

54. ——— **Half-blood.**—FITZWALTER'S CASE (1669), Collins's Baronies by Writ, 268; Cruise on Dignities, 177.

*Annotations* :—*Reid.* Devon (Peerage) Case (1831), 2 State Tr. N. S. 659; Wensleydale (Peerage) Case (1856), 8 State Tr. N. S. 479; Berkeley (Peerage) Case (1861), 8 H. L. Cas. 21.

55. ——— **Collateral heirs.**—ROOS (BARONY) CASE (1666), Collins's Baronies by Writ, 261, H. L.

56. **Life peerage—Grant to female.**—NORFOLK'S (DUCHESS) CASE (1397), cited in 8 State Tr. N. S. at p. 649.

*Annotation* :—*Distd.* Wensleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

57. ——— **BEDFORD'S (DUKE) CASE** (1414), Patent Roll, 2 Hen. 5, Pt. 1, M. 36.

*Annotation* :—*Distd.* Wensleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

58. ——— **Grant without words of limitation.**—FAUNHOPE (PEERAGE) CASE (1432), cited in 8 State Tr. N. S. at p. 651.

*Annotation* :—*Distd.* Wensleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

59. ——— **Letters patent** were granted by the Crown to a commoner, purporting to create him a baron of the United Kingdom for life, with a seat in Parliament. The letters patent were followed by a writ of summons to Parliament in the usual form. The House referred it to a Committee for Privileges to examine & consider the letters patent & to report their opinion thereon to the House. This reference was made without any previous reference of the matter by the Crown to the House. The Committee reported "that neither the letters patent nor the letters patent with the usual writ of summons issued in pursuance thereof, can entitle the grantee therein named to sit & vote in Parliament." The House affirmed the resolution. The Committee declined to put a question to the judges on this matter, which did not involve the validity of the patent for all purposes, but only the right under it to sit & vote in this House.—WENSLEYDALE (PEERAGE) CASE (1856), 5 H. L. Cas. 958; 8 State Tr. N. S. 479; 10 E. R. 1181, H. L.

*Annotations* :—*Consd.* Rhondda's Case, [1922] 2 A. C. 339. *Reid.* Buckhurst (Peerage) Case (1876), 2 App. Cas. 1; A.-G. for Dominion of Canada v. A.-G. for Province of Ontario (1879), 67 L. J. P. C. 17.

60. ——— **Pur autre vie—Life of father.**—RUTLAND (PEERAGE) CASE (1389), Reports on the Dignity of a Peer, Vol. 2, p. 191.

*Annotation* :—*Consd.* Wensleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

61. **Patent purporting to give precedence.**—MOUNTJOY'S CASE (1628), 3 Lords Journals, 774; cited in 8 State Tr. N. S. p. 608, n., H. L.

*Annotation* :—*Reid.* Wensleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

62. **Scottish peerages—Limitation to heirs male general presumed.**—SUTHERLAND (EARLDOM) CASE (1771), Maidment's Reports of Peerage Claims, 55; cited in L. R. 2 Sc. & Div. at p. 259.

*Annotations* :—*Apld.* Herries (Peerage) Case (1858), L. R. 2 Sc. & Div. 258; Mar (Peerage) Case (1875), 1 App. Cas. 1.

63. ——— **ANNANDALE (PEERAGE) CASE** (1844), 1 Scots Peerage, 269; cited in 5 Bli. N. S. p. 251; 5 E. R. 304, H. L.

*Annotations* :—*Consd.* Devon (Peerage) Case (1831), 5 Bli. N. S. 220. *Mentd.* Sturla v. Froccia (1880), 43 L. T. 209.

64. ——— **(1) On a claim to a Scottish peerage**, there being no patent or charter of creation or enrolment thereof discovered, a copy of an enrolment of a commission under the Great Seal & King's sign manual, dated in Feb. 1605, directing the comrs. to create James, Lord Drummond, Earl of Perth, was received & held, in conjunction with subsequent entries in the Parliament records, to be sufficient proof of the creation of the earldom.

(2) In the absence of the instrument of creation of a Scottish peerage, the limitations are taken from usage to be to the grantee & his heirs male general.

(3) On the death of a peer, leaving his eldest son & heir, who had been attainted, the peerage does not vest in him, nor, on his death, in the nearest heir male, but is forfeited, as much as if he had been a peer at the time of the attainder.

(4) A peerage limited to a man, & his heirs male, is one entire estate, & no substitution of heirs takes place.

(5) A peerage limited to a man & his heirs male whomsoever, is forfeitable under 26 Hen. 8, c. 13.

(6) Attested copies of French registers of marriages, births & deaths :—*Held* : admissible evidence, upon the testimony of a French advocate, that such registers were kept according to French law, & would be received in evidence in the French cts.—PERTH (EARLDOM) CASE (1848), 2 H. L. Cas. 805; 6 State Tr. N. S. 1126; 9 E. R. 1322, H. L.

65. ——— **(1) In the absence of contrary limitation**, the invariable presumption of law is, that a peerage descends to heirs male, & not to heirs general.

(2) The legal presumption in favour of heirs male may be rebutted by authoritative evidence, but not by inferential deduction. Were this rule departed from, many peerage claims would start up.—HERRIES (PEERAGE) CASE (1858), L. R. 2 Sc. & Div. 258; 3 Macq. 585, H. L.

*Annotation* :—*Apld.* Mar (Peerage) Case (1875), 1 App. Cas. 1.

66. ——— **(1) Queen Mary's creation of the Earldom of Mar in 1565** proved by a long train of circumstantial evidence.

Upon a review of all the circumstances of the case, I have arrived at the conclusion that the determination of it must depend solely on the effect of the creation of the dignity by Queen Mary & on that alone; . . . & there being no charter or instrument of creation in existence, & nothing to show what was to be the course of descent of this dignity, the *prima facie* presumption of law is that it is descendible to heirs male, which presumption has not in this case been rebutted by any evidence to the contrary (LORD CHELMSFORD).

It is clearly made out that the title of Mar which now exists was created by Queen Mary, some time between July 28 & Aug. 1, 1565; . . . & the only question in the case is whether that peerage so created by Queen Mary should be taken to be, according to the ordinary rule, a peerage descendible to male heirs only, or whether it should be taken to be a peerage descendible to heirs general. Now the *prima facie* presumption being in favour of heirs male . . . there is absolutely nothing which can be taken to be evidence in any way countervailing the *prima facie* presumption.

**Sect. 3.—Creation: Sub-sect. 3. Sect. 4: Sub-sects. 1, 2 & 3.]**

... The burden of proof lies upon opposing petitioner, & it not having been in any way discharged I am compelled to arrive at the conclusion ... that this must be taken to be a dignity descendible to heirs male, & therefore that it is now vested in the Earl of Kellie (LORD CAIRNS, C.).

(2) In the competition between Bruce & Baliol for the Crown of Scotland, the assessors appointed by King Edward, in answer to questions put to them, stated that "earldoms in the kingdom of Scotland were not divisible, & that if an earldom devolved upon daughters, the eldest born carried off the whole in entirety," thus speaking of a descent to females as a possible event (LORD CHELMSFORD).—MAR (PEERAGE) CASE (1875), 1 App. Cas. 1, H. L.

**SECT. 4.—PRIVILEGE.**

**SUB-SECT. 1.—IN GENERAL.**

**67. Right to sit & vote in Parliament—Life peer.]**—WENSLEYDALE (PEERAGE) CASE, No. 59, ante.

—Scottish peer created peer of United Kingdom.]—See Nos. 36, 37, ante.

**68. — Peeress in own right.]**—Take the case of a peeress in her own right, who, if of the other sex, would have a seat & vote in the House of Lords, can she appear & take her seat there? No; it is unquestionable that she can neither sit herself nor vote by proxy (WILLES, J.).—CHORLTON v. LINGS (1868), L. R. 4 C. P. 374; 1 H. P. & Colt. 1; 38 L. J. C. P. 25; 19 L. T. 534; 32 J. P. 824; 17 W. R. 284.

**Annotations:—**Consd. Rhondda's Case, [1922] 2 A. C. 339. *Mentd.* Chorlton v. Kessler (1868), L. R. 4 C. P. 397; Stowe v. Julliffe (No. 2) (1874), 43 L. J. C. P. 265; Beresford-Hope v. Sandhurst (1889), 23 Q. B. D. 79; De Souza v. Cobden (1891), 85 L. T. 130; Nairn v. St. Andrews University, [1909] A. C. 147; *Re* Royal Naval School, Seymour v. Royal Naval School (1910), 79 L. J. Ch. 366; Bebb v. Law Soc., [1914] 1 Ch. 286; A.-G. v. Liverpool Corp., [1922] 1 Ch. 211.

**69. — Sex Disqualification (Removal) Act, 1919 (c. 71), s. 1.]**—A peeress of the United Kingdom in her own right is not entitled by virtue of Sex Disqualification (Removal) Act, 1919 (c. 71), s. 1, to receive a writ of summons to Parliament.—RHONDDA'S (VISCOUNTESS) CASE, [1922] 2 A. C. 339; 92 L. J. P. C. 81; 128 L. T. 155; 38 T. L. R. 759; 66 Sol. Jo. 630, H. L.

—Allen heir to peerage.]—See ALIENS, Vol. II., p. 139, No. 141.

**70. Election of Scottish peer—Right to vote.]**—(1) The pedigree showing clearly claimant's title as the nearest heir male of the Breadalbane family:—*Held*: his claim was "made out."

(2) Under 10 & 11 Vict. c. 52, s. 4, when the right to a peerage or the right to vote in respect of a peerage is established & notified to the Lord Clerk Registrar by order of the House of Lords, no one except the individual whose right is so established shall during his or her life be allowed to vote in respect of such peerage until the House of Lords shall otherwise direct.—BREADALBANE (PEERAGE) CASE (1872), L. R. 2 Sc. & Div. 269, H. L.

**Annotations:—**Generally, *Mentd.* De Thoren v. A.-G. (1876), 1 App. Cas. 686; Fox v. Bearblock (1881), 44 L. T. 508; Sazry Velalder Aronogary v. Semboconty Valgalle (1881), 6 App. Cas. 364; *Re* Cooke's Trusts (1887), 56 L. T. 737; Halliday v. Phillips (1889), 23 Q. B. D. 48.

**71. — Oath.]**—A writ under 6 Ann. c. 23, to certify that a Scottish peer has taken the oaths in Chancery, does not require a *teste*; & if the *teste* is repugnant & impossible, it shall not vitiate.—TWEEDALE'S (MARQUIS) CASE (1794), 1 Anst. 143; 145 E. R. 826, H. L.

**Right to vote at election of Member of Parliament.]**—See ELECTIONS, Vol. XX., pp. 9, 10, Nos. 24–31.

**Privilege of Parliament.]**—See PARLIAMENT, Vol. XXXVI., pp. 288–295.

**Privileges of peeresses.]**—See Sub-sect. 4, *post*.

**SUB-SECT. 2.—PRIVILEGES OF IRISH PEERS.**

**72. How far entitled to privilege of peerage—Members of House of Commons excepted.]**—Since the union with Ireland Irish peers, with the exception of those, who are members of the House of Commons, are entitled to every privilege, & therefore to the letter missive.—ROBINSON v. ROKEBY (LORD) (1803), 8 Ves. 601; 32 E. R. 488, L. C.

**73. — Service on grand jury.]**—An Irish peer ought not to serve upon a grand jury unless he is a member of the House of Commons.—IRISH PEER CASE (1806), Russ. & Ry. 117; 168 E. R. 713, C. C. R.

**74. — Freedom from arrest.]**—COATES v. HAWARDEN (LORD), No. 88, *post*.

**75. No privilege in case of waste.]**—There is no privilege of peerage in Ireland in the case of waste.—*Ex p.* ANNESLEY (1747), 3 Atk. 481; 26 E. R. 1076, L. C.

**SUB-SECT. 3.—FREEDOM FROM ARREST.**

**76. In civil cases.]**—(1) A countess, either by marriage or descent, cannot be arrested for debt or trespass; she is a peer of the realm & shall be tried by her peers; & no one of the nobility, who is a Lord of Parliament, & by law ought to be tried by his peers, shall in such cases be arrested.

(2) Duke or not duke, earl or not earl, etc., shall be tried by record, & not by the country. But in the case of a woman who is a duchess, etc., by marriage, the trial shall be by the country.

(3) If a baroness, etc., by marriage marries again under the degree of nobility she has lost her name of dignity. But a woman, noble by birth or descent, whomsoever she marries, remains noble.

(4) In a plea in abatement of the writ, *dominus* is too general. The plea ought to be that deft. is a Baron of Parliament, & he ought to show a writ under seal testifying the same.—RUTLAND'S (COUNTESS) CASE (1606), 6 Co. Rep. 52 b; Moore, K. B. 765; 77 E. R. 332.

**Annotations:—***As to* (1) *Re* Rhondda's Case, [1922] 2 A. C. 339. *As to* (2) *Re* R. v. Knollys (1693), 1 Ld. Raym. 10. *As to* (4) *Re* R. v. Knollys (1693), 1 Ld. Raym. 10. *Generally, Re* Cowley v. Cowley (1900), 83 L. T. 218. *Mentd.* Calvin's Case (1609), 7 Co. Rep. 1 a; Macaulay's Case (1611), 9 Co. Rep. 65 b; Hodges v. Marks (1618), Cro. Jac. 485; R. v. Hampden (1637), 3 State Tr. 826; Benyon v. Evelyn (1664), O. Bridge. 324; Harland v. Cooke (1673), Freem. K. B. 315; Gwinn v. Poole (1692), 2 Lut. App. 1560; Parsons v. Loyd (1772), 3 Wils. 341; R. v. Cooke (1824), 2 B. & C. 871; Gosset v. Howard (1847), 16 L. J. Q. B. 345; Hooper v. Lane (1857), 6 H. L. Cas. 443; Demer v. Cook (1903), 88 L. T. 629.

**77. —.]**—SHREWSBURY'S (COUNTESS) CASE (1612), 12 Co. Rep. 94; 2 State Tr. 769; 77 E. R. 1369, P. C.

**Annotation:—***Re* Grand Opinion for the Prerogative concerning the Royal Family (1717), Fortes. Rep. 401.

**PART I. SECT. 4, SUB-SECT. 2.**

**a. Abuse of process of court—Whether any remedy available.]**—If a peer of the realm abuse a party in the service of the process of the ct., the ct. can give no remedy.—DENN v. DELAWARE (LORD), 1 How. E. E. 367.—IR.

78. —.]—*FOSTER v. JACKSON* (1615), Hob. 52; 80 E. R. 201; *sub nom.* *FORSTER'S CASE*, Moore, K. B. 857.

*Annotations*.—*Mentd.* *Phillips v. Bury* (1694), Skin. 447; *R. v. Baden* (1699), Show. Parl. Cas. 72; *R. v. Griepo* (1696), 1 Ld. Raym. 366; *Beal v. Simpson* (1697), 1 Ld. Raym. 408; *Barber v. Palmer* (1701), 1 Ld. Raym. 693; *Thorp v. Thorp* (1701), 12 Mod. Rep. 455; *Vaspor v. Edwards* (1701), 12 Mod. Rep. 658; *Worsenholm v. Berks Manu- facturers* (1701), 12 Mod. Rep. 599; *Beacon v. Peck* (1719), 11 Mod. Rep. 311; *Lancaster v. Fielder* (1727), 2 Ld. Raym. 1451; *Bank of England v. Fielder* (1727), 2 Ld. Raym. Hard. 219; *R. v. Cotton* (1751), Park. 112; *Hawks v. Crofton* (1758), 2 Burr. 698; *Camplin v. Bullman* (1761), Park. 198; *Mitchell v. Torup* (1766), Park. 297; *Giles v. Grover* (1832), 9 Bing. 128; *Lucas v. Nookells* (1833), 10 Bing. 157; *Canadian Prisoners' Case, Watson's Case, Re Parker, R. v. Batchelder* (1839), 3 State Tr. N. S. 963; *Bircham v. Tucker* (1840), 8 Scott, 469; *Thompson v. Parish* (1859), 5 C. B. N. S. 685; *Lehaine v. Philpott* (1875), 33 L. T. 98.

79. —.]—A writ of *latitat* issued against a peer superseded on motion, grounded on an office copy of the *præcipe*, in which deft. was styled Baron of W.—*COUCHE v. ARUNDEL* (LORD) (1802), 3 East, 127; 102 E. R. 545

80. — *Peeress.*—*RUTLAND'S (COUNTESS) CASE*, No. 76, *ante*.

81. —.]—ANON. (1670), 1 Vent. 298; 86 E. R. 192.

*Annotation*.—*Mentd.* *Holliday v. Pitt* (1733), *Leo temp.* Hard. 37.

82. —.]—*CASSIDY v. STEUART* (1841), 2 Man. & G. 437; 9 Dowl. 366; *Drinkwater*, 64; 2 Scott, N. R. 432; 10 L. J. C. P. 57; 5 Jur. 25; 133 E. R. 817.

*Annotations*.—*Mentd.* *Snape v. Waldegrave* (1842), 12 L. J. Q. B. 99; *Taylor v. Stuart do Rotheray* (1842), 4 Man. & G. 388; *Butcher v. Steuart* (1843), 11 M. & W. 857; *Hay v. Charleville* (1844), 13 L. J. Q. B. 201; *European & American Finance Corp'n. v. M. P.* (1865), 13 L. T. 447; *Re Newcastle, Ex p. Morris* (1869), 5 Ch. App. 172.

83. — *Claimant to peerage.*—If claimant of an earldom be arrested by the addition of gentleman; the ct., to prevent prejudice to his claim, will allow him to give bail without joining in the recognisance.—*SMITH v. VILLARS* (1702), 7 Mod. Rep. 38; 1 Salk. 3; 87 E. R. 1079.

*Annotation*.—*Consd.* *Digby v. Alexander* (1832), 9 Bing. 412.

84. — *Whether privilege available before taking seat in Parliament.*—A peer by patent who is arrested by his Christian & surname as a commoner shall not be discharged on common bail if he has never sat in Parliament.—*BANBURY'S (LORD) CASE* (1706), 2 Ld. Raym. 1247; 2 Salk. 512; 92 E. R. 321.

*Annotations*.—*Refd.* *Holliday v. Pitt* (1734), *Leo temp.* Hard. 37; *Brass Crosby's Case* (1771), 3 Wils. 188.

85. —.]—*Re HARLEY (LORD)* (1840), 7 State Tr. N. S. App. A. 1130; *sub nom.* *M'CABE v. HARLEY (LORD)*, 12 L. T. O. S. 313.

86. — *Distinct from privilege of Parliament.*—*CASSIDY v. STEUART* (1841), 2 Man. & G. 437; 9 Dowl. 366; *Drinkwater*, 64; 2 Scott, N. R. 432; 10 L. J. C. P. 57; 5 Jur. 25; 133 E. R. 817.

*Annotations*.—*Refd.* *Snape v. Waldegrave* (1842), 12 L. J. Q. B. 99; *Taylor v. Stuart do Rotheray* (1842), 4 Man. & G. 388; *Hay v. Charleville* (1844), 13 L. J. Q. B. 201; *Re Newcastle, Ex p. Morris* (1869), 5 Ch. App. 172. *Mentd.* *Butcher v. Steuart* (1843), 11 M. & W. 857; *European & American Finance Corp'n. v. M. P.* (1865), 13 L. T. 447.

87. — *Privilege cannot be waived.*—The ct. will not grant an attachment against a peer for not paying a sum of money awarded, though deft. consent on condition that the attachment shall lie in the office for a certain time.—*WALKER v. GROSVENOR (EARL)* (1797), 7 Term Rep. 171; 101 E. R. 915.

*Annotations*.—*Mentd.* *Wellesley v. Beaufort, Long Wellesley's Case* (1831), 2 Russ. & M. 639; *Carron Iron Co. v. MacLaron* (1855), 5 H. L. Cas. 416.

88. — *Irish peer—Having voted at election of representative peers.*—An Irish peer who has voted in the election of representative peers, cannot be arrested or sued by *capias*.—*COATES v. HAWARDEN (LORD)* (1827), 7 B. & C. 388; 2 State Tr. N. S. App. A. 998; 1 Man. & Ry. K. B. 110; 6 L. J. O. S. K. B. 62; 108 E. R. 768.

89. — *Scottish peer—Having voted at election of representative peers.*—*Qu.*: whether the mere fact of having voted at an election of representative peers for Scotland is conclusive as to deft.'s privilege from arrest.—*SMART v. JOHNSTONE* (1837), 3 M. & W. 69; 6 Dowl. 90; *Murp. & H.* 351; 7 L. J. Ex. 14; 150 E. R. 1080.

90. *In contempt—Whether claim to privilege available.*—ANON. (1572), Dal. 83; 123 E. R. 293.

91. —.]—*STORY v. PAWLET* (1580), Cary, 73; 21 E. R. 39, L. C.

92. —.]—*PHEASANT v. PHEASANT* (1870), as reported in 2 Vent. 340, n.; 86 E. R. 475.

93. —.]—*THORNBY d. HAMILTON (DUKE) v. FLEETWOOD* (1713), Cooke, Pr. Cas. 8; 125 E. R. 924.

94. —.]—Where the husband was a lunatic, the wife, though an Irish peeress, committed for not producing him.—*WENMAN'S (LORD) CASE* (1721), 2 Eq. Cas. Abr. 584; 1 P. Wms. 701; 22 E. R. 491, L. C.

95. —.]—Attachment may issue against a peer, but for not returning a *fi. fa. de bonis ecclesiasticis*, it is proper to move against the chancellor, commissary, or official.—*R. v. ST. ASAPH (BP.)* (1752), 1 Wils. 332; 95 E. R. 646; *sub nom.* *FOLLY v. LANGHORNE*, Say. 50.

*Annotation*.—*Mentd.* *Miller v. Knox* (1838), 4 Bing. N. C. 574.

96. —.]—*Qu.*: whether a trustee, being a peer of the realm, is privileged from arrest.—*AYLESFORD (EARL) v. POULETT (EARL)*, [1892] 2 Ch. 60; 61 L. J. Ch. 406; 60 L. T. 484; 40 W. R. 424; 8 T. L. R. 446; 36 Sol. Jo. 363.

*Annotation*.—*Mentd.* *Re Smith, Hands v. Andrews*, [1893] 2 Ch. 1.

97. — *In Ecclesiastical Courts.*—The ct. will pronounce an Irish peer in contempt for non-payment of costs, & direct such contempt to be signified, leaving the Lord Chancellor to decide whether the writ *de contumace capiendo* should issue.—*WESTMEATH v. WESTMEATH* (1829), 2 Hag. Ecc. 653; 162 E. R. 987; *subsequent proceedings* (1831), 9 L. J. O. S. Ch. 177, L. C.

98. —.]—A peer is privileged from arrest under process from the Ecclesiastical Cts.—*WESTMEATH v. WESTMEATH* (1831), 9 L. J. O. S. Ch. 177, L. C.; *previous proceedings* (1829), 2 Hag. Ecc. 653.

99. *Where fine due to Crown.*—A *capias* lies against a peer where a fine is due to the Crown.—*LINCOLN (EARL) v. FLOWER* (1596), Cro. Eliz. 503; 78 E. R. 753.

*Annotation*.—*Mentd.* *Cassidy v. Stuart* (1841), 2 Man. & G. 437.

100. *Succession to peerage—Discharge of bail.*—Bail is to be discharged, if deft. succeed to a peerage.—*TRINDER v. SHIRLEY* (1778), 1 Doug. K. B. 45; 99 E. R. 33.

101. *Conditions under which privilege taken away by statute.*—Where persons, having as a class certain privileges, are by statute subjected to certain liabilities, their privileges being expressly reserved to them, & other persons having the same privileges are afterwards as a class subjected to the same liabilities, but nothing is said of their privileges, these privileges still continue to exist.—*NEWCASTLE (DUKE) v. MORRIS*

**Sect. 4.—Privilege: Sub-sects. 3, 4 & 5, A., B., C., D. & E.]**

(1870), L. R. 4 H. L. 661; 40 L. J. Boy. 4; 23 L. T. 569; 35 J. P. 548; 19 W. R. 26, H. L.; *aff. S. C. sub nom. Re NEWCASTLE (DUKE), Ex p. MORRIS* (1869), 15 Ch. App. 172, L. J.

**Irish peer.]—See No. 88, ante.**

**Privilege of Parliament.]—See PARLIAMENT, Vol. XXXVI., pp. 291–293.**

#### SUB-SECT. 4.—PRIVILEGES OF PEERESSES.

**102. Wives of peers — Entitled to privilege of peerage.]—The widows of peers are to have privilege of peers, not to be arrested.—ANON. (1676), 2 Cas. in Ch. 224; 22 E. R. 920, L. C.**

**103. — Effect of marriage with commoner.]—There is a difference where a noble woman marries a noble man of less noble degree than she is, & when she marries one that is not noble, for in the first case she shall hold the dignity of her second husband, but in the last case she shall retain her ancient dignity (BROOKE, J.).—SUFFOLK'S (DUCHESS) CASE (1557), Owen, 81; 4 Leon. 196; 74 E. R. 914.**

**Annotation:—***Refd. Cowley v. Cowley*, [1900] P. 118.

**104. — A woman who attains nobility by marriage afterwards marrying under the degree of nobility loses her dignity; otherwise of a woman noble by descent.—ACOTON'S CASE (1608), 4 Co. Rep. 117 a; 76 E. R. 1107.**

**Annotations:—***Refd. Cowley v. Cowley*, [1900] P. 118. *Mentd. Ferrers' Case* (1760), 2 Eden, 373.

**105. — RUTLAND'S (COUNTESS) CASE, No. 76, ante.**

**106. — ANON. (1629), Hct. 88; 124 E. R. 364.**

**107. — DACRES' (LADY) CASE (1661), 11 Lords Journals, 298, H. L.**

**Annotation:—***Apld. Cowley v. Cowley*, [1901] A. C. 450.

**108. — Second marriage to nobleman of less degree—Acquire dignity of second husband.]—SUFFOLK'S (DUCHESS) CASE, No. 103, ante.**

**109. — Peer divorced on wife's petition—Remarriage of petitioner with commoner.]—COWLEY (EARL) v. COWLEY (COUNTESS), No. 211, post.**

**110. — May sue as pauper.]—WELLESLEY v. WELLESLEY (1847), 16 Sim. 1; 60 E. R. 772; subsequent proceedings (1852), 1 De G. M. & G. 501, L. J.**

**Annotations:—***Mentd. Re l'age, Page v. Page* (1853), 16 Beav. 588; *Re Lancaster* (1854), 18 Jur. 229.

**111. Peeress for life — Not entitled to privilege of peerage.]—RIVERS' (COUNTESS) CASE (1650), Sty. 252; 82 E. R. 687.**

**Annotation:—***Consd. Wonsleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479.

**112. — Husband no right to title.]—TALBOYS (PEERAGE) CASE (circa 1526), Collins's Baronies by Writ, 11, H. L.**

**Annotation:—***Refd. Wonsleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479.

**Right to sit & vote in Parliament.]—See Nos. 68, 69, ante.**

**Privilege from arrest.]—See Nos. 76, 82, ante.**

#### SUB-SECT. 5.—IN LEGAL PROCEEDINGS.

##### A. In General.

**113. Mode of trial — Peeress.] — RUTLAND'S (COUNTESS) CASE, No. 76, ante.**

**114. Right to refuse examination by lords of council.]—SHREWSBURY'S (COUNTESS) CASE (1612),**

**12 Co. Rep. 94; 2 State Tr. 769; 77 E. R. 1369, P. C.**

**Annotation:—***Mentd. Grand Opinion for the Prerogative concerning the Royal Family* (1717), Fortes. Rep. 401.

**115. Waiver of privilege.]—On granting a trial at Bar in ejectment by a peer the ct. will not oblige him to give security for costs or waive his privilege.—CONINGSBY'S (LORD) CASE (1721), 8 Mod. Rep. 20; 88 E. R. 16.**

**Annotations:—***Mentd. Short v. King* (1726), 3 Stra. 681; *London Corpn. v. Cox* (1867), L. R. 2 H. L. 239.

**116. — If a peer pltf. gives a rule for examining witnesses, deft. may proceed to examine without fear of breach of privilege. So if a peer brings an action at law, it is no breach to bring a bill for injunction (LORD HARDWICKE, C.).—DERBY (EARL) v. ATHOL (DUKE) (1751), 2 Ves. Sen. 298; 28 E. R. 193, L. C.**

**117. — It lies on pltf. to discover whether deft. be entitled to the privilege of peerage; & although he may have often waived the privilege, that will not make it regular to sue him by common process.—FORTNAM v. ROKEBY (LORD) (1812), 4 Taunt. 668; 128 E. R. 493.**

**Annotation:—***Mentd. Cassidy v. Stuart* (1841), 2 Man. & G. 437.

**118. Description in proceedings.]—A title of dignity is part of the name of the person who has it, & he must be described by it even when deft. in a suit by bill. The title of baronet is a title of dignity.—LAPIERE v. GERMAIN (SIR JOHN) & NORFOLK (DUCHESS) (1703), 2 Ld. Raym. 859; 92 E. R. 74; *sub nom. LEPARA v. GERMAIN*, 1 Salk. 50; 3 Salk. 234; Holt, K. B. 493.**

**119. — Irish peer.]—A peer of Ireland cannot sue or prosecute by his name of dignity; but must be described by his proper name, with the addition of his degree & title.—R. v. GRAHAM (1791), 2 Leach, 547; 168 E. R. 376.**

**Annotation:—***Refd. R. v. Gregory* (1846), 8 Q. B. 508.

**120. — Indictment.] — Indictment for assaulting a duke's eldest son, styling him by his father's second title according to common parlance, ill.—ANON. (circa 1700), 2 Salk. 451; 91 E. R. 391.**

**Annotation:—***Refd. R. v. Gregory* (1846), 2 New Sess. Cas. 229.

**121. Habeas corpus.] — Peers must yield obedience to writs of habeas corpus.—R. v. FERRERS (EARL) (1758), 1 Burr. 631; 97 E. R. 483, H. L.**

**Annotation:—***Mentd. R. v. Bourdon* (1847), 2 Car. & Kir. 366.

**122. Criminal prosecution — Right to sit covered.]—In a criminal prosecution against a peer in K. B. he has no right to sit covered or to have a place assigned to him.—R. v. ABINGDON (LORD) (1794), 1 Esp. 226; 170 E. R. 337, N. P.**

**Annotations:—***Mentd. R. v. Creevey* (1813), 1 M. & S. 273; *Hodgson v. Scarlett* (1817), Holt, N. P. 621; *R. v. Cardile* (1819), 3 B. & Ald. 167; *Lewis v. Walter* (1821), 4 B. & Ald. 605; *R. v. Harvey* (1823), 3 Dow. & Ry. K. B. 464; *Flint v. Pike* (1825), 4 B. & C. 473; *Roberts v. Brown* (1834), 10 Bing. 519; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *R. v. Pembroke* (1842), 3 Q. B. 901; *Davidson v. Duncan* (1857), 7 E. & B. 229; *Wagon v. Walter* (1868), 8 B. & S. 671; *R. v. Munslow*, [1895] 1 Q. B. 758; *Jones v. Hulton*, [1909] 2 K. B. 444.

**123. Receiver.]—A peer not to be the receiver.—A.-G. v. GEE (1813), 2 Ves. & B. 208; 35 E. R. 298, L. C.**

**124. Bail — Not accepted from peer.] — Bail rejected, on the ground that one of them was a peer of the realm.—BURTON v. ATHERTON (1816), 2 Marsh. 232.**

**Annotation:—***Refd. Duncan v. Hill* (1822), 1 Dow. & Ry. K. B. 126.

**125. Custody of infant peer — Jurisdiction in Scotland.]—The Great Seal has no judicial jurisdiction in Scotland though it may exercise**

ministerial & administrative functions there; & it exercises no greater or other jurisdiction touching the custody of an infant peer than of an infant commoner.—*STUART v. BUTE* (MARQUIS), *STUART v. MOORE* (LADY) (1861), 9 H. L. Cas. 440; 7 Jur. N. S. 1129; 9 W. R. 722; 11 E. R. 799; *sub nom. STUART v. MOORE, Re BUTE* (MARQUIS), 4 L. T. 382, H. L.; *reversg. S. C. sub nom. BUTE* (MARQUESS) *v. STUART*, 2 Giff. 582.

*Annotations*:—*Mentl. Nugent v. Vetzera* (1866), L. R. 2 Eq. 704; *Brown v. Collins* (1883), 25 Ch. D. 56.

**Barrister peer**—Right of audience in Lords.]—*See BARRISTERS*, Vol. III., p. 318, No. 45.

### B. Pleading Privilege.

126. Whether necessary to plead—Judicial notice.]—*HUNTER v. DELORAINÉ* (LORD) (1772), Lofft, 49; 98 E. R. 526.

127. —.]—If an Irish peer is sued by bill, this ct. will not stay the proceedings on motion, but will put him to plead his privilege in abatement.—*DAVIS v. RENDLESHAM* (1817), 7 Taunt. 679; 1 Moore, C. P. 410; 129 E. R. 270.

128. Sufficiency of plea.]—*LOVEL'S CASE* (1430), Y. B. 8 Hen. 6, fo. 9 B. pl. 22; cited in 6 Co. Rep. p. 53 b; 77 E. R. 334.

*Annotation*:—*Apld. R. v. Cooke* (1824), 2 B. & C. 871.

129. —.]—*RUTLAND'S (COUNTESS) CASE*, No. 76, *ante*.

130. — Must be clearly made out.]—The ct. will not, on motion, cancel a bail bond given by a person claiming to be an Irish peer, unless his peerage is clearly made out.—*STOREY v. BIRMINGHAM* (1823), 3 Dow. & Ry. K. B. 488; 2 L. J. O. S. K. B. 34.

131. — Derivation of title.]—Where deft. pleads in abatement to an indictment for a misdemeanour that he is a peer, he must state that he is a peer of the United Kingdom, & the mode in which he derives his title.—*R. v. COOKE* (1824), 2 B. & C. 871; 4 Dow. & Ry. K. B. 592; 2 Dow. & Ry. M. C. 354; 107 E. R. 605; *previous proceedings*, 2 B. & C. 618.

132. — Where title denied.]—Pltf. declared as Earl of S. deft. pleaded in abatement that pltf. was not Earl of S.:—*Held*: pltf., in his replication was bound to show how he claimed the dignity.—*STIRLING (EARL) v. CLAYTON* (1832), 1 Cr. & M. 241; 3 Tyr. 154; 2 L. J. Ex. 43; 149 E. R. 390.

*Annotation*:—*Mentl. May v. Seyler* (1848), 2 Exch. 563.

133. — Title at date of writ.]—A plea in abatement by an earl, of misnomer in his title of dignity, must allege positively, & not merely by inference, that he was earl at the time of suing out the writ.—*DIGBY v. ALEXANDER* (1832), 8 Bing. 416; 1 Dowl. 713; 1 Moo. & S. 559; 1 L. J. C. P. 122; 131 E. R. 454; *subsequent proceedings*, 9 Bing. 412.

### C. Security for Costs.

134. Whether ordered—Trial at Bar.]—*CONINGSBY'S (LORD) CASE*, No. 115, *ante*.

135. — Out of jurisdiction.]—A peer of the realm, who is resident abroad, cannot be required to give security for costs.—*FERRARS (EARL) v. ROBINS* (1834), 2 Dowl. 636; 3 L. J. Ex. 220.

*Annotation*:—*Reid. Raeburn v. Andrew* (1874), 30 L. T. 15.

136. — — —.]—Pltf. who is a peer, & out of the jurisdiction, must give the usual security for costs.—*ALDBOROUGH (LORD) v. BURTON* (1834), 2 My. & K. 401; 39 E. R. 997.

### D. Oaths.

137. In pleadings—Upon honour—Peer.]—*WARRINGTON (LORD) v. LEIGH* (1732), 2 Hov. Supp. 540; 34 E. R. 1217, L. O.

138. — — —.]—An amendment in the title of an answer being necessary, viz. instead of "the further answer to the original amended bill" entitling it "the further answer to the original bill & the answer to the amended bill" the answer, so amended, must in the case of a peer be again attested upon honour or as in the case of a common deft. it must be resworn.—*PEACOCK v. BEDFORD (DUKE)* (1813), 1 Ves. & B. 186; 35 E. R. 74, L. O.

139. — — —.]—The answer of a peer upon his protestation of honour may be read on the question of costs.—*DAWSON v. ELLIS* (1820), 1 Jac. & W. 524; 37 E. R. 467.

140. — — — Peeress.]—A peeress ordered to produce deed; confessed in her answer on honour only, not on oath.—*HAMILTON (DUKE) v. GERRARD (LADY)* (1699), Prec. Ch. 92; 24 E. R. 44, L. O.

141. — — —.]—Peeress, answering upon honour, in exactly the same situation as another deft. answering on oath.—*GILPIN v. SOUTHAMPTON (LADY)* (1812), 18 Ves. 469; 34 E. R. 394, L. C.

142. As witness—Upon oath.]—*WARRINGTON (LORD) v. LEIGH* (1732), 2 Hov. Supp. 540; 34 E. R. 1217, L. C.

— — —.]—*See EVIDENCE*, Vol. XXII., p. 451, Nos. 4717–4719.

### E. Execution.

143. *Capias ad satisfaciendum*.]—*R. v. REDMAN* (undated), cited Y. B. 11 Hen. 4 at p. 15.

*Annotations*:—*Reid. Lincoln v. Flower* (1596), Cro. Eliz. 503; *Rutland's Case* (1606), 6 Co. Rep. 53 b; *Foster v. Jackson* (1615), Hob. 52; *Wellesley v. Beaufort* (1831), 2 Russ. & M. 639.

144. Sequestration—Steps as procedure.]—*ANON.* (1671), 2 Vent. 342, n.; 86 E. R. 476.

145. — — —.]—*ATHOL (EARL) v. DERBY (EARL)* (1672), 1 Cas. in Ch. 220; 2 Lev. 72; 22 E. R. 771.

*Annotations*:—*Mentl. Wharam v. Broughton* (1748), 1 Ves. Sen. 180; *Goudy v. Duncombe* (1847), 1 Exch. 430.

146. — — —.]—*EYRE v. SHAFTSBURY (COUNTESS)* (1724), 2 P. Wms. 103; 2 Eq. Cas. Abr. 710; 24 E. R. 659; *sub nom. SHAFTSBURY (EARL) v. SHAFTSBURY*, Gilb. Ch. 172, L. C.

*Annotations*:—*Reid. Raymond's Case* (1734), Cas. temp. Talb. 58. *Mentl. Poinfort v. Windsor* (1752), 2 Ves. Sen. 472; *Mansell v. Mansell* (1757), Wilms. 36; *A.-G. v. Downing* (1767), Wilms. 1; *R. v. Green* (1781), 3 Doug. K. B. 36; *De Manneville v. De Manneville* (1804), 10 Ves. 52; *Re Long Wellesley* (1831), 2 State Tr. N. S. 911; *A.-G. v. Brodie* (1846), 11 Jur. 137; *A.-G. v. Magdalen College, Oxford* (1854), 18 Beav. 223; *Bell v. Holtby* (1873), L. R. 15 Eq. 178.

147. — — —.]—A sequestration *nisi* against a peer or Member of Parliament for want of his answer, if he answer, & the answer be reported insufficient, pltf. must move again for a sequestration *nisi*.—*RASHLEIGH v. BULLER* (1751), 1 Dick. 152; 21 E. R. 227.

— — —.]—*See, also, EXECUTION*, Vol. XXI., pp. 596, 597, Nos. 1797–1800.

### PART I. SECT. 4, SUB-SECT. 5.—C.

135 i. Whether ordered—Out of jurisdiction.]—A peer resident out of the jurisdiction will not be compelled to give security for costs, though he has no property apparent within the jurisdiction of the ct.—*DONAGAL'S (MARQUESS) LESSEE v. INGRAM* (1861), 18 L. T. O. S. 200.—*IR.*

### PART I. SECT. 4, SUB-SECT. 5.—E.

145 i. Sequestration.]—*KILWORTH (VISCOUNT) v. MOUNTASHILL (EARL)* (1892), 31 L. R. Ir. 81.—*IR.*

b. Attachment against peeress—Leave of court necessary.]—If a woman who was a peeress by marriage, has lost her privilege by marrying a

commoner, shall be served with process as a common person, & shall neglect or refuse to appear thereto, in such manner as she was entitled in the process, pltf. shall not enter an attachment against her, without leave of the ct. upon a special motion for that purpose.—*GASH v. PIERCE* (1730), 2 How. E. E. 633.—*IR.*

*Sect. 4.—Privilege: Sub-sect. 5, E., F. & G. Sect. 5: Sub-sects. 1 & 2, A. & B.; sub-sects. 3, 4 & 5.]*

**148. Estreat of bail.]**—If the body of a Baron of Parliament is not subject to execution, yet the bail shall stand . . . to pay the condemnation (ANDERSON, C.J.).—HARRIS & MOUNTJOY'S (LORD) CASE (1587), 2 Leon. 173; 74 E. R. 453.

*Annotations:—*Reid, *Cassidy v. Stewart* (1841), 2 Man. & G. 437; *Levy v. Lovell* (1880), 43 L. T. 242. *Mentd. Re Newcastle, Ex p. Morris* (1889), 5 Ch. App. 172.

**149. Defendant becoming peer after judgment.]**—*Qu.*: if judgment be obtained against deft. in trespass of assault, & he becomes a peer, what execution shall issue.—SAVILL'S (LORD) CASE (1630), Cro. Car. 205; 79 E. R. 780.

*Annotations:—*Reid, *R. v. Knollys* (1893), 1 Ld. Raym. 10; *Digby v. Stirling* (1832), 2 Moo. & S. 581. *Mentd. R. v. De Andmah* (Archbp.) & *Whaley* (1728), Fitz-G. 30.

**Duty of sheriff.]**—*See* EXECUTION, Vol. XXI., p. 466, No. 469.

**Execution by arrest.]**—*See* Sub-sect. 3, *ante*.

#### F. For Breach of Peace.

**150. General rule.]**—Privilege of peerage, not allowed on breach of the peace.—*R. v. CARMARTHEN (MARQUIS)* (circa 1720), Fortes. Rep. 359; 92 E. R. 890.

**151. Recognisances taken from peer.]**—Peers may be bound over to keep the peace by justices.—*R. v. SEVENOAKS (INHABITANTS)* (1845), 1 New Mag. Cas. 280; 14 L. J. M. C. 92; 5 J. T. O. S. 73; 9 J. P. 485.

*Annotations:—*Mentd. *R. v. Peterborough JJ.* (1857), 7 E. & B. 643; *Bromsgrove Overseers v. Halifax Overseers* (1858), 22 J. P. Jo. 417; *R. v. West Riding JJ.* (1858), E. & B. 713; *R. v. Skircoat* (1859), 28 L. J. M. C. 224; *R. v. Sussex JJ.* (1865), 4 B. & S. 966; *Liverpool Gas Light Co. v. Everton Overseers* (1871), L. R. 6 C. P. 414.

**152. — Whether enforceable.]**—Where a peer had been arrested by a warrant of two justices, & bound by recognisances with two sureties to keep the peace, the ct. refused an application for a *certiorari* to bring up the recognisances, on the ground of the justices having no jurisdiction in such a case as appct. was not in custody; & in the event of its being necessary to enforce the recognisances, their validity would be tried in another way.—*Ex p. GIFFORD* (1845), 1 New Sess. Cas. 490; 4 L. T. O. S. 341.

*Annotation:—*Reid, *R. v. Sevenoaks Inhabitants* (1845), 7 Q. B. 136.

#### G. Trial by Peers.

*See* CRIMINAL LAW, Vol. XIV., pp. 125, 126, Nos. 956–985.

### SECT. 5.—EXTINCTION AND SUSPENSION OF PEERAGE.

#### SUB-SECT. 1.—IN GENERAL.

**153. Failure of heirs indicated at creation.]**—*R. v. KNOLLYS* (1694), 1 Ld. Raym. 10; 2 Salk. 509; 91 E. R. 904; *sub nom. R. v. KNOWLES*, 12 Mod. Rep. 55; Comb. 273; 12 State Tr. 1187; *sub nom. R. v. BANBURY (EARL)*, Skin. 517.

*Annotations:—*Reid, *Re Rivett-Carnac's Will* (1885), 30 Ch. D. 136. *Mentd. Pridaux v. Morris* (1702), 7 Mod. Rep. 13; *R. v. Paty* (1704), 2 Ld. Raym. 1105; *Ferrers Case* (1760), 2 Eden. 373; *Burdett v. Abbot* (1811), 14 East. 1; *Digby v. Alexander* (1832), 8 Bing. 416; *Stockdale v. Hansard* (1839), 9 Ad. & El. 1; *Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479; *Fenton v. Hampton* (1858), 11 Moo. P. C. C. 347; *Bradlaugh v. Gossett* (1884), 50 L. T. 620; *Cowley v. Cowley*, [1900] P. 305.

**154. —.]**—GLANDORE'S (EARL) CASE (1856), cited in 5 H. L. Cas. 716; 10 E. R. 1084, H. L.

*Annotation:—*Reid, *Fermoy (Peerage) Case* (1856), 5 H. L. Cas. 716.

**155. Writ issued to son in peer's lifetime — Death in father's lifetime.]**—CLIFFORD'S (LORD) CASE (1694), cited 8 State Tr. N. S. at p. 659.

*Annotations:—*Reid, *Slane (Peerage) Case* (1835), 5 Cl. & Fin. 23. *Mentd. Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479.

#### SUB-SECT. 2.—ABEYANCE.

##### A. Descent to Co-Heirs.

**156. Right latent—Termination of abeyance by Crown.]**—ANON. (1218), cited Co. Litt. 165 a.

**157. —.]**—KING'S PREROGATIVE IN DIGNITIES (circa 1607), 12 Co. Rep. 112; 77 E. R. 1388.

**158. —.]**—OXFORD (EARLDOM) PETITIONS (1625), Collins's Baronies by Writ, 173; Co. Litt. 27 a; *sub nom. WILLOUGHBY OF ERESBY & OXFORD (EARL) CASE*, W. Jo. 96, 130; 82 E. R. 50, 69, H. L.

*Annotations:—*Consd. *Devon's Case* (1831), 2 Dow & Cl. 200; *Wiltes (Peerage) Case* (1869), L. R. 4 H. L. 126. *Reid. R. v. Knowles* (1693), 12 Mod. Rep. 55; *Braye (Barony) Case* (1839), West. 1; *Camoya (Peerage) Case* (1839), 5 Bing. N. C. 754; *G. E. Ry. v. Goldsmid* (1884), 9 App. Cas. 927; *Norfolk (Earldom) Case*, [1907] A. C. 10. *Mentd. R. v. London (Bp.) & Lancaster* (1693), 1 Show. 441; *Hunt v. Bourne* (1702), 1 Com. 124; *Wolferstan v. Lincoln (Bp.)* (1763), 2 Wils. 174.

**159. —.]**—WILLOUGHBY DE BROKE (BARONY) CASE (1695), Cruise on Dignities, 196; Collins's Baronies by Writ, 321; *sub nom. VERNY'S CASE*, Skin. 432; 90 E. R. 191, H. L.

*Annotation:—*Consd. *Wiltes (Peerage) Case* (1869), L. R. 4 H. L. 126.

**160. —.]**—CLINTON (PEERAGE) CASE (1704), Cruise on Dignities, 208.

**161. —.]**—CONYERS (PEERAGE) CASE (1800), Cruise on Dignities, 209.

**162. —.]**—ZOUCH (PEERAGE) CASE (1804), Cruise on Dignities, 2nd ed. 192; Hubback on Evidence of Succession, 482; 44 Lords Journals, 433, H. L.

*Annotation:—*Reid, *Braye (Peerage) Case* (1839), 6 Cl. & Fin. 757.

**163. —.]**—DE WALDEN (PEERAGE) CASE (1807), Cruise on Dignities, 2nd ed. 212; 46 Lords Journals, 115, H. L.

**164. Whether doctrine applicable to earldoms.]**—NORFOLK (EARLDOM) CASE, No. 8, *ante*.

**165. Proof of termination of abeyance.]**—MOWBRAY & SEGRAVE (PEERAGE) CASE (1877), Minutes of Evidence of Proceedings before the Committee of Privileges.

*Annotations:—*Consd. *St. John (Peerage) Case*, [1915] A. C. 282; *Beauchamp (Barony) Case*, [1925] A. C. 153.

**Dignities other than peerage.]**—*See* Part V., *post*.

##### B. Lapse of Time.

**166. No bar to claim.]**—HASTINGS (PEERAGE) CASE, No. 241, *post*.

**167. —.]**—(1) An ancient barony in fee, after having been enjoyed by the lineal heirs of the first baron successively for centuries, then becoming dormant for some time, was claimed & again enjoyed by one who, after full investigation, was found to be the heir of the first & last barons; it afterwards fell into & remained in abeyance among his coheirs for more than eighty years:—*Semble*: it is not necessary for one of these coheirs claiming the barony, to give proofs of the first creation, & of the divers mesne descents of it.

(2) *Semble*: on a claim to an ancient barony, minutes of proceedings on a former claim, before the King in Council, are admissible in evidence in the House of Lords.

(3) A long abeyance of a barony in fee, if satisfactorily explained, is no objection to a claim.

(4) A family pedigree, produced from the proper custody, & purporting to have been made by an ancestor of claimant before the year 1751, was offered in evidence, on proof of the handwriting, by a witness who had been for many years inspector of franks & of official correspondence; & who said that, from a few inspections he had of two or three other documents which were proved to be of the same ancestor's writing, he had formed in his mind such a standard of the character of his handwriting as to be able, without immediate comparison with those documents, to say whether any other document that might be produced to him was or was not in the same handwriting:—*Held*: the evidence was inadmissible; (5) claimant's solr., who said he had acquired a knowledge of the character of the ancestor's handwriting from having had occasion from time to time, in the course of his business for claimant, to examine several deeds & other documents written or signed by the ancestor, & which came to claimant together with property formerly belonging to that ancestor, was a competent witness to prove the handwriting of the pedigree.—*FITZWALTER (PEERAGE) CASE* (1844), 10 Cl. & Fin. 193, 946; 8 E. R. 716, 997, H. L.

*Annotation*:—*Generally*, *Reid*. Donoughmore (Peerage) Case (1853), 3 H. L. Cas. 822.

168. —.]—*MONTROSE'S (DUKE) CASE*, No. 15, *ante*.

169. — Though coupled with adverse possession.]—*WILLOUGHBY OF PARHAM CASE* (1767), Cruise on Dignities, 2nd ed. 169.

*Annotation*:—*Reid*. Lovat (Peerage) Case (1885), 10 App. Cas. 763.

170. — Absence of Irish peer in England.]—(1) A peer of Ireland being also a peer of England, & residing in England, does not lose his Irish title by long absence alone.

(2) Although a duke has not any possessions to support his dignity, yet it cannot be taken from him without an Act of Parliament.—*SHREWSBURY'S (EARL) CASE* (1612), 12 Co. Rep. 106; 2 State Tr. 741; 77 E. R. 1383, P. C.

*Annotations*:—*As to* (2) *Consd*. Wenleydale (Peerage) Case (1856), 8 State Tr. N. S. 479. *Generally*, *Reid*. R. v. Knowles (1693), 12 Mod. Rep. 55.

### SUB-SECT. 3.—MERGER.

171. In Crown.]—Leases made by the King of lands of the Duchy of Lancaster are not voidable for the nonage of the King, inasmuch as they pass from his person as King, & not as duke, for in the title of King the name of duke is merged.—*ANON.* (1560), 2 Dyer, 209 b; 73 E. R. 462.

172. —.]—The Sovereign cannot hold a peerage: accordingly, where a member of the Royal Family, who was a Peer of Ireland, succeeded to the Crown, the peerage became extinct.—*ORANMORE'S (LORD) CASE* (1848), 2 H. L. Cas. 910; 9 E. R. 1340, H. L.

173. —.]—*BUCKHURST (PEERAGE) CASE*, No. 47, *ante*.

174. In another peerage—Cannot be merged.]—*GREY DE RUTHYN CASE* (1640), Collins's Baronies by Writ, 195, 256; Cro. Car. 601; 79 E. R. 1117, H. L.

*Annotations*:—*Consd*. Berkeley (Peerage) Case (1861), 8 H. L. Cas. 21; Norfolk (Earldom) Case, [1907] A. C. 10. *Reid*. Devon (Peerage) Case (1831), 2 State Tr. N. S. 659; Braye (Barony) Case (1839), West. 1; Wenleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

175. —.]—*ROOS (BARONY) CASE* (1666), Collins's Baronies by Writ, 261, H. L.

### SUB-SECT. 4.—RESIGNATION, SURRENDER AND ASSIGNMENT.

176. Surrender to the Crown.]—*GREY DE RUTHYN CASE* (1640), Collins's Baronies by Writ, 195, 256, H. L.

*Annotations*:—*Consd*. Berkeley (Peerage) Case (1861), 8 H. L. Cas. 21. *Apld*. Norfolk (Earldom) Case, [1907] A. C. 10. *Reid*. Devon (Peerage) Case (1831), 2 State Tr. N. S. 659; Braye (Barony) Case (1839), West. 1; Wenleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

177. —.]—*PURBECK'S CASE* (1678), Collins's Baronies by Writ, 293; Cruise on Dignities, 113; *sub nom*. R. v. PURBECK (VISCOUNT), Show. Parl. Cas. 1; 1 E. R. 1, H. L.

*Annotations*:—*Consd*. Devon (Peerage) Case (1831), 5 Bl. N. S. 220; Berkeley (Peerage) Case (1861), 8 H. L. Cas. 21. *Apld*. Norfolk (Earldom) Case, [1907] A. C. 10. *Reid*. R. v. Knowles (1693), 12 Mod. Rep. 55; Kingston-upon-Hull Corpn. v. Horner (1774), 1 Cowp. 102; Wenleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

178. —.]—*NORFOLK (EARLDOM) CASE*, No. 8, *ante*.

179. Assignment.]—*GREY DE RUTHYN CASE* (1640), Collins's Baronies by Writ, 195, 256; Cro. Car. 601; 79 E. R. 1117, H. L.

*Annotations*:—*Consd*. Berkeley (Peerage) Case (1861), 8 H. L. Cas. 21; Norfolk (Earldom) Case, [1907] A. C. 10. *Reid*. Devon (Peerage) Case (1831), 2 State Tr. N. S. 659; Braye (Barony) Case (1839), West. 1; Wenleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

180. —.]—*BERKELEY (PEERAGE) CASE*, No. 13, *ante*.

181. —.]—*NORFOLK (EARLDOM) CASE*, No. 8, *ante*.

### SUB-SECT. 5.—FORFEITURE.

See Forfeiture Act, 1870 (c. 23), s. 1.

182. General rule.]—R. v. KNOLLYS, No. 10, *ante*.

183. Attainder of peer.]—(1) Ralph Nevil was, by letters patent under the Great Seal created Earl of Westmoreland, to him & the heirs male of his body:—*Held*: this was an estate tail within Statute de Donis, 1285 (c. 1), for it concerns land.

(2) After the death of Ralph, Charles Nevil, Earl of Westmoreland, lineal heir male of the body of Ralph, was attainted of high treason by outlawry & by Act of Parliament:—*Held*: the dignity was forfeited by force of a condition in law tacite annexed to the estate of the dignity; if it had not been forfeited by the common law, by 26 Hen. 8, c. 13, Charles had forfeited the dignity.—*NEVIL'S CASE* (1604), 7 Co. Rep. 33 a Cruise on Dignities, 195; 77 E. R. 460.

*Annotations*:—*As to* (1) *Reid*. Shrewsbury's Case (1605), 12 Co. Rep. 106; R. v. Knollys (1693), 1 Ld. Raym. 10; Ferrer's Case (1760), 2 Eden, 373.

184. — Where special remainder.]—*NORTHUMBERLAND'S (EARL) CASE* (1462), cited 7 Co. Rep. at p. 34 a; 77 E. R. 462.

*Annotations*:—*Reid*. Nichols v. Nichols (1675), 2 Plowd. 477; Tollemache v. Coventry (1834), 2 Cl. & Fin. 611. *Mentd*. Bushell's Case (1670), Vaugh. 135.

185. —.]—*BOLINGBROKE'S (LORD) CASE* (1751), Cruise on Dignities, 157.

*Annotation*:—*Reid*. Tollemache v. Coventry (1834), 2 Cl. & Fin. 611.

186. — No effect on collateral.]—*FERRERS' (EARL) CASE* (1760), 2 Eden, 373; 28 E. R. 942.

*Annotation*:—*Consd*. Re Rivett-Carnac's Will (1885), 30 Ch. D. 136.

187. — Son sitting in Parliament by writ at time of attainder.]—The fact that a son was sitting in Parliament by writ of summons in virtue of a barony belonging to a parent, would not, if that parent was attainted, save that barony from the consequences of that attainder.—*MONTACUTE & MONTHERMER (PEERAGES) CASE* (1874), L. R. 7 H. L. 305, H. L.



*Sect. 5.—Extinction and suspension of peerage: Sub-sect. 5. Sects. 6 & 7: Sub-sects. 1, 2 & 3, A.]*

188. — Restitution in blood by Act of Parliament.]—OXENFORD'S (COUNT) CASE (1393), 3 Rotuli Parliamentorum, 302, H. L.

189. — —.]—STOURTON'S (LORD) CASE (1575), 2 Eden, 377.

190. — —.]—DACRES (BARONY) CASE (1605), Collins's Baronies by Writ, 24; cited in Palmer's Peerage Law in England, at p. 197.

191. — —.]—AUDLEY'S (LORD) CASE (1677), Cruise on Dignities, 123.

192. — —.]—BOLINGBROKE'S (LORD) CASE (1751), Cruise on Dignities, 157.

*Annotation:—*Reid. Tollemache v. Coventry (1834), 2 Cl. & Fin. 611.

193. — —.]—SOMERSET (DUKEDOM) CASE (1818), 2 Eden, 379.

194. — —.]—Necessity for Act.]—MONT-ROSE'S (DUKE) CASE, No. 15, *ante*.

195. Attainder of heir—Peerage extinguished if heir survives peer.]—LUMLEY (BARONY) CASE (1723), Collins's Baronies by Writ, 373.

196. — Does not affect co-heirs.]—POWIS (BARONY) CASE (1731), Cruise on Dignities, 207.

*Annotation:—*Reid. Camoys (Peerage) Case (1839), 6 Cl. & Fin. 789.

197. — —.]—Circumstances in which the Committee for Privileges will receive in evidence the printed minutes & proceedings before a former Committee on the same peerage.

It is now established that an attainder of one co-heir to a barony in abeyance does not affect the other co-heirs who do not derive through the attainted person; & also, that if his heir is restored in blood, the Crown may terminate the abeyance in him or his descendants.—BEAUMONT (PEERAGE) CASE (1840), 6 Cl. & Fin. 868; 7 E. R. 924, H. L. *Annotation:—*Mentl. Wensleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

198. — —.]—BRAYE (PEERAGE) CASE, No. 29, *ante*.

199. — —.]—During the abeyance of a barony descendible to the heirs of the body, one of the co-heirs was attainted for treason. After the passing of an Act to restore in blood the sons & daughters of the party attainted, A. claimed through the co-heir who was so attainted, B. through another co-heir:—*Held*: it was competent to determine the abeyance in favour of A. or in favour of B.—CAMOYS (PEERAGE) CASE (1839), 6 Cl. & Fin. 789; 5 Bing. N. C. 754; 3 State Tr. N. S. App. 1290; West. 34; 7 E. R. 895; *sub nom.* BRAYE (PEERAGE) CASE, 8 Scott, 108, H. L. *Annotation:—*Reid. Braye (Peerage) Case (1839), 6 Cl. & Fin. 787.

200. Attainder & death of person before becoming heir.]—ATHOLL (DUKEDOM) CASE (1813), Cruise on Dignities, 128; cited in Palmer's Peerage Law in England, at p. 197.

201. — —.]—AIRLIE (EARLDOM) CASE (1813), Cruise on Dignities, 131.

*Annotation:—*Reid. Perth (Earldom) Case (1848), 2 H. L. Cas. 805.

202. — —.]—PERTH (EARLDOM) CASE, No. 64, *ante*.

203. — —.]—Scottish peerages, created by patents in 1616 & 1633 respectively, & limited to the grantee & his heirs male, descended through the line of his eldest son, & became, in 1699, vested in the fifth baron & earl, who was attainted of high treason in 1715, & died in 1729, without leaving issue. His collateral heir, descended from a younger son of the first peer, claimed the dignities in 1848:—*Held*: the attainder was a bar.—SOUTHERSK (EARLDOM) CASE (1848), 2 H. L. Cas. 908; 9 E. R. 1339, H. L.

204. Act of Parliament—Personal disability.]—Thomas de la Warre petitioned the Queen for his place in the House of Lords, which his great-grandfather had. It appeared that William, his father, had been disabled by Act of Parliament, during his life to claim or enjoy any dignity, etc., by descent, etc.; afterwards William was called by Queen Elizabeth to Parliament, by writ of summons, & sat as puisne Lord of Parliament, & afterwards died. The judges & House of Lords resolved that, this was only a personal temporary disability in William, & that Thomas was entitled to the place of his great-grandfather.—DE LA WARRE'S (LORD) CASE (1597), 11 Co. Rep. 1 a; 77 E. R. 1145.

*Annotations:—*Consd. Thornby v. Fleetwood (1720), 1 Stra. 318. Reid. Collingwood v. Pace (1638), 1 Vent. 413; R. v. Knollys (1693), 1 Ld. Raym. 10.

205. — Necessity for—To forfeit dignity apart from possessions.]—SHREWSBURY'S (EARL) CASE, No. 170, *ante*.

206. — Whether both possessions & dignity forfeited—Apart from express words.]—SHREWSBURY'S (EARL) CASE (1612), 12 Co. Rep. 106; 2 State Tr. 741; 77 E. R. 1383, P. C.

*Annotations:—*Consd. Wensleydale (Peerage) Case (1856), 8 State Tr. N. S. 479. Reid. R. v. Knowles (1693), 12 Mod. Rep. 55.

207. — — —.]—(1) A dignity or title of honour cannot be taken away, where there is no deficiency or corruption of blood, except by express words in an Act of Parliament:—*Held*: the Irish Act, 28 Henry 8, c. 3, vesting in the King, in right of the Crown of England, all honours, manors, castles, signiorities, jurisdictions, & all other possessions & hereditaments held by certain persons, or by any person to the use of any of them in Ireland, did not take away from any of them a personal dignity; & the opinion of Lord Coke & other judges, that it took away the Earldom of Waterford was erroneous in fact & in law.

(2) The House of Lords is now the only satisfactory tribunal to determine questions on claims to dignities, on reference from the Crown: accordingly, a question of law having arisen on a petition of an Irish Peer, presented to the House of Lords, claiming to be admitted to vote at the election of Irish representative peers, the House, with a view to a more solemn adjudication, recommended a petition claiming the peerage to be presented to the Crown, in order that it might be referred by the Crown to the House, with the report of the law officers of the Crown annexed, & then the House, acting on the report of its Committee of Privileges, would adjudicate the right, & report the same to the Crown.—WATERFORD'S (EARL) CASE (1832), 6 Cl. & Fin. 133; 3 State Tr. N. S. App. 1261; 7 E. R. 648, H. L.

*Annotation:—*As to (1) Reid. Wensleydale (Peerage) Case (1856), 8 State Tr. N. S. 479.

208. — How restoration effected.]—MONT-ROSE'S (DUKE) CASE, No. 15, *ante*.

209. Judgment of outlawry—Forfeiture follows until judgment reversed.]—WHARTON (PEERAGE) CASE, No. 53, *ante*.

## SECT. 6.—DEPRIVATION.

See Nos. 15, 204, *ante*.

## SECT. 7.—CLAIMS TO PEERAGE.

### SUB-SECT. 1.—JURISDICTION.

210. House of Lords.]—R. v. KNOLLYS, No. 10, *ante*.



211. — **Exclusive jurisdiction in questions of peerage & dignities.**—Where the marriage of a commoner with a peer of the realm has been dissolved by decree at the instance of the wife, & she afterwards, on marrying a commoner, continues to use the title she acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her former husband or so affected his employment of the incorporeal hereditaments he possesses in his title as to entitle him in the absence of malice to an injunction to restrain her use of the title.

Only the House of Lords can try questions of right in matters of peerage or dignities connected therewith.—**COWLEY (EARL) v. COWLEY (COUNTESS)**, [1901] A. C. 450; 70 L. J. P. 83; 85 L. T. 254; 50 W. R. 81; 17 T. L. R. 725, 11. L. *Annotations*:—*Mentd.* *Re Greenwood*, *Goodhart v. Woodhead*, [1902] 2 Ch. 198; *Re Croxon* (otherwise *Croxton*), *Croxon* (otherwise *Croxton*) v. *Ferrers* (1904), 89 L. T. 733; *Pryce v. Pioneer Press* (1925), 42 T. L. R. 29.

212. — **Election of Irish peers.**—**WATERFORD'S (EARL) CASE**, No. 207, *ante*.

213. — **On reference by Crown—To construe royal grant.**—**BUCKHURST (PEERAGE) CASE**, No. 47, *ante*.

214. **Court of law—Questions of dignity.**—Plea to a bill by a person suing as Earl of S., the earldom being a Scottish dignity, that he is not Earl of S., but that deft. is Earl of S. & K., & averring that pltf. is the natural son of the late Earl of S. & K., & M. M., who were resident & domiciled in England at the time of his birth, & were not married until several years after, overruled: there being no averment, either that the title of S. & K. was the same as that of S., or that pltf. was born in England. Whether the plea should conclude in bar or abatement. *Qu.*: whether the Ct. of Ch., for the purpose of deciding on the plea, has jurisdiction to determine to which party the dignity belongs.—**STRATHMORE (EARL) v. STRATHMORE (COUNTESS)** (1821), 2 Jac. & W. 541; 37 E. R. 735, L. C.; *subsequent proceedings, sub nom.* **STRATHMORE (PEERAGE) CASE**, 6 Bli. N. S. 487, H. L.

*Annotations*:—*Refd.* *Lauderdale (Peerage) Case* (1885), 10 App. Cas. 692. *Mentd.* *Doc d. Burtwhistle v. Vardill* (1840), 6 Bing. N. C. 385; *Kent v. Burgess* (1840), 11 Sim. 361.

215. — — — — — **COWLEY (EARL) v. COWLEY (COUNTESS)**, No. 211, *ante*.

#### SUB-SECT. 2.—PRACTICE AND PROCEDURE.

216. **Reference to committee of privileges.**—**LINCOLN'S (EARL) CASE** (1692), 15 Lords Journals, 203, H. L.

*Annotation*:—*Refd.* *Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479.

217. **General statement of procedure on reference.**—**BUCKHURST (PEERAGE) CASE** (1876), 2 App. Cas. 1, H. L.

*Annotations*:—*Refd.* *Cope v. De La Warr* (1877), 5 Ch. D. 666; *Rhondda's Case*, [1922] 2 A. C. 339. *Mentd.* *Cooper v. Stuart* (1889), 14 App. Cas. 286.

218. **Form of prayer in petition.**—**HUNTLY (PEERAGE) CASE**, No. 247, *post*.

219. — **Amendment.**—**HUNTLY (PEERAGE) CASE**, No. 247, *post*.

220. **Necessity for notice to other co-heirs.**—**VAUX (PEERAGE) CASE**, No. 30, *ante*.

221. **Parties heard on petition—Previous unsuccessful claimant.**—**SLANE (PEERAGE) CASE**, No. 266, *post*.

222. — **Commercial interests affected.**—**MONTROSE'S (DUKE) CASE** (1853), as reported in Lord Lindsay's Report, 3, H. L.

*Annotations*:—*Consd.* *Shrewsbury (Peerage) Case* (1858), 7 H. L. Cas. 1. *Mentd.* *Wensleydale (Peerage) Case* (1856), 8 State Tr. N. S. 479; *Herries (Peerage) Case* (1858), L. R. 2 Sc. & Div. 268.

223. — — — — — **SHREWSBURY (PEERAGE) CASE**, No. 209, *post*.

224. — **Attorney-General for Ireland—Duty to attend.**—**ROSCOMMON'S (EARL) CASE**, No. 254, *post*.

225. — — — — — **FERMOY (PEERAGE) CASE**, No. 38, *ante*.

226. **Questions of law affecting existence of peerage in question—Taken before evidence of pedigree.**—**SOUTHBESK (EARLDOM) CASE** (1848), 2 H. L. Cas. 908; 9 E. R. 1839, H. L.

227. **Peer may be judge & witness.**—**R. v. FIVE POPISSH LORDS** (1685), 7 State Tr. 1217, 1458, H. L.

228. — — — — — **R. v. MACCLESFIELD (EARL)** (1725), 16 State Tr. 767, H. L.

229. **Counsel becoming law officer during hearing.**—**WHARTON (PEERAGE) CASE** (1845), 12 Cl. & Fin. 301, n.; 8 E. R. 1422, H. L.

*Annotation*:—*Mentd.* *Polini v. Gray*, *Sturla v. Froocia* (1879), 12 Ch. D. 411.

230. **Previous decisions not binding.**—**WILTES (PEERAGE) CASE**, No. 41, *ante*.

231. **When two counsel on each side heard.**—**SLANE (PEERAGE) CASE**, No. 266, *post*.

232. **Crown asked to declare whether particular evidence would be given.**—**SUSSEX (PEERAGE) CASE**, No. 268, *post*.

233. **Calling rebutting evidence.**—**SUSSEX (PEERAGE) CASE**, No. 268, *post*.

234. **Costs—Proceedings taken for protection of settled land—Costs out of settled estates.**—Proceedings successfully prosecuted before the House of Lords Committee for Privileges to establish a claim to an earldom, the consequence of which was that petitioner afterwards recovered estates which were subject to similar limitations:—*Held*: to be "proceedings taken for the protection of settled land," the costs of which the ct. directed to be paid out of property subject to the settlement, under Settled Land Act, 1882 (c. 38), s. 36.—*Re* **AYLESFORD'S (EARL) SETTLED ESTATES** (1886), 32 Ch. D. 162; 55 L. J. Ch. 523; 54 L. T. 414; 34 W. R. 410.

235. **Aid to claimant in poor financial circumstances.**—**ROSCOMMON'S (EARL) CASE**, No. 254, *post*.

236. **What is matter for comment of counsel.**—**ROSCOMMON'S (EARL) CASE**, No. 254, *post*.

237. **Printed case in case of representative Irish Peer.**—**ROSCOMMON'S (EARL) CASE**, No. 254, *post*.

#### SUB-SECT. 3.—EVIDENCE.

##### A. In General.

238. **Particular rule directed by legislature to be observed—In every court of civil procedure—Whether binding on Committee of Privileges.**—**SHREWSBURY (PEERAGE) CASE**, No. 269, *post*.

239. **Exceptional rule observed only before Committee of Privileges.**—(1) It cannot be deemed that, as a general rule in ordinary cts. of law, a recital of certain facts in a private Act of Parliament is not admissible as evidence of the truth of those facts against persons not parties to the private Act of Parliament. That cannot be

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disputed, but in these cases of peerages recitals in certain private Acts are admitted. Even these recitals in other private Acts are not admitted (BRETT, L.J.).

(2) The rule which applies in the Committee of Privileges cannot be a general rule, because it is stated in terms which would comprise cases in which it is known the cts. would not admit the evidence. Then how is that rule to be dealt with? It seems to me that it must be dealt with as an exceptional case, & that it is a rule laid down to be observed before a Committee of Privileges, & in no other case & before no other tribunal. If that be so, of course the rule is no authority for the purpose which we have in hand, which is a matter before an ordinary ct. of law (BRETT, L.J.).

(3) Visitation of Heralds under a royal commission has been admitted in cases of pedigree before a Committee of Privileges, but I cannot help thinking that that also is exceptional & confined to that tribunal, & that a Visitation of Heralds would not be admitted in any ct. of law as evidence of facts stated in the report of the Heralds, or stated in the Heralds' Books. It seems to me that those authorities are confined to the tribunal of the Committee of Privileges, & that they obviously are not authorities for dealing with any document or with any head of evidence in cts. of law (BRETT, L.J.).—*POLINI v. GRAY, STURLA v. FRECCIA* (1879), 12 Ch. D. 411; 49 L. J. Ch. 41; 40 L. T. 861; 28 W. R. 81, C. A.; *affd.* (1880), 5 App. Cas. 623, H. L.

*Annotations:—Generally, Reidd. Haines v. Guthrie* (1884), 13 Q. B. D. 818; *Re Turner, Glenister v. Harding* (1885), 20 Ch. D. 985; *Lyell v. Kennedy* (1887), 56 L. T. 647; *Re Trufort, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Evans v. Merthyr Tydfil U. C.*, [1899] 1 Ch. 241; *Mercer v. Denne*, [1905] 2 Ch. 538; *Amyes v. Barton* (1911), 5 B. W. C. C. 117; *Re Djambi (Sumatra) Rubber Estates* (1912), 107 L. T. 631; *Heyne v. Fischel* (1913), 110 L. T. 264; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130; *Bird v. Keep*, [1918] 2 K. B. 692; *Collis v. Amphlett*, [1918] 1 Ch. 232; *Finn v. Shelton Iron, Steel & Coal Co.* (1924), 131 L. T. 213.

*See, generally, EVIDENCE, Vol. XXII., pp. 19 et seq.*

**Presumption of legitimacy.]—See BASTARDY, Vol. III., pp. 364–375.**

**Declaration of legitimacy.]—See BASTARDY, Vol. III., pp. 369–372.**

**Perpetuation of testimony.]—See EVIDENCE, Vol. XXII., pp. 612, 613, 615, 616, Nos. 6768, 6770, 6809.**

**B. Of Creation of Peerage.**

**240. Baronies by writ—Proof of sitting—Parliamentary rolls.]—BOTETOURT (PEERAGE) CASE** (1764), *Cruise on Dignities*, 2nd ed. 188; *Palmer's Peerage Law in England*, 46.

**241. ———.]—**(1) It is now settled law that a sitting in Parliament in pursuance of a writ of summons constitutes, in the absence of a patent, a dignity descendible to the heirs general of the body of the person summoned: & that in claims to ancient dignities, a summons & a sitting in Parliament are required to be proved.

(2) The usual evidence of a writ of summons, is the enrolment; & of a sitting, is the Parliament roll or journals of the time. Where the writs of summons, or enrolments of them, & the journals of remote times are wanting, a memorandum, entered on a Parliamentary roll, of a grant to the King in his Parliament, by certain persons named "*et caeteri magnates et proceres tunc in Parlamento existentes*," is sufficient evidence that a person named therein sat as a Lord of Parliament, although

there was no proof that he was summoned to that particular Parliament.

(3) Instruments purporting to be the acts of peers, but not acts done in Parliament, & not necessarily the acts of Peers of Parliament, are not evidence that a person named in them ever sat in Parliament, although he was certainly summoned.

(4) In a claim to an ancient barony, it was proved that Henry de H. was summoned by special writ to Parliament, in 1264; but there was no proof that he ever sat, there being no rolls or journals of that period. His son & heir John de H. sat in the Parliament of 1290; but there was no proof that he was summoned to that Parliament, there being no writs of summons, or enrolments of them, extant from 1264–1295. To the Parliament of 1295, & to several subsequent Parliaments, he was summoned, but there was no proof that he sat in any of them:—*Held*: it might be well presumed that John de H. sat in the Parliament of 1290, in pursuance of a summons; on the principle that *omnia presumuntur legitime facta donec probetur in contrarium*.

(5) Length of time is no bar to a claim to a dignity; yet if a series of persons, of right entitled to it, do not enjoy it, or assert their right, a presumption may arise against the right, on claim by their descendants, unless the absence of enjoyment or claim is satisfactorily accounted for.—**HASTINGS (PEERAGE) CASE** (1841), 8 Cl. & Fin. 144; 4 State Tr. N. S. App. A., 1367; West, 621; 8 E. R. 58, H. L.

*Annotations:—As to* (1) *N.F. St. John (Peerage) Case*, [1915] A. C. 282. *As to* (3) *Consd. Beauchamp (Barony) Case*, [1925] A. C. 153. *Generally, Reidd. Wiltes (Peerage) Case* (1869), L. R. 4 H. L. 126.

**242. ——— Acts of peers.]—HASTINGS (PEERAGE) CASE, No. 241, ante.**

**243. ——— Presumption in favour of legality.]—HASTINGS (PEERAGE) CASE, No. 241, ante.**

**244. Letters patent—Entry in Lords Journals.]—**The Committee of Privileges, in claims to vote at the elections of representative peers for Ireland, may admit an entry in their Journals as evidence of limitations in a patent of peerage without requiring the production of the patent.—**DUFFERIN & CLANEBOYE'S (LORD) CASE** (1837), 4 Cl. & Fin. 568; 7 E. R. 217, H. L.

**245. ———.]—**Where a patent of peerage cannot be found, entries on the Journals of the House of Lords, showing the limitations of the patent, may be referred to for that purpose, or an examined copy of the record of the patent will be received.—**SAYE & SELE (BARONY) CASE** (1848), 1 H. L. Cas. 507; 6 State Tr. N. S. App. A., 1126; 9 E. R. 857, H. L.

*Annotation:—Mentd. Hawes v. Draeger* (1883), 52 L. J. Ch. 449.

**246. ——— Copy of entry in Lords Journals.]—SLANE (PEERAGE) CASE, No. 266, post.**

**247. ——— Investment under Great Seal of Scotland.]—**(1) Upon a claim to a Scottish peerage, where no patent of creation can be found, but it appears from the records of the Parliament that the ancestor from whom the dignity is alleged to have descended, sat in Parliament, an original instrument, purporting to be under the Great Seal of Scotland, & produced from the repositories of the heir of entail of the family estates, will be received as evidence of the creation of such peer, with a limitation to him & his heirs male, as therein stated.

(2) If a claimant omit to give evidence of the creation & limitation of one of several dignities to which, he states, in his petition, that he is of right entitled, the Committee for Privileges will

not report that he has made good his claim to that dignity, on the presumption that it descended from the same ancestor with the other dignities to which the claimant has proved his right.

(3) In a claim of peerage, it is not sufficient, in the petition to the Crown, to state that the claimant is of right entitled to the dignity, but the petition should pray that the claimant may be declared so entitled, & the Committee for Privileges or the House has no power to supply the defect of the prayer, but it will be necessary for the claimant to present an amended petition to the Crown.—HUNTLY (PEERAGE) CASE (1838), 5 Cl. & Fin. 349; 7 E. R. 436, H. L.

248. — Copy of record of patent.]—LANESBOROUGH'S (EARL) CASE (1848), 1 H. L. Cas. 510, n.; 9 E. R. 858, H. L.

249. — Examined copy.]—SAYE & SELE (BARONY) CASE, No. 245, *ante*.

250. — Ancient patent without seal.]—(1) In a claim to an ancient Scottish dignity, if no patent or other instrument of creation can be produced, it may be presumed that the dignity was created by patent or charter, limiting it in the manner in which it has been actually enjoyed.

(2) An ancient patent without the seal, but with the attestation thereof duly verified, is admissible evidence.—CRAWFORD & LINDSAY (PEERAGES) CASE (1848), 2 H. L. Cas. 534; 6 State Tr. N. S. App. A, 1126; 9 E. R. 1196, H. L.  
*Annotation:—Generally, Mentd. Perth (Earldom) Case (1848), 2 H. L. Cas. 865.*

251. Statements of contemporary historians.]—VAUX (PEERAGE) CASE, No. 30, *ante*.

252. Presumption in favour of further claims where one proved.]—HUNTLY (PEERAGE) CASE, No. 247, *ante*.

253. Circumstantial evidence.]—MAR (PEERAGE) CASE, No. 66, *ante*.

#### C. Minutes of Previous Proceedings.

254. Admissibility.—In subsequent claim.]—(1) The right to the same dignity having been the subject of investigation in the Irish House of Lords, the minutes of proceedings & of evidence, including depositions taken by comrs. under an order of that House held admissible here, the witnesses being dead.

(2) It is the privilege as well as the duty of the A.-G. for Ireland, to attend this House on the investigation of claims to Irish peerages, but he may, with leave of the House, depute counsel to attend for him.

(3) Petitioner to the House of Lords, claiming, as an Irish peer, to be admitted to vote at the election of representative peers of Ireland, was required in consequence of a doubt of his right & also of an adverse claim, to give in a printed case containing his pedigree & references to his proofs.

(4) Claimant to a peerage having his petition to the House, stated a *prima facie* case, but being unable on account of his circumstances to complete it, the A.-G. was ordered to bring forward his witnesses & conduct his case at the expense of the Crown. But the House makes such orders reluctantly as they may embarrass the proceedings & encourage adventurers.

(5) The pedigree of a claimant as a descendant from the seventh son of the first peer, who was so created by letters patent to hold to him & the heirs

male of his body, stated that that peer left seven sons, that the issue of the first & second were extinct, & that the four next died without issue; there being no contemporaneous account of them, no other evidence except reputation in the family, which agreed with the pedigree:—*Held*: it might be presumed they died without issue, more especially as during a long contest for the dignity no descendant of them claimed it.

(6) Documents put before the House by a claimant, although not admitted in evidence, held to be fit matter for observation by his adversary's counsel, to prevent prejudice.—ROSCOMMON'S (EARL) CASE (1828), 6 Cl. & Fin. 97; 7 E. R. 634, H. L.

255. — —.]—BRAYE (PEERAGE) CASE, No. 29, *ante*.

256. — —.]—VAUX (PEERAGE) CASE, No. 30, *ante*.

257. — —.]—BEAUMONT (PEERAGE) CASE, No. 197, *ante*.

258. — —.]—An Irish earldom was created, & a holder of that earldom was afterwards created a viscount of the United Kingdom; the patent granting the viscounty described the grantee by the name & title of the Irish earldom. On the death of one holder of these titles his eldest son received a writ of summons to attend the House of Peers as an English viscount. He did so, & took his seat as a viscount. He subsequently petitioned to have his claim to vote for representative peers of Ireland allowed, & it was allowed. After his death, his son received a writ of summons as an English viscount, & took his seat in that character. He then petitioned to be admitted to vote for representative peers of Ireland in virtue of the Irish earldom. The petition came before the Committee for Privileges. The patents creating the Irish earldom & the English viscounty, the writ of summons to the previous viscount, & the entry on the journals showing that the preceding peer had taken his seat, & likewise the resolution of the Committee for Privileges admitting his claim to vote for representative peers, were all proved:—*Held*: this was not sufficient to establish the title of the present claimant; the evidence must be such as would of itself, if the claim was now made without reference to any previous claim, be sufficient to establish it. Such evidence not being producible at the moment, the consideration of the claim was adjourned.—DONOUGHMORE (PEERAGE) CASE (1853), 3 H. L. Cas. 822; 10 E. R. 327, H. L.

259. — —.]—BERKELEY (PEERAGE) CASE, No. 13, *ante*.

260. — —.]—LATYMER (PEERAGE) CASE (1912), *Times*, July 16, H. L.

#### D. Pedigree.

*See, generally, EVIDENCE, Vol. XXII., pp. 117-123.*

261. Pedigree in suit respecting property.]—SLANE (PEERAGE) CASE, No. 266, *post*.

262. Deposition of deceased person.]—(1) Upon the trial of an ejectment respecting Black Acre, between A. & B. in which it was necessary for A. to prove that he was the legitimate son of S. A. after proving by other evidence that S. was his reputed father, offered to give in evidence a deposition made by S. in a cause in Chancery, instituted

#### PART I. SECT. 7, SUB-SECT. 3.—B.

261 i. Statements of contemporary historians.]—In peerage questions contemporaneous historians may be referred to.—GLENCAIRN (PEERAGE) CASE (1797), 1 Macq. 444.—SCOT.

d. Certified copy of enrolment.—Under Great Seal of Scotland.]—In the absence of the original patent or charter of creation a certified copy of an enrolment of a commission under the Great Seal of Scotland & Royal Sign Manual

directing a Baron to be created an Earl with confirmatory entries in the Journals of the Scottish Parliament:—*Held*: sufficient evidence of the creation of an Earldom.—PERTH (EARLDOM) CASE (1853), 1 Macq. 776.—SCOT.

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by A. against C. in order to perpetuate testimony to the alleged fact disputed by C. that he was the legitimate son of S. in which character he claimed an estate in remainder in White Acre, which was also claimed in remainder by C. B. deft. in the ejectment, did not claim Black Acre under either A. or C. pltf. & deft. in the Chancery suit:—*Held*: according to law, the deposition of S. could not be received upon the trial of such ejectment against B. as evidence of declarations of S. the alleged father, in matter of pedigree.

(2) Upon the trial of an ejectment respecting Long Acre, between E. & F. in which it was necessary for E. to prove that he was the legitimate son of W. W. being at that time dead, E. after proving by other evidence that W. was his reputed father, offered to give in evidence, an entry in a Bible, in which Bible W. had made such entry in his own handwriting that E. his eldest son, born in lawful wedlock from G. the wife of W. on May 1, 1778, & signed by W. himself:—*Held*: such entry in such Bible, or in any other book, or on any other piece of paper, could be received to prove that E. is the legitimate son of W. as evidence of the declaration of W. in matter of pedigree.—*BERKELEY (PEERAGE) CASE* (1811), 4 Camp. 401; 171 E. R. 128, H. L.

*Annotations*:—As to (1) *Consd. Belfast v. Chichester* (1820), 2 Jac. & W. 439. *Generally, Reidd. Gordon v. Gordon* (1821), 3 Swan. 400; *Moseley v. Davies* (1822), 11 Price, 162; *Roscommon's Case* (1828), 6 Cl. & Fin. 57; *Davies v. Morgan* (1831), 1 Cr. & J. 587; *Monkton v. A.-G.* (1831), 2 Russ. & M. 147; *Davies v. Lowndes* (1843), 6 Man. & G. 471; *Sussex (Peerage) Case* (1844), 11 Cl. & Fin. 85; *Gee v. Ward* (1857), 7 E. & B. 509; *Shrewsbury (Peerage) Case* (1858), 7 H. L. Cas. 1; *Shodden v. Patrick* (1860), 2 Sw. & Tr. 170. *Mentd. Walker v. Beauchamp* (1834), 6 C. & P. 552; *Vander Donckt v. Thellusson* (1849), 8 C. B. 812.

263. Decretal order in Chancery.]—*WHARTON (PEERAGE) CASE*, No. 53, *ante*.

264. Entries—in family Bible.]—*BERKELEY (PEERAGE) CASE*, No. 262, *ante*.

265. ———.]—*FAIRFAX (PEERAGE) CASE*, [1908] W. N. 226, H. L.

266. ——— Family missal.]—(1) B. claiming, of right, to be Lord Baron of Slane, in the peerage of Ireland, as heir general of the last Lord Slane, & alleging that the same was a barony in fee, showed by his statement & proofs, that from the first creation of a peerage in his ancestors to the year 1597, four such peers, dying at various periods without issue male, but leaving daughters or sisters, were severally succeeded in the dignity by the heirs male, uncles or cousins, who were in possession of the family estates. Claimant further showed that a Lord Baron of Slane, whom he alleged to be the last peer of the family, & of whom he stated himself to be sole heir general, left a daughter, an only child, who long survived him but did not claim the peerage, & also two sisters, the elder of whom he stated to have died without issue, & from the younger the claimant derived his descent as her sole heir:—*Held*: the claimant, though he might be heir general, had failed to make out his claim to the dignity, as it appeared by his own statement to have gone uniformly to the heirs male in exclusion of the heirs female, who had never made claim to it.

(2) F., whose petition to the King claiming the barony of Slane as heir male was referred to the A.-G., but no report made thereon, was, upon petition to the House of Lords & a statement by the A.-G. to the Committee of Privileges, admitted to appear by his counsel & agents to oppose B.'s claim.

(3) If in a claim of peerage, an important

question of law arises, the Committee will depart from the ordinary rule, & hear two counsel on each side.

(4) In a claim of peerage, where there is no patent of creation or enrolment of such patent, & the contemporaneous Lords Journals are not in existence, an old MS. book, purporting to be copied from the Journals by an officer whose duty it was to prepare lists of peers present & absent, will be received as evidence of a peer's sitting in Parliament.

(5) A return to a royal commission, not signed nor sealed by the comrs., is not admissible to prove any matter therein stated.

(6) A pedigree made by a person with a view to a suit respecting property is not receivable in a claim of peerage by his son to prove his descent; nor a case stated for the opinion of counsel, produced from the family papers of a distant relative of the claimant.

(7) Entries in a family missal are admitted as evidence of births, deaths, & marriages of members of the family, just like similar entries in a family Bible. To make a copy of a record admissible in evidence, it is not enough that it was held by a witness while another read the original to him. There must be a change of hands, or the witness must himself read the copy with the original.—*SLANE (PEERAGE) CASE* (1835), 5 Cl. & Fin. 23; 10 Bli. N. S. 1; 7 E. R. 311, H. L.

267. ——— Old prayer book.]—(1) The case of a claimant to a peerage depending on the genuineness of entries written in an old prayer book, & dated 1728 & 1729, several witnesses, whose occupations for a long time made them so conversant with manuscripts of different ages, that they could take on themselves to name the period in which any manuscript previous to the year 1700 was written, were all of opinion that the entries were written in the early part & before the middle of the last century, & at or about the period of their dates:—*Held*: such evidence is but small testimony, hardly entitled to any weight, especially as the book containing the entries was not satisfactorily identified.

(2) Claimant to a peerage, after his case was referred to the House of Lords, & evidence taken on it, presented an additional case, alleging an inscription on a tombstone in a churchyard in Ireland; which, if proved, would sustain his claim. The tombstone could not be produced. Several witnesses from the neighbourhood swore positively that they saw the tombstone & inscription about twenty years ago. There was no material discrepancy in their statements, nor were any witnesses called to contradict them:—*Held*: the evidence was not sufficient of the existence of the tombstone or of the inscription; & the neglect of claimant to produce this material part of his case earlier, induced a suspicion of fraud; which could not be removed without the production of the tombstone, or of other witnesses of greater credit from the neighbourhood.—*TRACY (PEERAGE) CASE* (1843), 10 Cl. & Fin. 154; 1 L. T. O. S. 310; 8 E. R. 700, H. L.

268. ———.]—(1) In a claim of peerage, where the question was whether the deceased peer, the father of the claimant, had been married or not, a Prayer Book, found after the death of the claimant's mother among her papers, was received, & an entry made in her handwriting, declaring the fact of the marriage, read from it, not as conclusively proving that fact, but as a declaration of it made by one of the parties at the time.

(2) A will of deceased peer, made many years before his death, declaring, & in the most solemn

form, his marriage, & the legitimacy of his son, the claimant of the peerage, was proposed to be read as a declaration made by one of the parties; but it was rejected, because the date, & certain expressions in it, showed it to have been written after a suit to annul a marriage of the deceased peer had been instituted by his father, & because there was nothing to show that that marriage was not the very marriage in question. The declarations of deceased clergyman to his son, to the effect that he had celebrated a marriage between deceased peer & his alleged wife, are not receivable in evidence as the declarations of deceased party made against his own interest; such interest not being an interest of a pecuniary nature.

(3) In a claim of peerage, where evidence has been produced for the purpose of establishing a certain point, the party who has produced it will not, should the Crown call evidence of a contradictory kind, be allowed to produce additional evidence confirmatory of the first.

(4) Before claimant's junior counsel summed up the evidence previously to the opening of the case on the part of the Crown, the counsel for the Crown were required by the Committee to declare whether they would or would not call evidence on a question of foreign law, so as to enable claimant's counsel to determine whether they would then, as they could not afterwards, produce any additional evidence on that question.—*SUSSEX (PEERAGE) CASE (1844)*, 11 Cl. & Fin. 85; 6 State Tr. N. S. 79; 3 L. T. O. S. 277; 8 Jur. 793; 8 E. R. 1034, H. L.

*Annotations*.—*Generally*, Mentd. Davis v. Lloyd (1844), 1 Car. & Kir. 275; Vander Donckt v. Thellusson (1849), 8 C. B. 812; Leroux v. Brown (1852), 12 C. B. 801; R. v. Povey (1852), Dears. C. C. 32; Stapylton v. Clough (1853), 2 E. & B. 933; Papendick v. Bridgwater (1855), 5 E. & B. 166; Fenton v. Livingstone, Livingstone v. Livingstone (1859), 5 Jur. N. S. 1183; Bright v. Legerton (No. 1) (1860), 29 Beav. 60; Brook v. Brook (1861), 9 H. L. Cas. 193; A.-G. v. Sillem (1863), 2 H. & C. 431; Di Sora v. Philipps (1863), 10 H. L. Cas. 624; Re Coppin (1866), 2 Ch. App. 47; Smith v. Blakely (1867), 1 L. R. 2 Q. B. 326; Whaley v. Carlisle (1867), 15 W. R. 1183; Gaudet v. Brown, Golpel v. Cornforth, Argos (Cargo Ex), The Hewsons (1873), L. R. 5 P. C. 134; Rowley v. L. & N. W. Ry. (1873), 29 L. T. 180; River Wear Comrs. v. Adamson (1877), 2 App. Cas. 743; Re Goodman's Trusts (1881), 17 Ch. D. 266; Re Lambert (1886), 56 L. J. Ch. 122; Special Purposes Income Tax Comrs. v. Pemsel, [1891] A. C. 531; R. v. City of London Court Judge, [1892] 1 Q. B. 273; Il. v. Brixton Prison, Re Percival (1907), 76 L. J. K. B. 619; R. v. Dibden, [1910] P. 57; Tucker v. Oldbury U. C., [1912] 2 K. B. 317; Vacher v. London Society of Compositors, [1913] A. C. 107; Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co., [1913] 2 K. B. 130; Re Boulter, [1915] 1 K. B. 21; R. v. Naguib, [1917] 1 K. B. 359; G. W. Ry. & Mid. Ry. v. Bristol Corp'n. (1918), 87 L. J. Ch. 414; Bourne v. Keane, [1919] A. C. 815; Thomson v. St. Catharine's College, etc., [1919] A. C. 468; Perak Petroleum Maatschappij v. Deen, [1924] 1 K. B. 111.

#### 269. Statement in will.—In custody of stranger.]

—(1) A claimed a peerage. An estate was alleged to be annexed to the title. Persons who, in the event of the peerage being extinct, would be entitled to the estate, but who alleged that their title would be defeated if the claim to the peerage should be established, were allowed to appear, & he heard in opposition to the claim.

(2) A copy of a plate of the arms of the Knights of the Garter, now existing in the Chapel Royal at Windsor, was received in evidence, the plate itself not being removable, except by authority of the Queen, & no such plate having been removed since first put up in the reign of Henry V.

(3) Though the rule in peerage cases is, that the original will must itself be produced to the Committee, a copy of a will brought by the officer from the Prerogative Ct. was admitted in evidence, such will having been made at a time when the course of the officers of that ct. was to take copies of wills, & to return the originals to the exors., & the persons

now opposing the admission of the copy being the representatives of those exors.

(4) *Semble*: the recitals in private Acts of Parliament of very recent date are not evidence of the facts stated in them, such recitals being no longer submitted to the previous approval of the judges.

(5) When the legislature has directed that a particular rule as to evidence shall be adopted "in every court of civil judicature," though those words do not include a Committee for Privileges, such Committee will, if the rule itself is convenient, adopt & act upon it. C. L. P. Act, 1854 (c. 125), s. 27, which permits in all cts. of civil jurisdiction comparison of handwriting as a means of evidence was therefore adopted by the Committee.

(6) In 1671, the Crown issued a commission to authorise the College of Heralds to receive & record the family pedigrees of all such "Benefactors," as should be willing to contribute sums of money for the rebuilding of the Heralds' College, before then destroyed in the Great Fire of London. A pedigree so furnished to the College by a member of a family, & the signature to which was proved, was received in evidence, but only as a declaration of a member of the family.

(7) The declarations of a wife, as to the state of her husband's family, are equally admissible with the declarations of a husband as to the state of his wife's family. This admissibility does not extend to statements made by the wife's father.

(8) If a party is admitted to oppose a claim of peerage, he must make his opening statement after claimant's evidence has been closed, whether claimant's counsel sums up or not.

(9) The book called "Arms & Descents of the Nobility, E. 16," though produced from the Heralds' College, is not admissible in evidence, not being kept under authority of any official order, or in discharge of any official duty.

(10) A nobleman who had the wardship of another nobleman, under a grant from the Crown, made a will. This will contained a statement of the marriage of the ward with testator's daughter, accompanied by a direction, that in the event of the death of the ward his younger brother should marry the lady. The will was tendered in evidence to prove that the ward had a younger brother. *Qu.*: whether it was admissible.

(11) An old "collection of monumental inscriptions" in country churches:—*Held*: inadmissible to show what had been the inscription on a partly defaced tomb.

(12) A barrister who had attended as counsel for claimant of a peerage during the whole of one session, was, at the commencement of the next, appointed A.-G. The Committee for Privileges allowed him to continue to act as counsel for claimant, & accepted the Solicitor-General as his representative on the part of the Crown.

(13) Letters addressed to a lady who had married into a particular family were produced from the custody of a member of that family, who likewise assessed many other family papers & deeds, & held by descent some of the property formerly belonging to the husband of the addressee of the letters:—*Held*: admissible in evidence, to show in what character she was addressed by members of her own family.

(14) Bill filed in Chancery by A. as next friend to B. Deft. put in an answer, which was not signed; but there was indorsed a consent by A., that this answer should be received without oath. The bill & answer were produced from the proper office:—*Held*: they were admissible in evidence.

(15) A pedigree "touching the name & families of Talbots," though proved to be in the hand-

**Sect. 7.—Claims to peerage: Sub-sect. 3, D. Parts II., III. & IV.]**

writing of a former Garter King of Arms, not being shown to be a book kept by him in discharge of his duty in that office:—*Held*: inadmissible.

(16) A visitation was produced from the proper office; the commission under which it was taken could not be found. The visitation purported to have been taken by deputation from Clarenceux King of Arms. The deputation was produced. It recited the commission, & the power therein contained for Clarenceux to appoint his deputies:—*Held*: the visitation was admissible in evidence.

(17) A record of a Royal warrant of precedence was produced from the Herald's Office; the original had been sought for at the Home Office, & the State Paper Office, but in vain. It was a part of the duty of the heralds to record such warrants. The record was received in evidence.

(18) W. erected in a church a monument to the memory of T., whom he described in the inscription thereon to have been his, W.'s father. The inscription had been put up after W. had been engaged in a controversy as to his relationship with C., but it did not directly relate to that controversy. It was admitted in evidence.

(19) It was necessary to prove that W. married M.; there was no certificate of marriage found, but the will of her uncle T. was produced. It was in these words: "All this I give to my nephew, W.," who was identified as the W. in question; and the Act Book from Doctors' Commons was produced, granting administration to "W. nephew, minor, & universal legatee." Received as proof that a marriage had taken place between W. & D.—SHREWSBURY (PEERAGE) CASE (1858), 7 H. L. Cas. 1; 11 E. R. 1, H. L.

*Annotations*:—As to (2) *Consd. Berkeley* (Peerage) Case (1861), 8 H. L. Cas. 21. *Generally*, *Mentd. Friend v. Buckley* (1870), 10 B. & S. 973; *Polini v. Gray, Sturla v. Freccia* (1879), 12 Ch. D. 411; *Lyell v. Kennedy, Kennedy v. Lyell* (1889), 14 App. Cas. 437.

270. Document not signed by ancestor.] — VAUX (PEERAGE) CASE, No. 30, *ante*.

271. Letters—Addressed to wife of member of the family.]—SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

272. Family pedigree—In ancestor's handwriting.]—FITZWALTER (PEERAGE) CASE, No. 167, *ante*.

273. — Produced from Herald's Office.]—TRACY (PEERAGE) CASE (1843), 10 Cl. & Fin. 154; 1 L. T. O. S. 310; 8 E. R. 700, H. L.

274. — — —.] — SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

275. — Visitation of Herald's.]—POLINI v. GRAY, STURLA v. FRECCIA, No. 239, *ante*.

276. — In handwriting of former King at Arms—Not kept in discharge of duty.]—SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

277. — — —.] — ROSCOMMON'S (EARL) CASE, No. 254, *ante*.

278. Marriage registers—Proof of error.]—CHANDOS (PEERAGE) CASE (1802), Brydges's Report 1; Cruise on Dignities 2nd ed. 244; cited in Hubback on Evidence of Succession at p. 482, H. L. *Annotations*:—*Consd. Lloyd v. Passingham* (1809), 16 Ves. 59. *Refd. Braybrooke v. Inskip* (1803), 8 Ves. 417; *Roscommon's Case* (1828), 6 Cl. & Fin. 97.

279. — Copies.] — MARCHMOUNT (PEERAGE) CASE (1822), Minutes of Evidence of Proceedings before the Committee of Privileges, May 21; cited in Halsbury's Laws of England, Vol. XIII., p. 536, n.

280. — — — Foreign registers.] — PERTH (EARLDOM) CASE, No. 64, *ante*.

281. — Entry of grant of licence.]—LANESBOROUGH'S (EARL) CASE (1848), 1 H. L. Cas. 510, n.; 9 E. R. 858, H. L.

282. — Entry not in regular course of register.]—A memorandum in a register of a church by its deceased rector made about one hundred & eight years ago, though not a contemporaneous entry made in the regular course of the register is admissible as evidence, & goes to prove that the rector did the things stated in the memorandum.—LAUDERDALE (PEERAGE) CASE (1885), 10 App. Cas. 692, H. L.

*Annotations*:—*Mentd. Lovat* (Peerage) Case (1885), 10 App. Cas. 763; *Winans v. A.-G.*, [1904] A. C. 287; *Casdagli v. Casdagli*, [1919] A. C. 145.

283. Copy of will.]—Copies of wills are not evidence to support a claim of peerage. The originals must be produced.—NETTERVILLE (PEERAGE) CASE (1831), 2 Dow. & Cl. 342; 6 E. R. 755, H. L.

*Annotation*:—*Refd. Donoughmore* (Peerage) Case (1853), 3 H. L. Cas. 822.

284. — — —.] — WHARTON (PEERAGE) CASE, No. 53, *ante*.

285. — — —.] — SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

286. Records from Herald's Office—Funeral certificate.]—VAUX (PEERAGE) CASE, No. 30, *ante*.

287. — Warrant of precedence.]—SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

— — —.]—*See, also*, Nos. 273, 274, *ante*.

288. Tombstone inscription.] — TRACY (PEERAGE) CASE, No. 267, *ante*.

289. — — —.]—FAIRFAX (PEERAGE) CASE, [1908] W. N. 226, H. L.

290. — Secondary evidence where defaced.]—SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

291. Private Act of Parliament—Submission to approval of judges.]—WHARTON (PEERAGE) CASE, No. 53, *ante*.

292. — — —.] — SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

293. — Recitals.]—POLINI v. GRAY, STURLA v. FRECCIA, No. 239, *ante*.

294. Return of Royal Commission—Not signed & sealed.]—SLANE (PEERAGE) CASE, No. 266, *ante*.

295. Plate of the Arms of Knights of the Garter.]—SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

296. Printed case—To show pedigree prepared post litem motam.]—ANNANDALE (PEERAGE) CASE (1878), Minutes of Evidence of Proceedings before the Committee of Privileges, p. 139.

297. Memorandum in church register.] — LAUDERDALE (PEERAGE) CASE, No. 282, *ante*.

298. Declarations—Of husband.]—SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

299. — Of wife.]—SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

300. — Of wife's father.] — SHREWSBURY (PEERAGE) CASE, No. 269, *ante*.

301. — Of relatives.] — LINDSAY (PEERAGE) CASE (1877), Minutes of Evidence of Proceedings before the Committee of Privileges.

302. — — —.]—FAIRFAX (PEERAGE) CASE, [1908] W. N. 226, H. L.

303. — Dying declaration.] — ANGLESEA (EARLDOM) CASE (1771), Cruise on Dignities, 276; cited in 4 Camp. at p. 411; cited in 13 Ves. at p. 145, H. L.

*Annotations*:—*Consd. Vowles v. Young* (1806), 13 Ves. 140. *Refd. Berkeley* (Peerage) Case (1811), 4 Camp. 401.

304. Proper custody of peerage documents.]—ROOS (BARONY) CASE (1686), Collins's Baronies by Writ, 261, H. L.



## Part II.—Baronetage.

**305. A title of dignity.]—**LAPIERE *v.* GERMAIN (SIR JOHN) & NORFOLK (DUCHESS), No. 118, *ante*.

**306. Nature of dignity.]—**(1) The King may erect any name of dignity, which was not before; & for that reason the King may create a dignity, by name of baronet, & create one to be a baronet, to him & his heirs males of his body issuing.

(2) If he does not create him of some place, he shall not have an estate tail, but fee simple conditional, which shall be forfeited for felony.

(3) If he create him baronet of a place, then he shall have an estate-tail, within the Statute de Donis, 1285 (c. 1); & the King may grant to him & the heirs males of his body precedence before Knights Baronets, Knights of the Bath, & Knights Bachelors, & also may grant precedence to their wives, sons & daughters, etc., & he cannot create any dignity above the dignity of a baronet, & under the dignity of a baron; & the creation of his dignity of a baronet shall not discharge the heir to be in guard, as if the heir be made a knight, for he is not made knight by this, for the dignity of a knight is not descendible.—HONOURS & DIGINITIES, CREATION OF BARONETS (1612), 12 Co. Rep. 81; 77 E. R. 1359.

*Annotations:—As to (2) N.F. Re Rivett-Carnac's Will (1885),*

30 Ch. D. 136. *Reid. R. v. Knowles* (1894), 12 Mod. Rep. 55.

**307. ——— Incorporal hereditament — Baronet tenant in tail.]—**A dignity of title of honour, as an incorporeal hereditament, is "land" within Settled Land Act, 1882 (c. 38), s. 37. When a dignity is limited to the heirs of the body, then although no place be named in the creation of the title, the dignity is within the Statute de Donis, 1285 (c. 1), & descendible as an estate tail, & the patent does not create a fee simple conditional. There is no difference in these respects between a baronetcy & other descendible dignities.—*Re RIVETT-CARNAC'S WILL* (1885), 30 Ch. D. 136; 54 L. J. Ch. 1074; 53 L. T. 81; 33 W. R. 837; 1 T. L. R. 582.

*Annotations:—Reid. Hill v. Hill* [1897] 1 Q. B. 483; Cowley *v.* Cowley, [1900] P. 303. *Mentl. Re Aylesford's S. E.* (1886), 32 Ch. D. 162; *Re Sebright's S. E.* (1886), 55 L. T. 354.

**308. Claim to baronetcy—Proof—Necessity for documentary evidence.]—**COX OF DUNMANWAY (BARONETCY) CASE (1911), *Times*, Nov. 10, P. C.

——— **Under Legitimacy Declaration Act, 1858 (c. 93).]**—*See BASTARDY*, Vol. III., p. 369, No. 103.

## Part III.—Knighthood.

**309. Nature of dignity—Not local title.]—**LORD ADVOCATE *v.* WALKER TRUSTEES, No. 323, *post*.

## Part IV.—College of Arms.

**310. Name of dignity — Necessity to sue & be sued by title—Garter King at Arms.]—**Garter King at Arms is a name of dignity & the possessor must be sued by it. *Qu.*: if in matters not concerning his office.—*DETHICK'S CASE* (1591), Cro. Eliz. 224; 1 Leon. 248; 78 E. R. 480.

*Annotation:—Folld. Holt v. Ward* (1729), 2 Stra. 850.

**311. ——— Clarenceux.]—**HOLT *v.* WAID (1729), 1 Barn. K. B. 208, 247; 2 Stra. 850; 94 E. R. 142, 169.

**312. ——— ———.]—**Garter King at Arms is parcel of the name, & the possessor must sue & be sued by this title.—*CLARENCEUX v. DETHICK* (1597), Cro. Eliz. 542; 78 E. R. 788.

*Annotation:—Reid. Holt v. Ward* (1729), 1 Barn. K. B. 208.

**313. Herald of Chester—Appointment by letters patent—Appointment complete without investiture.]—**PINSON *v.* REDHEAD (*circa* 1600), Noy, 150; 74 E. R. 1112.

*Annotation:—Reid. R. v. Knowles* (1693), 12 Mod. Rep. 55.

**314. Court of Honour — Constitution.]—**How far the Earl Marshal alone, without the Constable of England, has a right to hold plea in matters relating to heraldry.—*ANON.* (1732), 2 Barn. K. B. 169; 94 E. R. 427.

**315. Somerset Herald—Privilege from arrest.]—**The officer of arms called Somerset Herald, being arrested on mesne process, the ct. refused to discharge him on motion, as a King's servant.—*LESLIE v. DISNEY* (1834), 1 Cr. M. & R. 578; 3

Dowl. 437; 5 Tyr. 181; 4 L. J. Ex. 15; 149 E. R. 1211.

*Annotations:—Distd. Byrn v. Dibdin* (1835), 1 Cr. M. & R. 821. *Reid. Swan v. Dakins* (1855), 16 C. B. 77.

**316. ——— ———.]—**The Somerset Herald at Arms is one of the Queen's servants in ordinary with fee, & bound to attend her whenever required, as well as on state ceremonials; & is therefore privileged from arrest.—*DYER v. DISNEY* (1847), 16 M. & W. 312; 4 Dow. & L. 698; 16 L. J. Ex. 182; 153 E. R. 1208.

*Annotation:—Reid. Swan v. Dakins* (1855), 16 C. B. 77.

**317. ——— Duties.]—***DYER v. DISNEY*, No. 316, *ante*.

**318. Recording pedigrees — Joint action by Herald & Poursuivant for work done—Evidence necessary.]—**Windsor Herald & Blue Mantle Poursuivant at Arms may maintain a joint action for work & labour in making out a pedigree, both having been on duty when the order for it was given, although only one of them was applied to by deft. In such an action plffs. are bound to give general evidence of the pedigree being true unless this has been dispensed with by deft.—*TOWNSEND v. NEALE* (1809), 2 Camp. 190; 170 E. R. 1125, N. P.

——— **Discovery against Poursuivant employed to protest.]—***See DISCOVERY*, Vol. XVIII., p. 122, No. 716.

**Court of Chivalry.]—***See COURTS*, Vol. XVI., p. 193, Nos. 975–979.

**Assumption of arms.]—***See NAME & ARMS*, Vol. XXXV., p. 711, Nos. 91–94.

## Part V.—Other Dignities.

**319. Devolution of dignity upon co-heiresses—Performance of duties by deputy—Office of constable.]—**CONSTABLE OF ENGLAND'S CASE (1514), Keil. 170; 72 E. R. 346.

**320. ——— Office of Lord Great Chamberlain—Status of deputy.]—**The office of Lord Great Chamberlain of England is hereditary; & where a person dies seised in fee of this office, leaving two sisters, the office belongs to both sisters, & they may execute it by deputy; but such deputy must be approved of by the King, & must not be of a degree inferior to a knight.—LORD GREAT CHAMBERLAIN'S CASE, *Ex p. BURRELL* (1781), 2 Bro. Parl. Cas. 146; 1 E. R. 850, H. L.

**321. ——— Rule as to subsequent descent.]—**CONSTABLE OF ENGLAND'S CASE (1514), Keil. 170; 72 E. R. 346.

**322. Office of Standard Bearer of Scotland—Nature of office.]—**The right to the office or dignity of Royal Standard Bearer of Scotland was established by the appellant since that office or title was granted *jure sanguinis*, & therefore, as there had been no failure of heirs who could have exercised the right, the alleged vesting of the office by an apprisement in the predecessor of resp. in 1670 was inoperative, because the office was neither feudal nor made alienable nor put *in commercio*

by any Act of Parliament.—WEDDERBURN v. LAUDERDALE (EARL), [1910] A. C. 342; 26 T. L. R. 389; 54 Sol. Jo. 441, H. L.

**323. Usher of White Rod in Scotland—Right to fees of honour—Titles of United Kingdom.]—**By the Treaty of Union between England & Scotland it was provided, art. 20, "That all heritable offices . . . be reserved to the owners thereof as rights of property in the same manner as they are now enjoyed by the laws of Scotland notwithstanding this treaty":—*Held*: this treaty did not enlarge the rights of the holders of the heritable office of Usher of the White Rod in Scotland so as to entitle them to claim fees of honour from all recipients of honours whose titles were titles of the United Kingdom of Great Britain & Ireland; & the holders of the said heritable office were only entitled to fees from a Scotsman who received an honour or from an Englishman when he was the recipient of a purely Scottish honour.

The order of knighthood is not in any sense a local title. It is an order of chivalry recognisable in every part of the King's dominions, & differs in that respect altogether from an earldom conferred by the King as Sovereign of the Kingdom of Scotland (LORD ATKINSON).—LORD ADVOCATE v. WALKER TRUSTEES, [1912] A. C. 95; 106 L. T. 194; 28 T. L. R. 101, H. L.

## PENALTIES, RELIEF AGAINST.

See BONDS; BUILDING CONTRACTS, ENGINEERS, AND ARCHITECTS; EQUITY; LANDLORD AND TENANT.

## PENALTY.

See CRIMINAL LAW AND PROCEDURE; DAMAGES; EQUITY.

## PENSIONS.

See BANKRUPTCY AND INSOLVENCY; CHANCES IN ACTION; CONSTITUTIONAL LAW; CONTRACT; CRIMINAL LAW AND PROCEDURE; CROWN PRACTICE; ECCLESIASTICAL LAW; EDUCATION; LUNATICS AND PERSONS OF UNSOUND MIND; METROPOLIS; POLICE; POST OFFICE; PRISONS; PUBLIC AUTHORITIES, BODIES AND OFFICERS; REVENUE; ROYAL FORCES; AND TITLES *passim*.



## PERCOLATION.

*See* EASEMENTS AND PROFITS À PRENDRE ; MINES, MINERALS, AND QUARRIES ; WATERS  
AND WATERCOURSES.

## PERFORMING RIGHTS.

*See* COPYRIGHT AND LITERARY PROPERTY.

## PERJURY.

*See* CRIMINAL LAW AND PROCEDURE.

## PERMANENT BUILDING SOCIETY.

*See* BUILDING SOCIETIES.

## PERPETUATING TESTIMONY.

*See* EQUITY ; EVIDENCE.

# PERPETUITIES.

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<i>Alienation of Property</i> <i>in futuro</i> . . . . .	<i>See GIFTS; PERSONAL</i>	<i>Limitation, Statutes of</i>	<i>See LIMITATION OF</i>
	<i>PROPERTY; SET-</i>	<i>Mortgage . . . . .</i>	<i>ACTIONS.</i>
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NOTE.—The law affecting perpetuities in this Title is only concerned with interests arising in futuro & not with interests arising in present.

In considering cases in this Title regard must be had to the effect of the Law of Property Act, 1925 (c. 20), ss. 161–166.

## Part I.—The Rule Against Perpetuities.

### SECT. 1.—PERIOD ALLOWED FOR SUSPENSION OF VESTING.

#### SUB-SECT. 1.—THE RULE.

1. Statement of rule.]—An executory devise of an estate of inheritance to a person unborn when he shall attain the age of twenty-one years, is good; & there is no danger of a perpetuity.—*STEBBENS v. STEPHENS* (1736), *Cas. temp. Talb.* 228; 2 *Barn. K. B.* 375; 25 *E. R.* 751, *L. C.*

*Annotations*.—*Consd.* *Doe d. Harris v. Howell* (1829), 10 *B. & C.* 191; *Duffield v. Duffield* (1829), 3 *Bl. N. S.* 260; *Cadell v. Palmer* (1833), 1 *Cl. & Fin.* 372; *Dungannon v. Smith* (1846), 12 *Cl. & Fin.* 546. *Reid.* *Gower v. Grosvenor* (1740), *Barn. Ch.* 54; *Butler v. Bradford* (1741), 2 *Atk.* 220; *Gibson v. Montfort, Rogers v. Gibson* (1750), 1 *Ves. Sen.* 485; *Sheppard v. Lessingham* (1751), *Amb.* 122; *Teynham v. Webb* (1751), 2 *Ves. Sen.* 198; *Doe v. Fonnereau* (1780), 2 *Doug. K. B.* 487; *Thellusson v. Woodford* (1798), 4 *Ves. 227*; *Ackers v. Phillips* (1835), 9 *Bl. N. S.* 430; *Elborne v. Goode* (1844), 14 *Sim.* 165; *Holmes v. Prosscott* (1864), 3 *New Rep.* 559; *Re Astor, Astor v. Astor*, [1922] 1 *Ch.* 364. *Mentd.* *Smith v. Newport* (1742), 2 *Atk.* 344; *Lovell v. Lovell* (1743), 3 *Atk.* 11; *Hodgson v. Bective* (1863), 1 *Hon. & M.* 376.

2. —.]—*GOODTITLE d. GURNALL v. WOOD* (1740), *Willes*, 211; 7 *Term Rep.* 103, *n.*; 2 *Eq. Cas. Abr.* 342; 125 *E. R.* 1136.

*Annotations*.—*Consd.* *Doe v. Hutton* (1804), 3 *Bos. & P.* 643; *Cadell v. Palmer* (1833), 1 *Cl. & Fin.* 372. *Reid.* *Jones v. Roe* (1789), 3 *Term Rep.* 88; *Thellusson v. Woodford* (1805), 1 *Bos. & P. N. R.* 357; *Villar v. Gilbey* (1806), 75 *L. J. Ch.* 308. *Mentd.* *Goodright v. Forrester* (1807), 8 *East*, 552.

3. —.]—Executory devise to the heirs of A's body, by a second husband on failure of issue by the first now living, too remote a contingency, & therefore void.

It is a future devise to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being & twenty-one years after, which is the line now drawn & very sensibly & rightly drawn (LORD MANSFIELD, C.J.).—*GOODMAN v. GOODRIGHT* (1759), 2 *Burr.* 873; 1 *Wm. Bl.* 188; 97 *E. R.* 608.

*Annotations*.—*Reid.* *Doe v. Fonnereau* (1780), 2 *Doug. K. B.* 487; *Habergham v. Vincent* (1792), 6 *Term Rep.* 92; *Cadell v. Palmer* (1833), 1 *Cl. & Fin.* 372.

4. —.]—It is not necessary to enter minutely into the history or reason of the law in setting bounds to the disposing power of every species of property in this kingdom: it may be sufficient to say, that the law, from an indulgence to the natural wishes of men to perpetuate their property in their own families, or the families they adopt, has given them a power of control over it for one or more lives in being at the same time, & twenty-one years after in case of infancy. But public convenience found constitutional policy & the spirit of liberty, which breathes through every part of our law, will not endure any species of property to be chained down any longer; & therefore, if testator meant, in this case, to lock up his leasehold & personal estate beyond his daughter's life, & that this bequest should hang like a cloud, to burst upon it, when there should be a failure of her issue "at any time after her death," his intention was an illegal one, & must yield to the law, & the bequest will be void. If, on the contrary, he intended, that this bequest over should take place upon the event of his

daughter's dying without issue, "living at the time of her death," then his intention being confined to a life in being, is agreeable to the rules of law, & the bequest over will be a good one; & therefore the question proposed strikes at the true point of this case. When did testator intend this bequest over should take effect? For once fix that intention, & the law decides upon it without the least ambiguity (*per CUR.*).—*KEILEY v. FOWLER* (1768), *Wilm.* 298; 3 *Bro. Parl. Cas.* 299; 97 *E. R.* 115, *H. L.*

*Annotations*.—*Consd.* *Bigge v. Bensley* (1783), 1 *Bro. C. C.* 188. *Reid.* *Doe v. Lyde* (1787), 1 *Term Rep.* 593; *Kirkpatrick v. Kirkpatrick* (1807), 13 *Ves.* 476; *Campbell v. Harding* (1831), 2 *Russ. & M.* 390; *Garratt v. Cockerell* (1842), 1 *Y. & C. Ch. Cas.* 494. *Mentd.* *Pye v. Linwood* (1842), 6 *Jur.* 618; *Harris v. Davis* (1844), 1 *Coll.* 416; *Turner v. Frampton* (1846), 2 *Coll.* 331.

5. —.]—In *Stephens v. Stephens*, No. 1, *ante*, the ct. took a large stride of twenty-one years after a life in being. The argument was, that this would not create a perpetuity. Former cases had said, a limitation might be made to take effect on the death of a person *in esse*, or the birth of a posthumous child, & alienation was not restrained for any longer time in *Stephens v. Stephens*, No. 1, *ante*, for, if a devise could hold to a posthumous child, there could be no alienation till he should attain the age of twenty-one (LORD MANSFIELD, C.J.).—*DOE v. FONNEREAU* (1780), 2 *Doug. K. B.* 487; 99 *E. R.* 311.

*Annotation*.—*Reid.* *Doe d. Scott v. Roach* (1816), 5 *M. & S.* 482.

6. —.]—*JEE v. AUDLEY*, No. 15, *post*.

7. —.]—A power to appoint among children does not extend to grandchildren. The appointment being had under the power, the party taking benefit of it not obliged to make satisfaction out of the personal estate, which he took under the same will.—*ROBINSON v. HARDCASTLE* (1788), 2 *Bro. C. C.* 344; 29 *E. R.* 193, *L. C.*

*Annotations*.—*Reid.* *Houtledge v. Dorrl* (1794), 2 *Ves.* 357; *Crompe v. Barrow* (1799), 4 *Ves.* 681; *Brudenell v. Elwes* (1801), 1 *East*, 442; *Bray v. Bree* (1834), 3 *Bl. N. S.* 568; *Williamson v. Farwell* (1887), 35 *Ch. D.* 128; *Re Abbott, Peacock v. Frigout*, [1893] 1 *Ch.* 54; *Re Hewett's Settlement*, *Hewett v. Eldridge*, [1915] 1 *Ch.* 810.

8. —.]—*THELLUSSON v. WOODFORD*, No. 67, *post*.

9. —.]—(1) Testator being entitled to leasehold premises for terms of years, bequeathed them to trustees, on trust to permit his grandson, B., to take the profits thereof during his life, & after his decease to permit such person, who for the time being would take by descent as heir male of the body of the B., his grandson, to take the profits thereof until some such person should attain the age of twenty-one years, & then to convey the same to such person so attaining that age, his exors., administrators, & assigns; but if no such person should live to attain the age of twenty-one, then in trust to permit such person & persons successively, who for the time being would take by descent as heirs male of the body of testator's son, father of B., to take the profits of the same leasehold premises until one of them should attain the age of twenty-one, & then to convey the same to such heir male first attaining that age, his exors., administrators, &

**Sect. 1.—Period allowed for suspension of vesting :  
Sub-sects. 1 & 2, A.]**

**assigns.** At the death of B., the grandson, his son & heir, A., had attained the age of twenty-one, & entered into possession of the leasehold premises. Upon a bill filed against him by the next of kin of testator:—*Held*: A. had not a good title to the leaseholds; the bequest to the heir male of the grandson attaining twenty-one was void for remoteness, & therefore, the next of kin of testator, at his death, became entitled to their distributive shares of the property on the death of the grandson.

(2) Where a testator has made a general bequest, one having a number of objects, there is no authority for holding that a ct. can so mould it as to say that it is divisible into two classes, the one embracing the lawful, & the other the unlawful objects of his bounty.

... It has been contended that, in applying this doctrine to the present case, we are unwarrantably adopting principles from the cases of gifts to classes of persons, such as children, brothers, or the like, & which have not been & ought not to be applied to a case where there is no gift to a class to take together, but rather several gifts to a series of persons, who are to take in succession one after the other. There does not appear to me to be any ground for this distinction (ROFFE, B.).

(3) Our first duty is to construe the will; & this we must do, exactly in the same way as if the rule against perpetuity had never been established, or were repealed when the will was made (PARKE, B.).

(4) It is not sufficient that it may vest within that period; it must be good in its creation, & unless it is created in such terms that it cannot vest after the expiration of a life or lives in being, & twenty-one years & the period allowed for gestation, it is not valid, & subsequent events cannot make it so (CRESSWELL, J.).

If, at the time of its creation, the limitation is so framed, as not, *ex necessitate*, to take effect within the prescribed period, that is, if it is bad in its inception, it will not become valid by reason of the happening of subsequent events which may bring the time of actual vesting & taking effect within the period prescribed by law (TINDAL, C.J.).—DUNNANON (LORD) v. SMITH (1846), 12 Cl. & Fin. 546; 10 Jur. 721; 8 E. R. 1523, H. L.; *affg.* S. C. *sub nom.* KER v. DUNNANON (LORD) (1841), 1 Dr. & War. 509, L. C.

**Annotations.**—*As to* (1) *Reid*, Holloway v. Webber, Holloway v. Holloway (1868), L. R. 6 Eq. 523. *As to* (2) *Consd.* Cattlin v. Brown (1853), 11 Hare, 372. *Appld.* Wainman v. Field (1854), Kay, 507. *Reid*, Pearks v. Moseley (1880), 5 App. Cas. 714; Ward v. Van der Loeff, Burnyeat v. Van der Loeff, [1924] A. C. 653. *As to* (4) *Appld.* Merlin v. Blagrove (1858), 25 Beav. 125. *Consd.* Christie v. Gosling (1866), L. R. 1 H. L. 279; Harrington v. Harrington (1871), L. R. 5 H. L. 87. *Reid*, Greenwood v. Roberts (1861), 15 Beav. 92; *Re* Bonce, Smith v. Bonce, [1891] 3 Ch. 242; Hancock v. Watson, [1902] A. C. 14; *Re* Hill, Hill v. Hill, [1902] 1 Ch. 807; *Re* Fane, Fane v. Fane, [1913] 1 Ch. 404; *Re* Atkinson, Atkinson v. Atkinson, [1916] 1 Ch. 91. *Generally*, *Reid*, Monypenny v. Dering (1860), 9 C. B. 793; Storrs v. Benbow (1853), 3 De G. M. & G. 390; Doe d. Evers v. Challis (1859), 29 L. J. Q. B. 131; *Re* Roberts, Repington v. Roberts-Gaven (1881), 19 Ch. D. 520; *Re* Dawson, Johnston v. Hill (1888), 39 Ch. D. 155; *Re* Wood, Tullett v. Colville, [1894] 3 Ch. 381; *Re* Lowman, Devenish v. Poster (1895), 73 L. T. 816; *Re* Hewett's Settlement, Hewett v. Eldridge, [1916] 1 Ch. 810; *Re* Deloitte, Griffiths v. Deloitte, [1926] Ch. 56.

10. —.]—BLAGROVE v. HANCOCK, No. 19, *post*.

11. —.]—Where a fund was given to a person for life, & after her decease to her children, but accompanied, as to daughters or female issue,

with a restraint on anticipation:—*Held*: the restraint was void as infringing the rule against perpetuities.

The Chancellors established this rule in favour of alienation; that property could not be tied up longer than for a life in being & twenty-one years after. That is called the rule against perpetuities (JESSEL, M.R.).

The law does not recognise dispositions which would practically make property inalienable for ever (JESSEL, M.R.).—*Re* RIDLEY, BUCKTON v. HAY (1879), 11 Ch. D. 645; 48 L. J. Ch. 563; 41 L. T. 336; 43 J. P. 588; 27 W. R. 527.

**Annotations.**—*Consd.* Herbert v. Webster (1880), 15 Ch. D. 610; *Re* Game, Game v. Tennent, [1907] 1 Ch. 276. *Reid*, *Re* Errington, Bawtree v. Errington, [1887] W. N. 23; *Re* Ferneley's Trusts, [1902] 1 Ch. 543.

12. —.]—(1) Testator gave his residuary estate upon trust for his wife for life, & after her decease upon trusts for the benefit of his brother C. & his present & future issue as his wife should appoint. The wife appointed the property in trust for C. for life & after his death for all his children who had attained or should attain the age of twenty-five years if born in her lifetime or twenty-one years if born after her decease. C. had nine children only all of whom were born in the lifetime of original testator, & all of whom had attained twenty-five before the death of the appointor:—*Held*: upon the appointment taking effect it was certain that within the limits of perpetuity not only would the persons to take be ascertained but their interests would be vested & the amount of their shares fixed; & consequently that the appointment was valid.

(2) The rule against perpetuities requires that every estate or interest must vest, if at all, not later than twenty-one years after the determination of some life in being at the time of the creation of such estate or interest, & not only must the person to take be ascertained, but the amount of his interest must be ascertained within the prescribed period (JOYCE, J.).

(3) The period within which estates & interests limited by the appointment made in exercise of a special power must vest does not begin from the death of the person exercising the power, but, if such power was created by a will, from the death of the original testator (JOYCE, J.).

(4) When it is stated in *Jarman on Wills* (5th ed. Vol. I. p. 259) that the test by which the validity of such a gift as that which I have had to consider must be tried is to read it as inserted in the deed or will creating the power in the place of the powers it is not meant that the precise language of the instrument exercising the power in the present case the will of M. is to be read into the instrument creating it, viz. the will of C.

The will of M. [the wife] was an ambulatory document having no force or effect whatever until her death (JOYCE, J.).—*Re* THOMPSON, THOMPSON v. THOMPSON, [1906] 2 Ch. 199; 75 L. J. Ch. 599; 95 L. T. 97; 54 W. R. 613.

**Annotations.**—*As to* (1) *Consd.* *Re* Paul, Public Trustee v. Pearce, [1921] 2 Ch. 1. *Reid*, *Re* Clarke's Settlement, Trust, Wanklyn v. Streetfield, [1916] 1 Ch. 467. *Generally*, *Mentd.* *Re* Poyser, London v. Poyser, [1910] 2 Ch. 444; *Re* Popham, Buller v. Popham (1914), 58 Sol. Jo. 673.

13. —.]—*Re* FANE, FANE v. FANE, No. 452, *post*.  
Period of gestation.]—*See* Sub-sect. 4, *post*.

**SUB-SECT. 2.—ASCERTAINMENT OF PERSONS  
AND INTERESTS.**

*A. Future Estate must be Good in its Creation.*

14. Must necessarily vest within period.]—*MASSENBURGH v. ASH*, No. 182, *post*

15. —]—(1) Testator gave £1,000 to M. & the issue of her body & in default of such issue he gave the £1,000 to be equally divided between the daughters then living of J. & E., his wife. This devise takes in daughters of J. & E. born after testator's death, & therefore the limitation is too remote.

The limitations of personal estate are void unless they necessarily vest, if at all, within a life or lives in being, & twenty-one years or nine or ten months afterwards (KENYON, M.R.).

The question before me is, not whether the limitation is good in the events which have happened, but whether it was good in its creation (KENYON, M.R.).

(2) I am desired to do in this case something which I do not feel myself at liberty to do, namely, to suppose it impossible for persons in so advanced an age . . . to have children (KENYON, M.R.).—JEE v. AUDLEY (1787), 1 Cox, Eq. Cas. 324; 29 E. R. 1186.

*Annotations:—As to (1) Apld. Routledge v. Dorril (1794), 2 Ves. 357. Consd. Leake v. Robinson (1817), 2 Mer. 363. Aprrd. Dunganon v. Smith (1846), 12 Cl. & Fin. 546. Exld. Cattlin v. Brown (1853), 11 Hare, 372. Apld. Re Wood, Tullett v. Colville, [1894] 3 Ch. 381. Refd. Deerhurst v. St. Albans (1820), 5 Madd. 232; Bull v. Pritchard (1826), 1 Russ. 213; Campbell v. Harding (1831), 2 Russ. & M. 390; Cadell v. Palmer (1833), 10 Bing. 140; Harvey v. Stracey (1852), 1 Drew. 73; James v. Wynford (1852), 1 Sm. & G. 40; Knapping v. Tomlinson (1864), 12 W. R. 784; Pearks v. Moseley (1880), 5 App. Cas. 714; Re Bowles, Amedroz v. Bowles, [1902] 2 Ch. 650; Hancock v. Watson, [1902] A. C. 14. As to (2) Apld. Re Sayer's Trusts (1867), 36 L. J. Ch. 350. Follid. Re Dawson, Johnston v. Hill (1888), 39 Ch. D. 155; Johnston v. Hill (1888), 37 W. R. 51. Apld. Re Hocking, Michell v. Lee, [1898] 2 Ch. 567; Re Cazenove, Perkin v. Bland (1919), 122 L. T. 181; Ward v. Van Der Loeff, Burnyeat v. Van Der Loeff, [1924] A. C. 653; Re Deloitte, Griffiths v. Deloitte, [1926] Ch. 56. Generally, Refd. Doe d. Evers v. Challis (1859), 29 L. J. Q. B. 121; Stuart v. Cockerell (1869), L. R. 7 Eq. 363. Mentd. Pye v. Linwood (1842), 6 Jur. 618; Vanderplank v. King (1843), 12 L. J. Ch. 497; Heasman v. Pearce (1871), L. R. 11 Eq. 522.*

16. —]—(1) A gift is too remote, unless, according to the intention of testator, some person must necessarily be in existence, with legal power to dispose of the property, within the period limited by the rules of law.

(2) A gift must not only vest within the time limited by the rule against perpetuities, but the interests of the respective parties in the property, must be capable of ascertainment within that period, otherwise the gift will be void.

(3) Testator bequeathed leaseholds in C. Street, having sixty years unexpired, & as to which there was no obligation on the part of the lessor to renew, to A. for life, with remainder to the children she should leave, & in default to B. He bequeathed to trustees other leaseholds, upon trust to accumulate the rents, until the leases of the C. Street property "should become nearly expired," & then to apply such part thereof as should be necessary in the renewal of the C. Street property, "for the benefit of the respective persons to whom he had before, by his will, given the same"; & the residue, after answering the purpose aforesaid, he gave to his residuary legatees. Testator died before Accumulations Act, 1799 (c. 98), came into operation:—*Held*: the trust for accumulation & renewal was void for remoteness & uncertainty.—CURTIS v. LUKIN (1842), 5 Beav. 147; 11 L. J. Ch. 380; 6 Jur. 721; 49 E. R. 533.

*Annotations:—As to (1) Distd. Oddie v. Brown (1859), 4 De G. & J. 179. As to (2) Distd. Oddie v. Brown (1859), 4 De G. & J. 179; Wood v. Drew (1864), 33 Beav. 610.*

17. —]—DUNGANNON (LORD) v. SMITH, No. 9, ante.

18. —]—(1) In considering the validity of the limitations, the state of the family at the death of testator, & not at the date of his will, is to be

regarded; & therefore, if a gift be to such of the children of a particular parent as shall attain a greater age than twenty-one years, & the parent die in the lifetime of testator, & the class be ascertained at testator's death, the gift is valid.

(2) The limitation to the unborn children of testator's children for their lives was not void for remoteness only, because it was a gift to persons who might be unborn at the death of testator.—WILLIAMS v. TEALE (1847), 6 Hare, 239; 67 E. R. 1155.

*Annotations:—As to (1) Follid. Southern v. Wollaston (1852), 16 Beav. 276. Apld. Re Hoof, Picken v. Matthews (1878), 48 L. J. Ch. 150. Refd. Peard v. Kekewich (1852), 15 Beav. 166; Re Dawson, Johnston v. Hill (1888), 39 Ch. D. 155. As to (2) Apld. Hampton v. Holman (1877), 5 Ch. D. 183.*

19. —]—Testator devised his real estates to trustees, in trust to apply the rents for the maintenance & support of his wife & his present & future grandchildren, during the life of his wife, & on her death, to convey the estates to all his present & future grandchildren, as they respectively attained the age of twenty-five years, to hold to them, their heirs & assigns, as tenants in common:—*Held*: the trust to convey was void for remoteness.

I take the settled rule of law to be that an executory devise in order to be good must be in such a form that it must, at all events, vest within the compass of a life or lives in being & twenty-one years after (SHADWELL, V.-C.).—BLAGROVE v. HANCOCK (1848), 16 Sim. 371; 18 L. J. Ch. 20; 12 Jur. 1081; 60 E. R. 917.

*Annotations:—Consd. Greenwood v. Roberts (1851), 15 Beav. 92. Refd. Hobbs v. Parsons (1854), 23 L. T. O. S. 47; Re Finch, Abbiss v. Burney (1881), 17 Ch. D. 211.*

20. —]—A bequest to A. for life with remainder to such of his children as should live to attain twenty-five equally with an imperative direction that the interest thereof while any person presumptively entitled should be under twenty-five should be applied for his maintenance & a discretionary power of advancement:—*Held*: void for remoteness.—SOUTHERN v. WOLLASTON (1852), 16 Beav. 166; 1 W. R. 86; 51 E. R. 740. *Annotation:—Refd. Cam v. Salmon (1856), 5 W. R. 31.*

21. —]—A gift of a legacy to A. for life & afterwards to pay & divide it amongst his children who shall attain the age of twenty-five, is not too remote, if, by the death of A. at such a time before testator, all the children must necessarily attain twenty-five within twenty-one years after testator's death.—SOUTHERN v. WOLLASTON (1852), 16 Beav. 276; 22 L. J. Ch. 664; 1 W. R. 86, 534; 51 E. R. 785.

*Annotation:—Consd. Re Dawson, Johnston v. Hill (1888), 39 Ch. D. 155.*

22. —]—Testator, by his will, gave to A. a sum of £1,000 in trust to invest & accumulate, & pay the accumulated fund to any son he might have named John who should attain twenty-two years of age, & if the first son he should have & call John should die before twenty-two, then to the next son called John, & if no son called John should attain twenty-two years, then A. was to retain the £1,000 for his own use. Testator then declared that his residuary estate should be divided among his pecuniary & particular legatees in proportion to the particular legacies. A. claimed to retain the £1,000 on the ground that the legacy was void as being too remote; & the residuary legatees claimed it according to their shares of the residue:—*Held*: (1) the legacy was void, as given upon a trust which might continue for more than a life in being & twenty-one years.

(2) The residuary legatees were entitled, & not A.—JOY v. ASPINWALL (1854), 23 L. T. O. S. 206.

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**Sub-sect. 2. A. & B.]**

23. —.] — *MORGAN v. GRONOW*, No. 426, *post*.

24. —.] — Testator gave all his estate & effects to trustees upon trust for such of the children of his daughter A. as should attain the age of twenty-five. The eldest child attained twenty-five in the lifetime of testator:—*Held*: the gift was not void for remoteness because the class to take was ascertained at the death of testator.—*PICKEN v. MATTHEWS* (1878), 10 Ch. D. 264; 39 L. T. 531; *sub nom. Re HOOFF, PICKEN v. MATTHEWS*, 48 L. J. Ch. 150.

*Annotations*.—*Appld. Re Mosley's Trusts* (1879), 11 Ch. D. 555. *Distd. Re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197. *Reid. Re Barker, Capon v. Flick* (1905), 92 L. T. 831.

25. —.]—Testatrix, Miss R., had a brother, a widower advanced in life, who had assumed the name of R. G., & had two children, one a bachelor of unsound mind, the other a daughter. By her will she bequeathed a fund to trustees in trust to pay the income to her brother for life, then to his son for life, & from & after the decease of both of them, upon trust to pay the income for life unto any immediate or direct descendants of my said brother or nephew who shall bear the name of R. G. only, & from & after his or her decease, or in case of failure of any such immediate or direct descendant of my said brother or nephew who shall bear the name of R. G. only, upon trust for certain specified charitable societies. There was a clause for determining the interests of any descendants who after becoming entitled to the receipt of the income should abandon the name of R. G. Before the death of the nephew, a son born after the death of testatrix, of the daughter of testatrix's brother, assumed by royal licence the name of R. G., & at the decease of the survivor of the brother & nephew there was no other descendant of either of them who bore that name:—*Held*: the limitations after the life interests were not void for remoteness.—*Re ROBERTS, REXINGTON v. ROBERTS-GAWEN* (1881), 19 Ch. D. 520; 45 L. T. 450, C. A.

*Annotations*.—*Reid. Re Harvey, Peek v. Savory* (1888), 39 Ch. D. 239; *Re Wood, Tullett v. Colville*, [1894] 3 Ch. 381. *Mentd. Wainwright v. Miller*, [1897] 2 Ch. 255; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352.

26. —.]—*LONDON & SOUTH WESTERN RY. Co. v. GOMM*, No. 195, *post*.

27. —.]—H. devised real estate unto & to the use of trustees in fee upon trust to pay the rents to her sister M. for life, then to M.'s children successively for their lives & after the death of M., & her children to her sister E. for life, & then to E.'s children successively for their lives, & after the deaths of M. & E. & all their children to hold the property on such trusts as the longest liver of M., E. & their children should by deed or will appoint, & in default of appointment upon trust for the heir of testatrix. M. & E. survived testatrix. The longest liver of M., E. & their children left a will by which she purported to appoint the property. The heir-at-law of H. claimed the property as undisposed of. The trustees of the will of H. took out an originating summons to have it decided to whom they ought to convey the property. At the request of the parties the Ct. of Appeal consented to decide the construction of the will, & held that as the person to exercise the power of appointment was not necessarily ascertainable within a life or lives in being & twenty-one years, the power was void, & the property on the death of the survivor of

M. & E. & their children went as undisposed of to the heir-at-law.

I must say a few words as to *Avern v. Lloyd*, No. 257, *post*, which is very like the present case. The Vice-Chancellor there says that . . . there may be a limitation of valid life estates to the unborn children. . . .

It may be contended that as the alienation of the estate is not prevented the case is not within the rule as to remoteness. But that is not the true way of looking at it. An executory limitation to take effect on the happening of an event which may not take place within a life in being & twenty-one years, is not made valid by the fact that the person in whose favour it is made can release it (*COTTON, L.J.*).—*Re HARGREAVES, MIDGLEY v. TATLEY* (1889), 43 Ch. D. 401; 59 L. J. Ch. 384; 62 L. T. 473; 38 W. R. 470, C. A.

*Annotations*.—*Appld. Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535. *Reid. Re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51; *Re Fane, Fane v. Fane*, [1913] 1 Ch. 404.

28. —.]—Testator, who died in 1847, by his will gave legacies to trustees, upon trust to establish day schools in certain parishes, & to continue the same for ever thereafter, & he declared that if at any time thereafter the govt. should establish a general system of education the trusts of the legacies should determine, & he bequeathed the legacies in the same manner as he had bequeathed the residue of his personal estate:—*Held*: there was an immediate disposition in favour of charity in perpetuity, & the residuary legatees took a future interest which was to arise upon an event which need not necessarily occur within the perpetuities limits, & the gift over to them was consequently bad.—*Re BOWEN, LLOYD PHILLIPS v. DAVIS*, [1893] 2 Ch. 491; 62 L. J. Ch. 681; 68 L. T. 780; 41 W. R. 535; 9 T. L. R. 380; 37 Sol. Jo. 386; 3 R. 529.

*Annotations*.—*Appld. Re Barnett-Waring v. Painter Stainers Co.* (1908), 24 T. L. 788. *Folld. Re Peel's Release*, [1921] 2 Ch. 218. *Reid. Re Blunt's Trusts, Wigan v. Clinch*, [1904] 2 Ch. 767; *Worthing Corp'n. v. Heather*, [1906] 2 Ch. 532.

29. —.]—A gift over of personal estate, limited to take effect upon an indefinite failure of issue of living persons, is not void for remoteness if the necessary effect of the whole limitation under which the gift over & the prior gifts are made is that the property will vest, if at all, in some person absolutely within a life in being & twenty-one years.—*Re LOWMAN, DEVENISH v. PESTER*, [1895] 2 Ch. 348; 64 L. J. Ch. 567; 72 L. T. 816; 11 T. L. R. 390; 12 R. 302, C. A.

*Annotations*.—*Distd. Re Hocking, Michell v. Loe*, [1898] 2 Ch. 567. *Reid. Re Casenove, Perkin v. Bland* (1919), 122 L. T. 181. *Mentd. Re Carter, Dodds v. Pearson*, [1900] 1 Ch. 801; *Re Glassington, Glassington v. Follett*, [1906] 2 Ch. 305; *Re Dunstan, Dunstan v. Dunstan*, [1918] 2 Ch. 304; *Re Richards, Jones v. Rebbeck* (1921), 90 L. J. Ch. 298.

30. —.]—(1) A freehold estate was conveyed by a vendor unto & to the use of the purchaser in fee simple, "except & reserving unto the vendor a piece of land not less than forty feet in width commencing at the point A marked on the plan" to the conveyance "& terminating at the nearest road to be made by the purchaser or his assignee on the estate so as to give access to such road from" other lands of the vendor. The exact position of the piece of land so excepted was not in any way defined either by boundaries or colour so as to distinguish it from the rest of the land described in the conveyance & plan. Subsequently the purchaser, who had bought the estate for building purposes, prepared a road plan showing a strip of land 40 feet in width the site for a road extending from the point A on the plan to the conveyance to an intended road,



also shown on the road plan & afterwards completed, & which was the "nearest road" to the point A. This was said to operate as an election by the purchaser defining the "40 feet" piece & so making the uncertain exception certain:—*Held*: the "40 feet" piece so said to have been defined had not been effectually excepted from the conveyance (a) because the conveyance operated at common law & not under the Statute of Uses, 1535 (c. 10), so that the exception, being in the nature of a limitation of an estate of freehold to commence *in futuro*, was bad; & (b) because, even if the conveyance could be held to operate under the Statute of Uses, 1535 (c. 10), the exception was bad as infringing the rule against perpetuities, since any election necessary to give effect to the exception might not be made, according to the terms of the conveyance, until after the "nearest road" had been made by the purchaser or his assignee, an event not necessarily occurring within the period prescribed by the rule.

(2) *Qu.*: whether an uncertainty in a grant or exception can be made good by election.—*SAVILL BROTHERS, LTD. v. BETHELL*, [1902] 2 Ch. 523; 71 L. J. Ch. 652; 87 L. T. 191; 50 W. R. 580, C. A.

*Annotations*:—*Generally*, *Consd. S. E. Ry. v. Associated Portland Cement Manufacturers*, 1900, *Ltd.*, [1910] 1 Ch. 12. *Mentd.* *Taylor v. British Legal Life Assoc.* (1925), 94 L. J. Ch. 284.

31. —.—.]—Testator, who died in 1858, by his will dated in 1845, devised certain freehold property to his son for life, with remainder to his grandson in fee. Subsequently testator became entitled to the payment of a sum of money for certain lands taken by a railway co. for the purposes of their undertaking. Accordingly, by a codicil dated in 1857, testator bequeathed this sum to his son & his two daughters in equal shares; & he directed that "if the minerals" under the devised property "should be worked" the same should "be divided in the same manner as before mentioned in three parts equal shares:—*Held*: the gift of the minerals to testator's son & daughters, not being a present one, so that the minerals should pass to them immediately, but a conditional one, the division of the proceeds depending on the working & sale of the minerals, which condition might not happen within the period allowed by law, the gift was void under the rule against perpetuities.—*THOMAS v. THOMAS* (1902), 87 L. T. 58; 46 Sol. Jo. 585, C. A.

32. —.—.]—*Re WILMER'S TRUSTS*, *MOORE v. WINGFIELD*, No. 69, *post*.

33. —.—.]—*Re BEWICK*, *RYLE v. RYLE*, No. 299, *post*.

34. —.—.]—*Re FANE*, *FANE v. FANE*, No. 452, *post*.

35. —.—.]—P. in 1837 by deed granted & released an acre of land to trustees, upon trust to permit the same to be "for ever thereafter" used as & for a place for the instruction of seventy poor children resident within the parish "in the principles of the Church of England as by law established, & in reading, writing, casting accounts & other proper, useful & common learning for poor children." The deed also provided that if, by any law or statute or otherwise, the release should, as to the charitable purposes thereby intended to be made & established, "either not take effect, or, having taken effect, shall afterwards cease or determine or be defeated, or, the precise objects of these presents being for the education of poor children in the principles of the Church of England, become prevented," then the trustees for the time being should stand seised of the land & the school house, if any, to be built thereon in trust for P.,

his heirs & assigns. By a codicil to his will P. provided for raising a sum of money for building a school house on the land, the balance to be applied as an endowment for the school for the payment of the schoolmaster & schoolmistress. P. died in 1838, & after his death the school house was built, & a sum of money stood invested in the names of the present trustees of the deed, representing the money set apart by P. for the maintenance & support of the school. The school was carried on until about 1920, but the income of the fund was insufficient for the maintenance of the schoolmistress; the scholars' attendance was very small; & the school was practically derelict through the income being insufficient to enable it to be carried on:—*Held*: the event contemplated by the clause of reverter had arisen, but the clause was void as a perpetuity, & the original gift being expressed to be perpetual, there could be no reverter or resulting trust to P.'s heir or personal representatives, either of the school & site or of the endowment fund.—*Re PEELE'S RELEASE*, [1921] 2 Ch. 218; 90 L. J. Ch. 369; 127 L. T. 123; 65 Sol. Jo. 580.

36. *Exception to rule—Limitations introduced by reference.*—*Re FANE*, *FANE v. FANE*, No. 452, *post*.

37. *Effect of election by alienee—Power to release.*—*Re HARGREAVES*, *MIDGLEY v. TATLEY*, No. 27, *ante*.

38. —.—.]—*SAVILL BROTHERS, LTD. v. BETHELL*, No. 30, *ante*.

*Period of vesting.*—*See* Sect. 3, sub-sect. 1, *post*.

#### B. Effect of Subsequent Events.

39. *Interest bad at inception—Validity.*—*JEE v. AUDLEY*, No. 15, *ante*.

40. —.—.]—*Subsequent modification.*—Trust of a term during the respective minorities of the respective tenants for life or in tail in possession, etc., to receive & lay out the rents, etc., in stock, to accumulate, for such persons, as should upon the expiration of such minorities, or death of the minors, be tenants in possession, or entitled to the rents, & of the age of twenty-one, too remote; &, being void in its creation, is incapable of modification, so as to establish it in the extent, to which it might have been originally carried.

This trust is altogether void; except so far as it is a trust for the payment of debts (*GRANT, M.R.*).—*SOUTHAMPTON (LORD) v. HERTFORD (MARQUIS)* (1813), 2 Ves. & B. 54; 35 E. R. 239.

*Annotations*:—*Apld.* *Marshall v. Holloway* (1820), 2 Swan. 432. *Consd.* *Perrand v. Wilson* (1845), 4 Hare. 344. *Apld.* *Dungannon v. Smith* (1840), 12 Cl. & Fin. 446. *Beld.* *Ibbetson v. Ibbetson* (1840), 10 Sim. 495; *Browne v. Stoughton* (1840), 14 Sim. 369; *Turvin v. Newcome* (1856), 3 K. & J. 16; *Towart v. Lawson* (1874), L. R. 18 Eq. 490; *Re Stamford & Warrington*, *Payne v. Grey*, [1912] 1 Ch. 343. *Mentd.* *Crosse v. Glennie* (1843), 2 Y. & C. Ch. Cas. 237.

41. —.—.]—If the power of the trustees to cut timber for the purposes of settlement be permissive only, & not imperative, it is at least concurrent with the right of the infant tenant in tail to the timber, &, to the extent in which it derogates from that right, it is liable to the objection of creating a perpetuity.

The law, which admits of a strict settlement, admits that the *corpus* of the estate may be inalienable for centuries, by reason of disabilities which the law imposes. But it is another question whether the settlor may superadd a disability by making that also inalienable for centuries, the enjoyment of which by law is not suspended for an hour. It is material, in considering questions like these, to bear in mind that, although, by force of a strict settlement, which the law allows, the

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corpus of the estate may be rendered inalienable for an indefinite time, the rents & profits are in a course of uninterrupted enjoyment & distribution as part of the personal estate of the tenant for life, though an infant; & this observation applies as well to the timber growing on the estate of an infant tenant in tail, as to the other profits of the estate (WIGRAM, V.-C.).

It is admitted on all hands, that the validity of the limitations in a will must be determined at the death of testator (WIGRAM, V.-C.).—**FERRAND v. WILSON** (1845), 4 Hare, 344; 15 L. J. Ch. 41; 9 Jur. 860; 67 E. R. 680.

**Annotations:—**Consd. **Briggs v. Oxford** (1852), 1 De G. M. & G. 363. **Refd.** **Dungannon v. Smith** (1846), 12 Cl. & Fin. 546; **Birmingham Canal Co. v. Cartwright** (1879), 11 Ch. D. 421. **Moutd.** **Kekewich v. Marker** (1851), 3 Mac. & G. 311; **Langdale v. Briggs** (1856), 8 De G. M. & G. 391; **Carroll v. Graham** (1865), 11 Jur. N. S. 1012; **Dashwood v. Magniac**, [1891] 3 Ch. 306.

**42. ———.]—DUNGANNON (LORD) v. SMITH, No. 9, ante.**

**43. ———.]—**The interest in the residue of a term of years in land was devised to R., his exors., etc., subject to a proviso that, if R. or his issue male should become actually entitled to land comprised in the will of N., the interest in the term should go over to another party. By N.'s will, lands were devised to J. for life, remainder to trustees to preserve contingent remainders, remainder to J.'s first & other sons in tail general, remainder to R., remainder to trustees to preserve contingent remainders, remainder to R.'s first & other sons in tail general. On the death of the deviser of the term, R. became possessed of the land devised for the term. He died; & his issue male entered into possession. After R.'s death, J. died without issue, & the remainder to R.'s sons, under N.'s will took effect:—**Held**: the interest of R.'s representative in the term was not defeated, the proviso being bad for remoteness: for that, even if the proviso could be construed as contemplating independent alternatives, namely, the devolution of the estates comprised in N.'s will either to R. or to his issue male, still the alternative limitation under which alone, in the event, the proviso could operate, was the devolution to R.'s issue male, which alternative limitation was originally bad for remoteness.—**HARDING v. NOTT** (1857), 7 E. & B. 650; 26 L. J. Q. B. 244; 29 L. T. O. S. 179; 3 Jur. N. S. 1020; 5 W. R. 574; 119 E. R. 1387.

**44. ———.]—Re WILMER'S TRUSTS, MOORE v. WINGFIELD, No. 69, post.**

**Subsequent election by allenees.]—See Nos. 27, 30, ante.**

**Period of vesting.]—See Sect. 3, sub-sect. 1, post.**

**C. Quantum of Interest.**

**45. Necessity for ascertainment.]—CURTIS v. LUKIN, No. 16, ante.**

**46. ———.]—Whether necessary when persons ascertained.]—**Testator bequeathed five leasehold houses, having about fifty-four years to run, to his daughter for life, with remainder to her children. After the expiration of any of the leases, he directed his trustees to convey to his daughter & her children one or more of his five freehold houses of equal annual value, or as near as could be, to the expired leasehold:—**Held**: the devise was neither invalid for remoteness nor uncertainty.

The objection is that the gift is too remote:

the persons, however, who are to take are all ascertained, they are M. Wood & her children, & therefore are persons who were all either living at testator's death, or who would be ascertained at the death of the tenant for life. Then it is said that if you cannot ascertain accurately the interests of the parties in the subject-matter within a life or lives in being twenty-one years afterwards the whole gift fails. . . . But the error in this reasoning lies in this: that it is not a question of remoteness at all, but a question of uncertainty; it amounts to this, that if you cannot ascertain the amount of a gift, you cannot carry it into effect, though persons to take are ascertained & are *in esse*. It is necessary to distinguish between remoteness & uncertainty (ROMILLY, M.R.).—**WOOD v. DREW** (1864), 33 Beav. 610; 55 E. R. 505.

**Annotation:—Refd.** **Re Wood, Tullett v. Colville**, [1894] 3 Ch. 381.

**47. ———.]—**When once this [the ascertainment of persons to take] can be done, the persons to take may be regarded, for the shares are vested: you know who the persons are. It matters little—I have not to deal with that—what shares they take. If you know who must take the property, then you care less whether the time for selling has arrived (KEKEWICH, J.).—**Re WOOD, TULLETT v. COLVILLE**, [1894] 2 Ch. 310; 63 L. J. Ch. 544; 71 L. T. 184; *affd.* on other grounds, [1894] 3 Ch. 381, C. A.

**Annotation:—Refd.** **Re Bowick, Ryle v. Ryle**, [1911] 1 Ch. 116.

**48. ———.]—Re THOMPSON, THOMPSON v. THOMPSON, No. 12, ante.**

**49. Trust for sale—Reservation of excess proceeds.]—**A reservation of part of the proceeds of sale of land to arise under a trust for sale, where the exercise of the trust is not limited to any certain period, is not void as infringing the rule against perpetuities, although the amount of the part reserved cannot be ascertained until the sale takes place.

In Mar. 1853, C. being owner of buildings subject to mtges., executed a deed declaring that he held the property upon trust for sale, & for division, after certain payments, of the surplus proceeds into three equal parts, of which he should retain one, & should pay the other two to other persons. In Aug. 1853, C. assigned his one-third share to a purchaser, reserving to himself, in the event of the sale moneys exceeding £85,000, one-tenth of the difference between the actual amount of the one-third share & the amount it would have been if the sale moneys had been £85,000 only. The property was sold in 1898 by the then trustees of the deed of Mar. 1853, for much more than £85,000, & £4,500 was set aside by them to answer the claim of the representative of C., who had died. It was alleged by the parties interested, other than the representative of C., that the persons for the time being entitled to the rents & profits of the buildings had before the sale spent large sums in lasting improvements thereof, & they claimed that certain India Stock, then representing the sum of £4,500, should contribute a proportionate part of the expenditure on these improvements. The trustees brought an action asking for a declaration of the ct. upon the validity of the reservation & of the claim for contribution:—**Held**: the reservation did not infringe the rule against perpetuities, & was valid.—**Re COULSON'S TRUSTS, PRICHARD v. COULSON** (1907), 97 L. T. 754.

**Time of vesting.]—See Sect. 3, sub-sect. 1, post.**

**PART I. SECT. 1, SUB-SECT. 2.—C.**

**45 1. Necessity for ascertainment.]—SMITHWICK v. HAYDEN** (1887), 19 L. R. Ir. 490.—IR.

*D. Alienee under Disability.*

**50. General rule—Personal incapacity disregarded.]—**(1) Testator devised four estates, three of which he settled to uses in strict settlement under which an infant was now tenant in tail of the O. estate. The fourth estate he limited to trustees for a term of one thousand years upon trust out of the rents & profits to discharge the incumbrances upon all the estates in a certain order, & subject thereto he settled the estate to the uses of the two estates other than the C. estate. The will contained a provision as to each estate that if any person who, if the provision had not been inserted therein, would for the time being be entitled to the possession or receipt of the rents & profits of such estate as tenant for life or in tail should be under the age of twenty-one years, then & in such case & as often as the same should happen, the trustees of the will should enter into possession or receipt of the rents & profits of the estate, & should during the minority of such person keep up the mansion house & manage the property, with power (*inter alia*) to hold manorial cts. & accept surrenders of leases; & should maintain the infant, & apply the surplus rents & profits in the same way as those of the fourth estate. Upon an originating summons to determine the validity of the minority clause:—*Held*: there was no necessity for implying any estate at all in the trustees, for without any such estate they could enter & take possession & exercise the powers entrusted to them, & the mere inclusion in those powers of one, that of holding manorial cts., which could not be exercised without their having the legal estate did not operate so as to change the whole character of the settlement. At most it was only a power, & not a trust, to do something which the law would not allow. The minority clause was therefore valid.

(2) When the ct. is asked to read a clause into a will by implication it is asked to construe the will so as to give effect to the real intention of testator implicitly contained in, but not expressed in terms by, the words of the will. It is possible that testator may have intended to infringe the rule against perpetuities, but the ct. would not insert words having that effect unless it was absolutely unavoidable (*FARWELL, L.J.*)

(3) It is well settled that limitations to A. for life with remainder to his first & other sons in tail were as valid at common law as under Statute of Uses, 1535 (c. 10). . . . The barrable nature of the estate tail was held sufficient & the cts provided against such risk of perpetuity as they considered incident to an estate tail by requiring a particular estate of freehold to support contingent remainders & by forbidding limitations to the unborn child of an unborn child. . . . If then the barrable nature of estates tail renders them free from any objection on the ground of perpetuity notwithstanding the infancy of tenants in tail, no power of entry which is called into existence in respect of & is limited in duration to the continuance of the infancy of the tenant in tail can be obnoxious to the rule (*FARWELL, L.J.*).

(4) The trusts of the term are not altogether void. So far as the trust is for payment of debts, it is good (*COZENS-HARDY, M.R.*).

(5) It is impossible at the present date to contest the validity of what is known as the name & arms clause (*FLETCHER MOULTON, L.J.*).—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, [1912] 1 Ch. 343; 81 L. J. Ch. 302; 105 L. T. 913; 28 T. L. R. 159; 56 Sol. Jo. 204, C. A.

**51. Infancy—Provision superadded to tenancy**

in tail—*Timber on estate of infant tenant in tail.]—FERRAND v. WILSON*, No. 41, *ante*.

**52. —.]—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, No. 50, *ante*.**

**Period of vesting.]—See Sect. 3, sub-sect. 1, *post*.**

**SUB-SECT. 3.—LIVES IN BEING.**

**53. Number of lives—Not restricted—No perpetuity until lives not in being.]—**The limitation of a term to several persons in reversion one after another, if those persons were in being & particularly named, could in no wise tend to the entail of a chattel, or creation of a perpetuity; but limiting of it to a person not in being did; & where any person had the trust of a possibility in remainder of a term, he had good power to declare & make a disposition of the trust of such possibility; but the limitation of such remainder in possibility of a chattel real to the heir of the person limiting was a void limitation (*per CUR.*).—*GORING v. BICKERSTAFF* (1662), 1 Cas. in Ch. 4; *Freem. Ch.* 163; *Poll.* 31; 22 E. R. 665, L. C.

*Annotations:—Consd. Thellusson v. Woodford* (1798), 4 Ves. 227. *Reid. Goodtitle d. Gurnall v. Wood* (1740), *Willcs*, 211.

**54. —.]—**If a term be devised to A. for life, with remainder to B. for life, & if B. die without issue of his body begotten, then to C., the limitation over to C. is too remote to take effect.

If all the remaindermen are living at the time of the devise, it is good (*TWIDEN, J.*).—*LOVE v. WYNDHAM* (1669), 1 Mod. Rep. 50; 1 Eq. Cas. Abr. 191; 1 Lev. 290; 1 Sid. 450; 1 Vent. 79; 2 Keb. 637; 86 E. R. 724; *sub nom. WINDHAM v. LOVE*, 2 Rep. Ch. 14.

*Annotations:—Reid. Forth v. Chapman* (1720), 1 P. Wms. 663; *Thellusson v. Woodford* (1806), 1 Bos. & P. N. R. 357; *Lepine v. Ferard* (1831), 2 Russ. & M. 378. *Mentd. Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636.

**55. —.]—NORFOLK'S (DUKE) CASE, HOWARD v. NORFOLK (DUKE), No. 181, *post*.**

**56. —.]—Period ascertained by life of survivor.]—**(1) If a devise be made to trustees for years, & then "to the issue male of A." he having no issue at the time of the devise, & dying afterwards without issue during the term: "& if A. should die without issue male, then to the issue male of B." he having issue a son at the time of the devise, & expiration of the term: the devise to the issue of A. is void, & the issue of B. shall have the estate.

(2) Devise to the first issue of A., being after a precedent term, not good by way of executory devise.

A devise of a term to A. for life, & after to B. for life, & to C. for life, is good, if they be all *in esse* at the time of the devise; & if it be made to the heir of one of them, all subsequent trusts or limitations are void, because that would tend to a perpetuity. The like rule of executory devises of land (*BLENCOWE, J.*).

For let the lives be never so many, there must be a survivor, & so it is but the length of that life (*POWELL, J.*).—*SCATTERWOOD v. EDGE* (1697), 1 Salk. 229; 1 Eq. Cas. Abr. 190; 12 Mod. Rep. 278; 91 E. R. 203.

*Annotations:—As to (1) Reid. Barnes v. Jennings* (1866), L. R. 2 Eq. 448. *As to (2) Consd. Gore v. Gore* (1733), *Kel. W.* 254; *Andrews d. Jones v. Fulham* (1738), *Andr* 263. *Reid. Mortimer v. Mortimer* (1732), *Kel. W.* 26; *Hayward v. Stillingfleet* (1737), 1 Atk. 423; *Gulliver v. Wickett* (1745), 1 Wils. 105; *Gulliver v. Vaux* (1746), 8 De G. M. & G. 167; *Thellusson v. Woodford* (1805), 1 Bos. & P. N. R. 357; L. & S. W. Ry. v. Gomm (1882), 20 Ch. D. 562. *Generally, Reid. Doe v. Brabant* (1791), 3 Bro. C. C. 393. *Mentd. Thrustout v. Peake* (1715), 1 Stra. 12; *Ammurst v. Litton, Litton v. Ammurst* (1729), 1 Barn. K. B. 217; *Wallis v. Hodson* (1741), 3 Atk. 114; *Wilkes v. Holmes* (1759), 9 Mod. Rep. 485; *Wynne v. Wynne* (1840), 2 Man. & G. 8.

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 Sub-sects. 4 & 5.]**

fee; & it was directed, that the trustees should stand seised, upon the failure of male lineal descendants of A. B. & C. as aforesaid, upon trust to sell, & pay the produce to His Majesty, his heirs, & successors, to the use of the Sinking Fund; the accumulation, till the purchases or sales can take place, to go to the same purpose; with a direction, that all the persons becoming entitled shall use the surname of testator only. The decree, establishing the trusts of the will, was affirmed by the House of Lords upon appeal.

Property may be so limited as to make it unalienable during any number of lives, not exceeding that to which testimony can be applied to determine when the survivor drops.

It is competent to a testator to give a life estate, to be appointed by the survivor of a thousand persons (LORD ELDON, C.).

(2) The first objection to the will is, that testator has exceeded that portion of time, within which the contingency must happen, upon which an executory devise is permitted to be limited by the rules of law (MACDONALD, C.B.).

(3) With an easy interpretation we find from LORD NOTTINGHAM what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience; namely, where an executory devise would have the effect of making lands unalienable beyond the time which is allowed in legal limitations; that is, beyond the time at which one in remainder would attain his age of twenty-one, if he were not born when the limitations were executed (MACDONALD, C.B.).

(4) It appears, then, that the co-existing lives at the expiration of which the contingency must happen, are not confined to any definite number. . . . The usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite impracticable to ascertain the extinction of the lives described (MACDONALD, C.B.).

(5) If the estates for life had been given to the several *cestui que vie* in this will, & after their deaths to their children, either born or *en ventre sa mère* at testator's death, they would have been good. No tendency to perpetuity then can arise in the case of such lives being taken, not to confer in them a measure of beneficial interest, but to fix the time, during which the vesting of the property which is the subject of this devise shall be protracted; inasmuch as the circulation of real property is no more fettered in one case than in the other (MACDONALD, C.B.).—THELLUSSON v. WOODFORD (1805), 11 Ves. 112; 1 Bos. & P. N. R. 357; 32 E. R. 1030, H. L.; *affg.* (1799), 4 Ves. 227.

**Annotations:—***As to (5) Consd.* Cadell v. Palmer (1833), 10 Bing. 140; *Re Burrows, Cloghorn v. Burrows*, [1895] 2 Ch. 487. *Apld. Re Wilmer's Trusts, Moore v. Wingfield*, [1903] 1 Ch. 874. *Reid.* Godfrey v. Davis (1801), 6 Ves. 43; Blackburn v. Stables (1814), 2 Ves. & B. 367; Villar v. Gilbey, [1907] A. C. 139. *Generally, Reid.* Southampton v. Hartford (1813), 2 Ves. & B. 54; Beard v. Westcott (1814), 5 Taunt. 393; Leake v. Robinson (1804), 9 Ves. 316; *Mentl.* St. Paul's, London v. Morris (1804), 9 Ves. 316; Underhill v. Horwood (1804), 10 Ves. 309; Bell v. Coleman (1820), 6 Madd. 22; Doe d. Winter v. Porritt (1826), 5 B. & C. 48; Doe d. Winter v. Perratt (1843), 6 Man. & G. 314; Cooke v. Turner (1844), 14 Sim. 218; Nightingale v. Goulbourn (1848), 2 Ph. 594; Egerton v. Brownlow (1853), 4 H. L. Cas. 1; Langdale v. Briggs (1856), 8 De G. M. & G. 391; Turvin v. Newcome (1856), 3 K. & J. 16; Thellusson v. Rendlesham (1859), 7 H. L. Cas. 429; Eastern Counties, etc. Cos. v. Marriage (1860), 9 H. L. Cas. 32; Willford v. Watson (1872), 42 L. J. Ch. 90; Income Tax Special Purposes Comrs. v. Pemsel, [1891] A. C. 531; *Re Stamford & Warrington, Payne v. Grey*, [1911] 1 Ch. 265.

68. ———.]—(1) In a devise of an estate to A. for life with remainder to A.'s child or children for their lives, in equal shares &, after the decease of any such child or children of the share of him or them so dying to his or their child or children, & his or their heirs as tenants in common, the limitations to the children of such of A.'s children as may be living at the death of testator are not void for remoteness; *secus*, as regards the limitations to the children of such of A.'s children as may be unborn at testator's death.

(2) The gifts of shares to the children of each of the children of A. are separate & independent gifts &, therefore, such of these gifts as can take effect within the limits prescribed by law are good though such as cannot take effect within those limits are bad.

(3) In the case before me, all the children were *in esse*, because I consider the child *en ventre sa mère* at the death of testator, was, for the purpose of the rule as to perpetuities, a child *in esse* (KINDERESLEY, V.-C.).—KNAPPING v. TOMLINSON (1864), 34 L. J. Ch. 3; 10 L. T. 558; 10 Jur. N. S. 626; 12 W. R. 784.

**Annotations:—***As to (1) Distd.* Bentinck v. Portland (1877), 7 Ch. D. 693. *Apld. Re Russell, Dorrell v. Dorrell*, [1895] 2 Ch. 698.

69. ———.]—(1) Although interest of child to contrary.]—(1) For the purpose of deciding a question of perpetuity arising upon a gift, there is an established rule that a child *en ventre sa mère* at the time of testator's death, who is subsequently born must be treated as having been alive at testator's death; & that rule is not to be departed from merely because it may be in the interest of the child to contend that the gift is void as infringing the rule against perpetuity.

Testatrix devised real estate to trustees upon trust to pay the income to M. during her life, & after her death to stand possessed of the *corpus* upon trust for the second & every younger son of M., "born or to be born" successively, during his life, with remainder, after the death of each such son, upon trust for his first & other sons, successively, in tail male.

Testatrix died in Oct. 1880, at which date M. had had a son who died in 1887, a son who was disqualified by the will from taking under the limitations, & she was pregnant of a third son, S., who was born in Feb. 1881. M. died in 1886, S. being then still living:—*Held*: the limitations after S.'s life estate were valid as not transgressing the rule against perpetuities.

(2) If the limitations are such that events might have so turned out as that the rules as to remoteness would have been infringed, then the limitations fail, although in the events which actually did happen the legal period was not exceeded (STIRLING, L.J.).—*Re WILMER'S TRUSTS, MOORE v. WINGFIELD*, [1903] 2 Ch. 411; 72 L. J. Ch. 670; 89 L. T. 148; 51 W. R. 609; 47 Sol. Jo. 602, C. A.

**Annotation:—***As to (1) Consd.* Villar v. Gilbey, [1907] A. C. 139.

70. ———.]—(1) There is no fixed rule of construction which compels a ct. to hold that a child was born in the lifetime of testator because it was at that time *en ventre sa mère*. That peculiar rule of construction is limited to cases where that construction of the word "born" is necessary for the benefit of the unborn child, as decided by LORD WESTBURY, C., in *Blasson v. Blasson*, No. 646, *post*.

(2) A testator by his will devised real estate in strict settlement to his brother's first & second sons, who were alive at the date of the will, successively for life, with remainder to their first

& other sons in tail, with remainder to his brother's third, fourth, & other sons successively in tail, but declared his intention to be that any third or other son born in testator's lifetime should not take a larger interest than for life only, with remainder to his issue in tail male. The brother's third son was born three weeks after testator's death. The first & second sons died without issue:—*Held*: the third son took an estate tail, not having been born in testator's lifetime.

(3) The cases in class two establish this, that in construing the rule [against perpetuities] a child *en ventre* may be deemed to be a "life in being," & the period of gestation may be added at both ends of the period of twenty-one years mentioned in the rule (LORD ATKINSON).—VILLAR v. GILBEY, [1907] A. C. 139; 76 L. J. Ch. 339; 96 L. T. 511; 23 T. L. R. 392; 51 Sol. Jo. 341, H. L.

*Annotations*:—As to (1) *Apld. Re Salaman, De Pass v. Sonnenthal*, [1908] 1 Ch. 4. *Generally, Mentd. Williams v. Ocean Coal Co.*, [1907] 2 K. B. 422; *Schofield v. Orrell Colliery Co.*, [1909] 1 K. B. 178.

71. Application of rule—Devise to child *en ventre sa mère*—Gift over on death of child without issue.]—After a devise to an infant *en ventre sa mère* for life in case it should be a son, remainder to such issue male or the descendants of such issue male of such child as at the time of his death should be his heir-at-law, & in case at the time of the death of such child there should be no such issue male, nor any descendants of such issue male then living, or in case such child should not be a son, then over; the limitation over is not too remote to take effect.—LONG v. BLACKALL (1797), 7 Term Rep. 100; 101 E. R. 875; *subsequent proceedings*, 3 Ves. 486, L. C.

*Annotations*:—*Consd. Griffiths v. Vere* (1803), 9 Ves. 127. *Apld. Thellusson v. Woodford* (1805), 1 Bos. & P. N. R. 357. *Consd. Cadell v. Palmer* (1833), 10 Bing. 140. *Apld. Re Wilmer's Trusts, Moore v. Wingfield*, [1903] 2 Ch. 411. *Reid. Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Villar v. Gilbey*, [1906] 1 Ch. 583.

72. ————— Executory trust in tail.]—BLACKBURN v. STABLES, No. 187, *post*.

73. ————— Gift to class—Grandchildren of brothers.]—STORRS v. BENHOW, No. 362, *post*.

74. Period must not be in gross—Must relate to actual gestation.]—A limitation by way of executory devise, which is not to take effect until after the determination of a life or lives in being, & a term of twenty-one years as a term in gross, & without reference to the infancy of any person who is to take under such limitation, or of any other person, is a valid limitation. *Secus*: if to the term in gross of twenty-one years be added the number of months equal to the period of gestation.

Upon the second & third questions proposed by your lordships, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, & upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years & months to be taken as a term in gross, & without reference to the infancy of any person whatever, born or *en ventre sa mère* the unanimous opinion of the judges is, that such a limitation would be void as too remote (BAXLEY, B.).—CADELL v. PALMER (1833), 1 Cl. & Fin. 372; 10 Bing. 140; 7 Bl. N. S. 202; 3 Moo. & S. 571; 6 E. R. 956, H. L.; *affg. S. C. sub nom. BENGOUGH v. EDRIDGE* (1827), 1 Sim. 173.

*Annotations*:—*Distd. Tollemache v. Coventry* (1834), 2 Cl. & Fin. 611. *Consd. Phipps v. Ackers* (1842), 9 Cl. & Fin. 583; *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Cole v. Sewall* (1848), 2 H. L. Cas. 186. *Apld. Stuart v. Cockerell* (1869), L. R. 7 Eq. 363; *English v. Cliff*, [1914] 3 Ch. 376. *Reid. Andrews v. Drever* (1835), 9 Bl. N. S. 471; *Catlin v. Brown* (1853), 1 Eq. Rep. 550; *Hampton J.*—VOL. XXXVII.

*v. Holman* (1877), 36 L. T. 287; *Whitby v. Mitchell* (1890), 38 W. R. 337; *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Villar v. Gilbey*, [1907] A. C. 139. *Mentd. R. v. Mills* (1844), 10 Cl. & Fin. 534; *Rodriguez v. Speyer*, [1919] A. C. 59.

75. Time when period may run—Both ends of period of twenty-one years.]—VILLAR v. GILBEY, No. 70, *ante*.

Right of children *en ventre sa mère* under will.]—See WILLS.

#### SUB-SECT. 5.—CHOICE OF PERIOD OF TWENTY-ONE YEARS.

76. Period may be in gross—After existing life.]—MASSENBURGH v. ASH, No. 182, *post*.

77. —————.]—(1) Testator gave real & personal estate in trust that a commodious & proper house should be taken on lease at such yearly rent, as should be agreed on, or otherwise, as the trustees should think fit, as a school; & that the children & grandchildren of some relations should be placed there from the age of seven to fourteen, then to be put out apprentices, also that such other children, as the trustees should think fit, should be placed at the same school; & he gave directions as to an inscription, visitation, etc.; this trust is void under the Mortmain Act, as to the general purpose of a permanent charity, but good as to the disposition for the relations, to the extent of children & grandchildren, of such of the stocks specified, as were in being at testator's death; & while the school is kept open for them other children may be educated there.

(2) There may be any number of springing uses within twenty-one years after lives in being.—BLANDFORD v. THACKERELL (1793), 2 Ves. 238; 4 Bro. C. C. 394; 30 E. R. 612, L. C.

*Annotations*:—As to (1) *Consd. Leake v. Robinson* (1817), 2 Mer. 363. *Reid. A. G. v. Whitechurch* (1798), 3 Ves. 141; *Braund v. Davon* (1868), 3 Ch. App. 800; *Rooke v. Dawson*, [1895] 1 Ch. 480. *Generally, Mentd. Kirkbank v. Hudson* (1819), Dan. 259.

78. —————.]—CADELL v. PALMER, No. 74, *ante*.

79. Minority of allenees—Vesting on majority.]—STEPHENS v. STEPHENS, No. 1, *ante*.

80. —————.]—GULLIVER v. WICKETT (1745), 1 Wils. 105; 95 E. R. 517.

*Annotations*:—*Consd. Thellusson v. Woodford* (1805), 1 Bos. & P. N. R. 357. *Apld. Evers v. Challis* (1859), 7 H. L. Cas. 532. *Reid. Doe d. Herbert v. Selby* (1824), 2 B. & C. 926; *Doe d. Harris v. Howell* (1829), 10 B. & C. 191; *Eastwood v. Lockwood* (1867), L. R. 3 Eq. 487; *Re Martin, Smith v. Martin* (1885), 54 L. J. Ch. 1071; *Re Burrows, Cleghorn v. Burrows*, [1895] 2 Ch. 497; *Hancock v. Watson*, [1902] A. C. 14. *Mentd. Parry v. Boodle* (1785), 1 Cox, Eq. Cas. 183; *Doe v. Brabant* (1791), 3 Bro. C. C. 393; *Warren v. Rudall, Hall v. Warren* (1858), 4 K. & J. 603.

81. —————.]—THRUSTOUT d. SMALL v. DENNY (1750), 1 Wils. 270; 95 E. R. 613.

82. —————.]—PHIPPS v. KELYNGE (1767), 2 Ves. & B. 57, n.; 35 E. R. 240, L. C.

*Annotations*:—*Distd. Thellusson v. Woodford* (1798), 4 Ves. 227; *Southampton v. Hertford* (1813), 2 Ves. & B. 54; *Hamer v. Hamer* (1851), 17 L. T. O. S. 308. *Reid. Browne v. Stoughton* (1846), 14 Sim. 389.

83. —————.]—Bequest of personal estate, in trust, when & as the child & children of A. should severally attain the age of twenty-one years, to pay & divide the same equally between them & the children of such of them, if any, as might depart this life under the age of twenty-one years; but so, nevertheless, that the children of any deceased child, on attaining twenty-one, should take between them such share only as the parent would have taken if living:—*Held*: not too remote.

If the limitation had been to the great-grandchildren of A., such great-grandchildren to take

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when the child of a living person attained twenty-one, I should hold the gift perfectly good (ROMILLY, M.R.).—PACKER v. SCOTT (1864), 33 Beav. 511; 55 E. R. 467.

**34. Minority of person not interested—Unborn child of living person.]—PACKER v. SCOTT, No. 83, ante.**

**SUB-SECT. 6.—WHEN NO LIVES CHOSEN.**

**35. General rule—Limitations invalid unless vesting within twenty-one years.]—If the interest of an unborn child of a person in being does not vest when such unborn child attains twenty-one, the gift is too remote & void, & the limitations over are void also.—PALMER v. HOLFORD (1828), 4 Russ. 403; 6 L. J. O. S. Ch. 104; 38 E. R. 857.**

**Annotation:—Distd. Williams v. Lewis (1859), 6 H. L. Cas. 1013.**

**36. ———.]—Testator directed the application of the surplus income of his estate for the maintenance of his children during their minority or apprenticeship, & the application of certain sums for their advancement; & after his youngest child should have attained twenty-one, he directed his exors. to divide any surplus in their hands, every three years, during his wife's life or widowhood, & after her death or marriage, every year equally amongst his children, or their heirs instead of any one that might happen to be dead, until the expiration of fifty years from the time of his death; & that, at the end of the said fifty years, his exors. should sell his remaining estate, & pay, discharge or divide the money for the same amongst his children, naming them, or any of their heirs in their stead, & if any of his said children should die without lawful issue such share or shares of those so dying to belong to the survivors or their lawful heirs equally:—Held: (1) the ct. could not read "or" as "and" where the purpose was manifestly substitution of objects, & not succession; (2) the word "heirs" must be construed "issue," & not "children"; & it was not a ground for departing from such meaning that the consequence of adhering to it would be to render the will void for remoteness; (3) the words of the gift did not direct a substitution, once for all, of persons to take each child's share at a given time not too remote; but contained a running direction to the trustees to pay the income from time to time, during the whole period of fifty years, to the children, or, in case of their deaths, to such of their lineal descendants as might from time to time come *in esse*; (4) the limitations of the property at the end of the term of fifty years were void for remoteness.**

The only ground upon which I am pressed to limit the construction of the word "heirs" or "issue" to grandchildren of testator was the consequence to which it would lead, viz. that it would or might lead to a decision that the limitation at the expiration of the term of fifty years was void for remoteness. That, I apprehend, is not a sufficient reason for departing from the plain meaning of testator's words (WIGRAM, V.-C.).—SPEAKMAN v. SPEAKMAN (1850), 8 Hare, 180; 68 E. R. 323.

**37. Gift restricted to lives in being.]—Gift by testator to his wife, for her life, or until her second marriage, of the interest of his real & personal estate, which, whether arising from rents or public securities, was to be applied for the benefit of herself & children; & if she married again**

he declared that her power & benefit under his will should cease; & when thirty years were expired he ordered all his property, both freehold & leasehold, to be sold, & two-thirds to be divided amongst his children living at that period, or to their heirs, & one-third to be invested for the benefit of his wife; & after her decease, he bequeathed such third to his children then living & to their heirs:—Held: the gift at the end of thirty years was not liable to objection on the ground of remoteness; there was no substitution of the legatee created by the gift to the children "or to their heirs," but that the word "or" must be read "and"; & the children of testator living at the end of thirty years, who were also the same children as were living at the death of the widow, were entitled to the proceeds of the sale of the estate, & also to the intermediate rents after the death of the widow & before the expiration of the thirty years.—LACHLAN v. REYNOLDS (1852), 9 Hare, 796; 68 E. R. 738.

**Annotation:—Reid. Wingfield v. Wingfield (1878), 9 Ch. D. 658.**

**38. Trust for sale of real estate—Right of legatees of proceeds of sale.]—Testator devised a fee simple house, which was subject to a lease, to the trustees of his will upon trust to pay the ground rent under the lease to certain persons, & upon the expiration of the lease he directed that the house should be sold & the proceeds of sale should be divided amongst certain other persons ascertainable within the period allowed by the rule against perpetuities. At the date of testator's death forty-nine years of the term created by the lease were unexpired:—Held: although the trust for sale was void for remoteness, the legatees of the proceeds of sale were, notwithstanding, entitled to the benefits intended by testator, inasmuch as in equity they were entitled to take the house as real estate.—Re DAVERON, BOWEN v. CHURCHILL, [1893] 3 Ch. 421; 63 L. J. Ch. 54; 69 L. T. 752; 42 W. R. 24; 9 T. L. R. 570; 37 Sol. Jo. 631; 3 R. 685.**

**Annotations:—Distd. Re Wood, Tullett v. Colville, [1894] 2 Ch. 310. Appvd. Re Appleby, Walker v. Lever, Walker v. Nisbet, [1903] 1 Ch. 565.**

**39. ———.]—Testator who died in 1854 devised his real estate in certain events upon trust for sale & gave the proceeds of the sale among classes of persons who were all ascertainable without infringing the rule against perpetuities. The trust for sale was admitted to be bad as not being dated to take effect within the prescribed period; the will contained no direct gift of the income of the property until sale in favour of the persons entitled to the proceeds of sale if the trust for sale had been good:—Held: as the persons who were intended by testator to take the beneficial interest in his property were persons who could be ascertained within the rule against perpetuities the gift to them was good; though the trust for sale was bad it was mere machinery for the purpose of division & could be disregarded & that the beneficiaries took the property as real estate.—Re APPLEBY, WALKER v. LEVER, WALKER v. NISBET, [1903] 1 Ch. 565; 72 L. J. Ch. 332; 88 T. T. 219; 51 W. R. 455; 47 Sol. Jo. 334, C. A.**

**Annotation:—Mentd. Slade v. Chaine, [1908] 1 Ch. 522.**

**SUB-SECT. 7.—EFFECT OF RULE ON CONSTRUCTION.**

**A. In General.**

**Construction of will generally.]—See WILLS.**

**39. Rule against perpetuities disregarded—Construction not restricted to comply with rule.]—**



BOUGHTON v. BOUGHTON, BOUGHTON v. JAMES, No. 758, *post*.

91. ———.] — SPEAKMAN v. SPEAKMAN, No. 86, *ante*.

92. ———.] — Testatrix, by her will, devised her estates to a son, charged with £1,000, payable to trustees, upon trust to pay the interest to her daughter for life, & after her decease, upon trust to dispose thereof unto or amongst the child & children of her daughter, to be a vested interest or vested interests on their respectively attaining the age of thirty years; & testatrix declared that, if any child or children of her daughter should die under the age of thirty years without lawful issue, the share or shares of him, her or them so dying, as well original as accruing by survivorship, should go to the survivors or survivor, in equal shares if more than one, & become vested at such ages or times as his, her or their original share or shares. The daughter had two children, one, who died in her lifetime, aged twenty-seven years; & another, who survived her, & attained the age of thirty years:—*Held*: the word "vested" was used in the sense of "not subject to be divested" or "indefeasible"; & the bequest of the £1,000 after the decease of the daughter, to her child & children, was a valid bequest creating a vested interest in the children who survived her, & the representatives of the child who died in her lifetime; & the gift over only was void for remoteness.

In considering this question, the ct. lays out of sight the circumstances that, if one construction be adopted, the disposition in favour of A.'s children will be void for remoteness, while according to the other construction, the dispositions will in a great measure be supported.

The ct. in such cases first ascertain what the provisions of the instrument are, by applying to it the ordinary rules of construction, & it then determines to what extent the provisions thus ascertained are in accordance with the rules of law (PARKER, V.-C.).—TAYLOR v. FROBISHER (1852), 5 De G. & Sm. 191; 21 L. J. Ch. 605; 9 L. T. O. S. 242; 16 Jur. 283; 64 E. R. 1076.

*Annotations*.—*Distd. Re Blakemore's Settlement*, (1855), 20 Beav. 214; *Re Morse's Settlement*, (1855), 21 Beav. 174; Rowland v. Tawney (1858), 26 Beav. 67; *Re Thotoher's Trusts* (1859), 26 Beav. 365; *Goaling v. Goaling* (1863), 32 Beav. 58. *Appl. Re Baxter's Trusts* (1864), 4 New Rep. 131. *Distd. Re Stevens, Clark v. Stevens* (1896), 40 Sol. Jo. 296. *Mentd. Archer v. Legg* (1862), 31 Beav. 187; *Re Arnold's Estate* (1863), 33 Beav. 163; *Lakin v. Lakin* (1865), 34 Beav. 443; *Armstrong v. Wilkinson* (1878), 3 App. Cas. 355; *Best v. Williams*, [1890] W. N. 189.

93. ———.] — HEASMAN v. PEARSE, No. 226, *post*.

94. ———.] — DUNGANNON (LORD) v. SMITH, No. , *ante*.

95. ———.] — (1) Testator devised estate A. to B. for life, & after his decease to & among all the children of B. during their natural lives in equal shares; & from & after the death of any or either of such child or children, he gave the share if him or her so dying unto his or their child or children lawfully to be begotten, & to his or their heirs for ever as tenants in common; & in case 3. should die without leaving a child or children, grandchild or grandchildren, then he gave the estate to C. — *Held*: every child of B. alive at the time of the death of testator took an estate for life in his or her share, with remainder to his or her children in fee; & every child of B. who was born after the death of testator took a life interest in his or her share, but the remainder in fee to his or her children was too remote, & went to the heir-at-law of testator under the intestacy.

You cannot give the whole property to those who are in fact ascertained within the period, & might have taken if the gift had been to them *nominatim*, because they were intended to take in shares to be regulated in amount, augmented or diminished according to the number of the other members of the class, & not to take exclusively of those other members (PAGE-WOOD, V.-C.).

(2) The second rule is, that you must ascertain the objects of testator's bounty, by construing his will without any reference to the rules of law which prohibit remote limitations; & having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction of the will, you are then to apply the rules of law as to perpetuities to the objects so ascertained (PAGE-WOOD, V.-C.).

(3) The fifth & last rule is that where there is a gift or desire of a given sum or property to each member of a class & the gift to each is wholly independent of the same or similar gift to every other member of the class & cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by the law (PAGE-WOOD, V.-C.).

(4) If the devise be to . . . a series of single individuals answering a given description & any one member of the series intended to take may by possibility be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to exclude all, & not to give to one excluding others (PAGE-WOOD, V.-C.). —CATLIN v. BROWN (1853), 11 Hare, 372; 1 Eq. Rep. 550; 68 E. R. 1319; *sub nom.* CATLIN v. BROWN, 1 W. R. 533.

*Annotations*.—*As to* (1) *Distd. Webster v. Boddington* (1858), 26 Beav. 128. *Appl. Knapping v. Tomlinson* (1864), 34 L. T. Ch. 3. *Appl. Re Moseley's Trusts* (1871), L. R. 11 Eq. 499. *Distd. Bentinck v. Portland* (1871), 7 Ch. D. 693. *Appl. Re Russell, Dorrill v. Dorrill*, [1886] 2 Ch. 698. *Expld. Re Nash, Cook v. Frederick*, [1899] 2 Ch. 450. *Reid. Pearks v. Moseley* (1880), 5 App. Cas. 714; *Whitby v. Mitchell* (1890), 44 Ch. D. 85. *As to* (2) *Appl. Merlin v. Blagrove* (1868), 25 Beav. 125. *As to* (3) *Appl. Wilkinson v. Duncan* (1861), 30 Beav. 111. *Generally, Reid. Re Bence, Smith v. Bence*, [1891] 3 Ch. 242.

96. ———.] — (1) Personal estate was given by will to S., a bachelor, for life, remainder to the eldest son of S. for life, remainder to E. for life, & after the death of S. his eldest son, & E., upon trust to transfer the same "to all & every the children of S. share & share alike, & the children of such of the children of S. as shall be then dead, according to the Statute of Distribution, 1670 (c. 10), but in case there shall be no child or grandchild of S. then living, upon trust to transfer the same to the children of E." — *Held*: the gift was void for remoteness, the gift over showing that it was not a gift to all the children of S., with a substitution of the children of such of them as died before the period of distribution, but a gift to a class of children & grandchildren to be ascertained at a period not confined within a life in being & twenty-one years.

(2) We have to construe this will according to the natural meaning of the words as if no rule against perpetuities existed (JAMES, L.J.). —STUART v. COCKERELL (1870), 5 Ch. App. 713; 39 L. J. Ch. 729; 23 L. T. 442; 13 W. R. 1057, L. J.

*Annotations*.—*As to* (1) *Consd. Re Brown & Sibby's Contract* (1876), 3 Ch. D. 156. *Distd. Watson v. Young* (1885), 25 Ch. D. 436. *Reid. Evans v. Walker* (1876), 3 Ch. D. 211; *Wainwright v. Miller*, [1897] 2 Ch. 365. *Generally, Reid. Re Cunynghame's Settlement*, (1871), L. R. 11 Eq. 324; *Re Harvey, Peck v. Savory* (1888), 39 Ch. D. 289.

**Sect. 1.—Period allowed for suspension of vesting:**  
**Sub-sect. 7, A. & B.]**

97. —[I think it is the duty of a judge . . . to construe the instrument in a proper way, to arrive at its meaning independently of the results, & then apply the law. This has been laid down over & over again with regard to another rule of law—the rule against remoteness or perpetuity (JESSEL, M.R.).—*CUNLIFFE v. BRANCKER* (1876), 3 Ch. D. 393; 46 L. J. Ch. 128; 85 L. T. 578, C. A.

*Annotations*.—*Reid*, *Patching v. Barnett* (1880), 49 L. J. Ch. 665; *Re Hollis' Hospital Trustees & Hague's Contract* (1889), 47 W. R. 891. *Mentd.* *Richardson v. Harrison* (1885), 16 Q. B. D. 85; *Tudball v. Medlicott* (1888), 36 W. R. 886. *Re Brooke, Brooke v. Brooke*, [1894] 1 Ch. 43; *Re Brooke, Brooke v. Dickson*, [1923] 2 Ch. 265.

98. —[(1) In ascertaining whether a bequest falls within the rule against remoteness, the words of testator are first to be taken, & their meaning determined; & it is then to be considered whether that meaning brings them within the operation of the rule.

You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of testator. You take his words & endeavour to arrive at their meaning exactly in the same manner as if there had been no such law, & as if the whole intention expressed by the words could lawfully take effect (*LORD SELBORNE, C.*).

(2) The vice of remoteness affects a class as a whole, 'if it may affect an unascertained number of its members.

A gift is said to be to a class of persons when it is to all those who shall come within a certain category or description defined by a general or collective formula, & who, if they take at all are to take one divisible subject in certain proportionate shares; & the rule is that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of its members (*LORD SELBORNE, C.*).

(3) In a devise to a class, if all the shares would necessarily be ascertained within due limits of time, it would be immaterial that in a later part of the will there were found, as to some particular shares, superadded conditions which might or might not be void by reason of remoteness. If you could find in this will a gift simply to all the children of testator's daughter who shall attain the age of twenty-one years . . . & the lawful issue of such of them as shall die under that age leaving lawful issue at his, her, or their death or respective deceases . . . no doubt there would be no remoteness (*LORD SELBORNE, C.*).

A will contained a bequest of a particular sum of £3,000 to testator's daughter & her husband for life, & after their deaths "my will is that the sum of £3,000, the securities for the same, & the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, & the lawful issue of such of them as shall die under that age, leaving lawful issue at his, her, or their death or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age, having issue at his, or their death or deceases respectively, as tenants in common if more than one, but such to take only the share or shares which his, her, or their parent or parents respectively would have taken if living." A life interest in another sum of £3,000 was given to the son, with exactly the same trusts for his issue; in default, over:—*Held*: the bequest was void for remoteness; the bequest being to a class,

the parts of it could not be severed, so as to treat one portion as good, though the other was void.—*PEARKS v. MOSELEY, Re MOSELEY'S TRUSTS* (1880), 5 App. Cas. 714; 50 L. J. Ch. 57; 43 L. T. 449; 29 W. R. 1, H. L.

*Annotations*.—As to (1) *Apld.* *Re Mervin, Mervin v. Crossman*, [1891] 3 Ch. 197; *Willerton v. Stocks*, [1892] W. N. 29; *Re Bower, Lloyd Phillips v. Davis*, [1893] 2 Ch. 491; *Re Oliver's Settlement, Evered v. Leigh*, [1903] 1 Ch. 191; *Whitby v. Von Lusdecke*, [1906] 1 Ch. 783; *Re Peel's Release*, [1921] 2 Ch. 218. *Consd.* *Ward v. Van Der Loeff, Burnyeat v. Van Der Loeff*, [1924] A. C. 653. *Reid*, *Goodier v. Johnson* (1881), 18 Ch. D. 441; *Re Bevan's Trusts* (1887), 34 Ch. D. 716; *Re Wenmoth's Estate, Wenmoth v. Wenmoth* (1887), 37 Ch. D. 266; *Re Lowman, Devenish v. Pester* (1895), 64 L. J. Ch. 567; *Re Mortimer, Gray v. Gray* (1905), 74 L. J. Ch. 745; *Re Harcourt, Portman v. Portman*, [1921] 2 Ch. 491; *Portman v. Portman*, [1922] 2 A. C. 473. *Generally*, *Reid*, *Re Wood, Tullett v. Colville*, [1894] 3 Ch. 381; *Wainwright v. Miller*, [1897] 2 Ch. 255. *Mentd.* *Re Harvey's Estate, Harvey v. Gillo*, [1893] 1 Ch. 567; *Lloyd Groome v. A.-G.* (1893), 10 T. L. R. 66; *Kingsbury v. Walter*, [1901] A. C. 187; *Re Sanford, Sanford v. Sanford*, [1901] 1 Ch. 939.

99. —[*Re MERVIN, MERVIN v. CROSSMAN*, [1891] 3 Ch. 197; 60 L. J. Ch. 671; 65 L. T. 186; 39 W. R. 697.

*Annotations*.—*Consd.* *Re Stevens, Clark v. Stevens* (1896), 40 Sol. Jo. 296; *Re Burnyeat's Trusts, Burnyeat v. Ward* (1923), 92 L. J. Ch. 450. *Reid*, *Willerton v. Stocks*, [1892] W. N. 29; *Re Barker, Capon v. Flick* (1905), 92 L. T. 831.

100. —[*WILLERTON v. STOCKS*, [1892] W. N. 29.

101. —[Testator devised freehold estates to uses in strict settlement. By a codicil testator directed that no devisee of any of his real estates devised under or by virtue of his will should have a vested interest therein or in any part thereof, or be entitled to the possession of the same or any part thereof until the attainment of the age of twenty-four years, anything contained in his will or any law or usage to the contrary notwithstanding:—*Held*: the effect of the codicil was to make the limitations of the will executory devises, & consequently that they were void for remoteness & there was an intestacy.

The question which arises for our consideration is, what is the effect of the will & codicil taken together, & for this purpose the rule against perpetuities or the doctrine of remoteness must be put aside (*COZENS-HARDY, L.J.*).—*Re WRIGHTSON, BATTIE-WRIGHTSON v. THOMAS*, [1904] 2 Ch. 95; 73 L. J. Ch. 742; 90 L. T. 748, C. A.

*Annotation*.—*Reid*, *White v. Summers*, [1908] 2 Ch. 256.

102. —[In considering a will this ct. has first to construe the words & then apply to them such rules of general law, e.g. the rule against perpetuities or the Thelusson Act [Accumulations Act, 1800 (c. 98)] as may be appropriate. If it thereupon appears that there is any infringement of such rules the ct. is bound to refuse to allow its process to be used to carry out such illegality (*FARWELL, J.*).—*Re OLIVER'S SETTLEMENT, EVERED v. LEIGH*, [1905] 1 Ch. 191; 74 L. J. Ch. 62; 53 W. R. 215; 21 T. L. R. 61.

*Annotations*.—*Reid*, *Re Beales' Settlement, Barrett v. Beales*, [1905] 1 Ch. 256; *Re Wright, Whitworth v. Wright*, [1906] 2 Ch. 288; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1; *Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492. *Mentd.* *Re Thursty's Settlement, Grant v. Littledale*, [1910] 2 Ch. 181; *Re Macartney, Macartney v. Macartney*, [1918] 1 Ch. 300; *Re Bostock's Settlement, Norrish v. Bostock*, [1921] 2 Ch. 469.

103. —[(1) By a settlement made in 1844 on the marriage of W. & G. real estate was settled to the use of G. for her life, & after her death to the use of such children of the marriage in such shares & manner as G. should by will devise the same. The only two children of the marriage were L., born in 1846, & A., born in 1852. G. died in 1877, having by her will devised that



the yearly income of the settled estate should be equally divided "during their respective lives between my daughters L. & A.," & that "in the event of the death of either the survivor shall receive the whole income," & that on her death the estate should be sold & the proceeds divided among the children of L. & A.:—*Held*: the gift to the survivor was a contingent & not a vested estate, & as the survivor might be a person not ascertainable within twenty-one years from the death of G., the gift was void as contravening the rule against perpetuities.

(2) That, of course, is upon the construction of the document. For the purpose of arriving at that I shut my eyes to the consequences (BUCKLEY, J.).

(3) There is a difference . . . between these two things—a vested estate for life [i.e. to each unborn person] which may fail to fall into possession . . . & the gift of a contingent estate for life. What I have here is a gift under which, as I understand the language, only the survivor . . . will be entitled to some estate (BUCKLEY, J.). —WHITBY v. VON LUEDECKE, [1906] 1 Ch. 783; 75 L. J. Ch. 359; 94 L. T. 432; 54 W. R. 415.

*Annotations*:—As to (1) *Follis*. *Re Orlinton's Settlement*, Sweetman v. Batty (1912), 106 L. T. 588; *Re Samuda's Settlement*. Trusts, Horne v. Courtenay, [1924] 1 Ch. 61.

104. —.]—EDWARDS v. EDWARDS, No. 174, *post*.

105. —.]—*Re HUME, PUBLIC TRUSTEE v. MABEY*, No. 109, *post*.

When construction complying with rule preferred.]—See Sect. 1, sub-sect. 7, B., *post*.

Effect of reference to rule in instrument.]—See Sect. 1, sub-sect. 7, C., *post*.

### B. When Construction Complying with Rule Preferred.

Construction of wills, generally, see WILLS.

106. Construction avoiding perpetuity preferred.]—Cts. will avoid a construction leading to a perpetuity & void devise, if possible. So they will, in marriage settlements, consider the general intent as in favour of the issue described, & not let property revert, or go to a father as the representative of one child to the prejudice of the rest, if no positive reason for it to be clearly inferred.—EXEL v. WALLACE (1751), 2 Ves. Sen. 117; 28 E. R. 77; *on appeal*, 2 Ves. Sen. 318, L. C.

*Annotations*:—*Reid*. Kelley v. Fowler (1768), Willm. 208; Garratt v. Cockrell (1842), 1 Y. & C. Ch. Cas. 494.

107. —Will admitting of two constructions—Intention expressed in will.]—The phrase in a will "estate tail in possession" does not necessarily mean actual possession, but may be construed as meaning entitled to a vested estate tail in the property, though it may be vested in remainder & the party entitled may not be in actual possession, a previous life estate existing at the time. There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but it if is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will. Where there has been a decree, all the parties interested being before the ct., long acquiesced in, which declared a direction for accumulation to be void for remoteness, but also declared that the will was well executed, & the trusts thereof, except that direction, ought to be carried into effect, the presumption will be that a possible objection to a similar clause in the will had not been overlooked, but had been considered & decided on before the declara-

tion to carry the trusts of the will into execution was made.

It is not improper to take into consideration that in the whole of the will he [testator] has carefully provided that the limitation of his estates shall not be open to the objection of being contrary to that law, [against remoteness] & if the clause in question is capable of two constructions, one of which would render it void upon a ground which testator throughout his will seems to have been anxiously guarding against, & the other of which is reconcilable with all his previously expressed intentions, there can be no doubt which of them ought to be adopted (LORD CHELMSFORD). —MARTELLI v. HOLLOWAY (1872), L. R. 5 H. L. 532; 42 L. J. Ch. 26, H. L.

*Annotations*:—*Apld*. *Re Mortimer*, Gray v. Gray, [1905] 2 Ch. 502; *Re Stamford & Warrington*, Payne v. Grey, [1912] 1 Ch. 343. *Consd*. *Re Atkinson*, Atkinson v. Atkinson, [1916] 1 Ch. 91; *Re Lewis*, Busk v. Lewis, [1918] 2 Ch. 308. *Reid*. *Re Fothergill's Estate*, Price-Fothergill v. Price, [1903] 1 Ch. 149; *Re Parker*, Parker v. Parkin, [1910] 1 Ch. 581; *Portman v. Portman*, [1922] 2 A. C. 473.

108. —.]—Where land is devised to an unborn person for life with remainder to his children in tail or to his sons in tail male, the ct. under the doctrine of *cy-près* will give legal effect to the general intention of testator by treating the life estate as an estate tail or an estate tail male, as the case may be; but, except in the case of an executory trust, in which a greater latitude is allowed in moulding the provisions of the will, the doctrine will only be applied in this manner; & the ct. will not construe a will *cy-près* if the result is to include as an object of testator's bounty any person whom he intended to exclude, or to exclude any person whom he intended to include.

Devise of real estate to the use of A. for life, remainder to the use of the first & every other son of A. successively for life, remainder to the use of the first & every other son of that son successively in tail male, remainder to the use of the daughters of each of A.'s sons as tenants in common in tail with cross-remainders, the daughters of each elder son to take before the daughters of the younger sons remainder to the use of A.'s daughters as tenants in common in tail with cross-remainders, remainder to the use of A. in fee simple. A. survived testator & died a bachelor. The limitations after A.'s life estate being void as they stood for remoteness, it was proposed, in order to give effect to the general intention of testator without including in the devise the class of persons omitted by him, namely, daughters of sons' sons, to substitute under the doctrine of *cy-près* a series of limitations in tail differing in form from the original limitations & involving the introduction of a contingent remainder:—*Held*: the doctrine of *cy-près* was not applicable, & the ultimate limitation to A. in fee simple failed.—*Re MORTIMER, GRAY v. GRAY*, [1905] 2 Ch. 502; 74 L. J. Ch. 745; 93 L. T. 459, C. A.

*Annotation*:—*Reid*. *Re Stamford & Warrington*, Payne v. Grey, [1912] 1 Ch. 343.

109. —.]—In considering whether the trusts of a will are void for perpetuity the ct. must first construe the gifts according to the ordinary canons of construction, & then consider whether any part of it, as so construed, offends against the perpetuity rule & it cannot construe the gift otherwise than according to its natural meaning because, if so construed it would offend against the rule, though possibly, if the gifts might equally well be construed in two ways, one only of which would offend against the rule, the ct. might adopt the other construction.

*Sect. 1.—Period allowed for suspension of vesting:*  
*Sub-sect. 7, B. & C. Sect. 2: Sub-sects. 1*  
*2, A. (a).]*

Possibly if the gift might equally well be construed in two ways, one of which only would offend against the rule, the ct. might because of the rule be led to adopt the other construction (PARKER, J.).—*Re HUME, PUBLIC TRUSTEE v. MABEY*, [1912] 1 Ch. 693; 81 L. J. Ch. 382; 106 L. T. 335; 56 Sol. Jo. 414.

*Annotations:—Mentd. Re Ussher, Foster v. Ussher*, [1922] 2 Ch. 321; *Re Blackwell, Blackwell v. Blackwell*, [1926] Ch. 223.

110. *Presumption as to testator's intention—Not to intend offence against rule.*—A will is to be read with an inclination to believe, when it can be not unreasonably supposed, that testator did not intend to transgress the law (KNIGHT BRUCE, V.-C.).—*LEACH v. LEACH* (1843), 2 Y. & C. Ch. Cas. 495; 63 E. R. 222.

*Annotation:—Reid, Habergham v. Ridehalgh* (1870), L. R. 9 Eq. 395.

111. ——— *No reference to rule in will—No contrary presumption raised.*—Testator bequeathed freeholds to trustees & their heirs, to the use of his nephew for life, remainder to the use of his first son in tail male, with remainders over. He gave to the same trustees leaseholds, in trust for such person or persons as should for the time being be entitled to the several freehold hereditaments thereinbefore devised, to the end that the said leaseholds might go along with, & be held & enjoyed by the person or persons who, for the time being, should be entitled to the said freehold hereditaments, so far as the nature of the said leaseholds, & the rules of law & equity, would permit; but no person taking an estate tail by purchase in the freeholds was, for the purpose of transmission to representatives, to become absolutely entitled to the leaseholds until twenty-one. He devised to the same trustees & their heirs copyholds upon trust to permit & suffer the same to be held & enjoyed by such person or persons as for the time being should become seised of or entitled unto any estate of freehold, or inheritance of & in the said freehold hereditaments for & during so long time as the rules of law & equity would permit. Power was reserved by the will to certain persons to cut timber; & the trusts of the timber money, when invested, were declared to be, to pay the income to such person or persons as for the time being would be entitled to the rents & profits of the freehold hereditaments. Testator further directed his trustees, out of his personalty, to set apart £10,000, & invest the remainder, after payment of his debts, & pay the dividends & interest thereof from time to time as the same should become due & be received, unto such person or persons as for the time being should be entitled to the rents & profits of his freehold hereditaments thereinbefore devised; & in case of failure of the issue of certain persons, upon trust to transfer what should remain of the personal estate to a college.—*Held*: the personal estate vested absolutely in the first tenant in tail.

The ct. will look to the general intention of a testator that the personal estate shall go with the realty, rather than to an apparent intention on his part to limit the personalty to an extent not permitted by law.

He does not advert to the state of the law, but it does not follow that on that account the ct. will see an intention to violate the rule against perpetuities; it will rather see an intention to give the property to the owner of the first estate of inheritance (PAGE-WOOD, V.-C.).—*Re JOHN-*

TRUSTS (1866), L. R. 2 Eq. 716; 12 Jur. N. S. 616.

112. ———.]—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, No. 50, *ante*.

113. *Personalty limited by reference to limitations of realty—Limitations cut down not to offend rule.*—Testatrix devised a reversion in real estate upon trust for C. for life, with remainder to his first & other sons in tail, & directed her trustees to stand possessed of £2,000 to apply the dividends in the repair of the property at the request of the person in possession. Testatrix died. C. was the tenant for life of the property by a title prior to the will of testatrix, & had a grandson who died in his father's lifetime. C. then died leaving a son, *pltf.*, who then became first tenant in tail in possession.—*Held*: *pltf.* was entitled to the fund.

Where a testator gives real estate by a series of limitations & afterwards gives chattels by a mere general reference to go according to the limitations of the real estate as long as the rules of law & equity will permit, a ct. of equity will not deviate from the limitations of the real estate in order to tie up the personalty along with it if the testator has so moulded the limitations of the real estate as not to fit the case of personalty. It will not cut down the interest of the tenant in tail; it will only cut down the operation upon the personalty of the words used in limiting the real estate, so as to avoid offending against the rule as to perpetuities (PAGE-WOOD, V.-C.).—*COX v. SUTTON* (1856), 25 L. J. Ch. 845; 28 L. T. O. S. 119; 2 Jur. N. S. 733.

*Annotations:—Reid, Re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149; *Re Lewis, Bush v. Lewes*, [1918] 2 Ch. 308.

*C. Effect of Reference to Rule in Instrument.*

Construction of wills, generally, *see* WILLS.

114. "As near as the rules of law & equity permit"—*Construction not controlled.*—B. devised freeholds, upon trust for the use of E., his nephew, for life, with remainders to the use of his first & other sons in tail male, with successive remainders over for life, & remainders to the first & other sons of the successive tenants for life in tail male; & he bequeathed his residuary personal estate, upon such trusts, etc., as were thereby declared concerning the devised freehold hereditaments, "or as near thereto as the rules of law & equity would permit"; provided, nevertheless, that such residuary personal estate should not vest absolutely in any tenant in tail unless such person should attain the age of twenty-one years.—*Held*: the words "as near as the rules of law & equity will permit" would not by their own force have controlled the construction.—*CHRISTIE v. GOSLING* (1866), L. R. 1 H. L. 279; 35 L. J. Ch. 667; 15 L. T. 40, H. L.; *affg.* S. C. *sub nom.* *GOSLING v. GOSLING* (1862), 1 De G. J. & Sm. 1, L. C.

*Annotations:—Distd. Harrington v. Harrington* (1871), L. R. 5 H. L. 87. *Appl. Martelli v. Holloway* (1879), L. R. 5 H. L. 532; *Re Dayrell, Hastie v. Dayrell*, [1904] 2 Ch. 496. *Expld. & Distd. Re Atkinson, Atkinson v. Atkinson*, [1916] 1 Ch. 91. *Reid. Burnell v. Firth* (1867), 15 W. R. 546; *Burton v. Newbery* (1875), 1 Ch. D. 234; *Re Cresswell, Parkin v. Cresswell* (1883), 24 Ch. D. 102; *Re Parry, Powell v. Parry* (1889), 60 L. T. 489; *Harbin v. Masterman*, [1894] 2 Ch. 184; *Re Johnston, Mills v. Johnston*, [1894] 3 Ch. 204; *Wharton v. Masterman*, [1895] A. C. 186; *Re Fothergill's Estate, Price-Fothergill v. Price*, [1903] 1 Ch. 149; *Re Couturier, Couturier v. Shea*, [1907] 1 Ch. 470; *Re Trevanion, Trevanion v. Lennox*, [1910] 3 Ch. 538; *Portman v. Portman*, [1923] 2 A. C. 473. *Mentd. Re Jeffery, Nussey v. Jeffery* (1913), 110 L. T. 11.

—.]—*See* Nos. 107, 111, *ante*.

115. "Capable of taking effect"—What law allows to take effect—Appointment to uses of prior settlement.]—Where under a special power of appointment a testator appoints to the uses or trusts of an antecedent instrument or such of them as are "capable of taking effect," the phrase "capable of taking effect" may be construed as meaning what the law allows to take effect, & need not be confined to a reference to the uses or trusts which, by reason of the deaths of parties & other intervening circumstances, are still in fact existing, or capable of coming into existence; & if therefore some of the uses or trusts fail by reason of the *cestuis que trust* not being objects of the power, or by reason of the rule against perpetuities being infringed, those uses or trusts may be treated as excluded from the appointment.—*Re FINCH & CHEW'S CONTRACT*, [1903] 2 Ch. 486; 72 L. J. Ch. 690; 89 L. T. 162.

## SECT. 2.—INTERESTS SUBJECT TO THE RULE.

### SUB-SECT. 1.—*LEX LOCI SITUS*.

116. General rule — Rule confined to England.]—(1) Objection, that the bequest of a fund to be invested in a regular Scottish entail was void as a perpetuity overruled; the rules acted upon by the cts. in this country with respect to testamentary dispositions tending to perpetuities relating to this country only.

(2) The fund being to be administered in a foreign country is payable here, though the purpose to which it is to be applied would have been illegal, if the administration of the fund had been to take place in this country.—*FORDYCE v. BRIDGES* (1848), 2 Ph. 497; 2 Coop. temp. Cott. 324; 17 L. J. Ch. 185; 41 E. R. 1035, L. C.

*Annotations*.—*Generally*, *Mentd.* *Brassey v. Chalmers*, *Seacombe v. Holme* (1853), 4 De G. M. & G. 528; *Watlington v. Waldron* (1853), 4 De G. M. & G. 259; *Fletcher v. Moore* (1857), 29 L. T. O. S. 173; *Salisbury & Denton* (1857), 3 K. & J. 529.

117. Property abroad—Fund to be administered in Scotland—Not subject to rule.]—*FORDYCE v. BRIDGES*, *NC* 116, *ante*.

118. Colonial law — Whether rule applicable.]—*CHOA CHOON NEOH v. SPOTTISWOODE* (1869), 1 Kyshe's Reports, 216; *Woods' Oriental Cases*, App. I.

*Annotation*.—*Apprvd.* *Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381.

119. ———.]—The law of England must, having regard to the Royal Charters of 1807, 1826, & 1855, be taken to be the law of Penang so far as it is applicable to the circumstances of the place, & modified in its application by these circumstances English statutes, therefore, in their nature inapplicable to Penang, are not introduced along with the general law of England. The rule, however, which prevails in England against perpetuities, which exists independently of statutes, & is founded upon public policy, is part of the law of the colony; so, also, the exception to that rule which exists in favour of charitable uses passes with the rule into the law.—*YEAP CHEAH NEO v. ONG CHENG NEO* (1875), L. R. 6 P. C. 381, P. C.

*Annotations*.—*ReM.* *Re Manser, A.-G. v. Lucas* (1904), 74 L. J. Ch. 95. *Mentd.* *Elliot v. Totnes Union* (1892), 57 J. P. 151; *Re Howell, Re Buckingham, Leggins v. Buckingham* (1914), 84 L. J. Ch. 209; *Bourne v. Keane*, [1919] A. C. 815.

120. ———.]—(1) When there are no

land laws in a colony at the time of annexation, transactions relating to land are governed by English law, so far as that law can be justly & conveniently applied, including the rule as to perpetuities as between subject & subject.

(2) The reservation of a power in a Crown grant of land in New South Wales, made in 1823, to resume a portion of the land for public purposes is not repugnant to the grant, & if the rule as to perpetuities is applicable to the Crown in England, it is not applicable to the Crown in that colony.—*COOPER v. STUART* (1889), 14 App. Cas. 286; 58 L. J. P. C. 93; 60 L. T. 875; 5 T. L. R. 387, P. C.

*Annotations*.—*Generally*, *ReM.* *Savill v. Bethell*, [1902] 2 Ch. 523; *S. E. Ry. v. Associated Portland Cement Manufacturers* (1900), Ltd., [1910] 1 Ch. 12.

*Foreign disposition of English leaseholds*.]—*See CONFLICT OF LAWS*, Vol. XI., pp. 364, 365, Nos. 448, 449.

## SUB-SECT. 2.—LEGAL INTERESTS.

### A. Real Estate.

#### (a) *Springing and Shifting Uses*.

121. Whether subject to rule.]—*NORFOLK'S (DUKE) CASE, HOWARD v. NORFOLK (DUKE)*, No. 181, *post*.

122. ———.]—Though a man may limit a future use upon a contingent after a death without issue, within the compass of a life; yet such future use to take effect after a death without issue generally, is so remote a possibility that the law will not admit of it (*HOLT, C.J.*).—*DAVIS v. SPEED* (1692), *Holt*, K. B. 730; 4 Mod. Rep. 153; 2 Salk. 675; *Skin*. 351; 12 Mod. Rep. 38; 90 E. R. 1302; *on appeal* (1698), *Show*. Parl. Cas. 104, H. L.

*Annotation*.—*ReM.* *Winter v. Perratt* (1843), 9 Cl. & Fin. 606.

123. ———.]—It is a certain rule of law, that if such a construction can be put upon a limitation as that it may take effect by way of remainder, it shall never take place as a springing use or executory devise, & therefore a limitation in a settlement "to trustees to the use of A. the settlor for life, remainder to B., his intended wife, for life, except as thereafter excepted, remainder to the heirs of the body of A., begotten on B., remainder to A. & his heirs, with a proviso, that if A. should die, & leave such issue as aforesaid, without making any provision for such child or children in his lifetime, said trustees should stand seised of one moiety, from & after the decease of A., to the use of such child":—*Held*: a contingent remainder, & not a springing use, & therefore barred by a fine levied by A. & B.

The notion of a springing use was introduced, just as executory devises were . . . in order that, after a departure with the whole fee, a new limitation of the fee might take place upon a contingency to arise within a reasonable compass of time, & not within the danger of a perpetuity (*HENLEY, LORD KEEPER*).—*CARWARDINE v. CARWARDINE* (1758), 1 Eden, 27; 28 E. R. 594.

*Annotations*.—*Consd.* *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1. *ReM.* *Cole v. Sewell* (1848), 2 H. L. Cas. 186; *Re Finch, Abbess v. Burney* (1881), 17 Ch. D. 211. *Mentd.* *Parker v. Bolton* (1835), 5 L. J. Ch. 98.

124. ———.]—*BLANDFORD v. THACKERELL*, No. 77, *ante*.

125. ———.]—The old rule against "a possibility on a possibility," applicable to legal limitations

## PART I. SECT. 2, SUB-SECT. 2.—A. (a).

1. *Whether subject to rule*.]—*O'REILLY v. BELLEW*, [1924] 1 I. R. 1.—I

**Sect. 2.—Interests subject to the rule: Sub-sect. 2, A.**  
**(a), (b), (c) & (d).]**

of real estate, namely, that although an estate may be limited to an unborn person for his life, yet a remainder cannot be limited to the children of that unborn person, as purchasers, is still existing, & has not been abrogated by the more modern rule against perpetuities, which prohibits property being tied up for a longer period than a life or lives in being & twenty-one years afterwards, with the addition of the period of an actually existing gestation—the two rules being in fact independent & co-existing.

[ By a post-nuptial settlement made in pursuance of ante-nuptial arts., freehold lands were limited to the use of the husband & wife successively for life, with remainder to the use of their issue, born before any appointment made, as they should by deed appoint. Having had issue, two daughters only, they by deed appointed one moiety of the lands to the use of one daughter for life for her separate use without power of anticipation, & after her decease to the use of such person or persons as she should by will appoint, & in default of appointment to the use of her children living at the date of that deed equally as tenants in common in fee:—*Held*: the only part of the appointment which was good was the limitation to the daughter for life for her separate use; the appointment being read into the settlement, & the latter being treated as having been made prior to the marriage of the husband & wife.

The rule against perpetuities originated & was rendered necessary on account of the introduction of executory claims & springing uses, against which the old rule would have been an insufficient protection (LOPES, L.J.).—*WHITBY v. MITCHELL* (1890); 44 Ch. D. 85; 59 L. J. Ch. 485; 62 L. T. 771; 38 W. R. 337, C. A.; *affg.* (1889), 42 Ch. D. 494.

**Annotations:—***Distd. Re Bowles, Amendroz v. Bowles*, [1902] 2 Ch. 650. *Consd. Re Ashforth, Sibley v. Ashforth*, [1906] 1 Ch. 535. *Ext'd. Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1; *Re Clarke's Settlt. Trust, Wanklyn v. Streetfield*, [1916] 1 Ch. 467. *Reid. Re Frost, Frost v. Frost* (1889), 43 Ch. D. 248; *Whitting v. Whitting* (1908), 53 Sol. Jo. 100; *Re Bullock's Will Trusts, Bullock v. Bullock*, [1915] 1 Ch. 493; *Re Elton, Elton v. Elton*, [1917] 2 Ch. 413; *Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 669.

126. —.] — *Re HOLLIS' HOSPITAL TRUSTEES & HAGUE'S CONTRACT, No. 133, post.*

127. —.] — *SAVILL BROTHERS, LTD. v. BETHELL, No. 30, ante.*

128. **Shifting clause—After gift in fee simple.**—*BENNETT v. BENNETT, No. 237, post.*

— **In defeasance of estate tail.**—*See Sub-sect. 6, C., post.*

**(b) Contingent Remainders.**

**What is contingent remainder.**—*See REAL PROPERTY.*

129. **Whether subject to rule.**—*NORFOLK'S (DUKE) CASE, HOWARD v. NORFOLK (DUKE), No. 181, post.*

130. —.] — (1) Testator, who died in 1870, by his will dated the same year devised a freehold estate to the use of his sons & their heirs during the life of his daughter E., upon trusts for such daughter; & after her decease "to the use of any husband whom she may hereafter marry" during his life; & after the death of the survivor of his daughter & such husband, to the use of the children of his daughter as she should appoint & in default of such appointment to the use of all the children of his daughter who should be living at the death of the survivor of her & her husband,

or should have previously died leaving issue then living, in equal shares; but in case no child of his daughter should be living at the death of such survivor or should have previously died/leaving issue then living, then to the use of such of his sons & of his other daughters as should be then living, or should have previously died leaving issue then living, in equal shares. The will contained a gift of residue. The daughter E. was a spinster at testator's death, but subsequently, in 1872 married & died shortly afterwards without issue. Her husband died in 1888:—*Held*: the limitations subsequent to the life estate of the daughter's husband were void for remoteness & on his death the devised estate passed under the residuary gift.

(2) But they [contingent remainders] were subject, before this rule was invented, to another rule which was thus expressed in the old legal language, that you cannot limit a possibility upon a possibility & the familiar illustration is that you cannot limit by way of legal devise or conveyance to A., an existing person, for life, with remainder to his unborn son for life, with remainder to the children of that unborn son. That last remainder was void. . . . I think there is no question that this is the law to this day (KAY, J.).

(3) I do not at all agree that under the law of the present day there cannot be any application of the rule against perpetuities to remainders. I find in *Fearne on Contingent Remainders*, in the edition already referred to [10th edition, p. 502] this statement of the law: "Here indeed it may not be improper to remark, once for all, that any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our cts. considered void in its creation." Here, then, is a clear statement of the law in a book of great authority, that the rule against remoteness will be applied to contingent remainders as well as to contingent limitations by way of executory devise (KAY, J.).—*Re FROST, FROST v. FROST* (1889), 43 Ch. D. 246; 59 L. J. Ch. 118; 62 L. T. 25; 38 W. R. 264.

**Annotations:—***As to (1) Consd. Re Garnham, Taylor v. Baker*, [1916] 2 Ch. 413. *Reid. Whitting v. Whitting* (1908), 53 Sol. Jo. 100. *As to (2) Foll'd. Re Park's Settlt., Foran v. Bruce*, [1914] 1 Ch. 595. *Consd. Re Bullock's Will Trusts, Bullock v. Bullock*, [1915] 1 Ch. 493. *Reid. Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Re Nash, Cook v. Frederick*, [1909] 2 Ch. 450.

131. —.] — *Re ASHFORTH, SIBLEY v. ASHFORTH, No. 336, post.*

132. —.] — *WHITBY v. VON LUEDECKE, No. 103, ante.*

**Equitable contingent remainders.**—*See Nos. 177–180, post.*

**(c) Common Law Conditions.**

133. **General rule—Subject to rule.**—By indentures of lease & release of May 18, 1726, certain hereditaments were assured to one J. to have & to hold unto said J. his heirs & assigns to the use of one T., & certain other persons therein named, being the trustees of a charity known as H.'s Hospital upon the trusts therein mentioned for the maintenance & management of the hospital, subject to the following proviso: "Provided always, & it is hereby agreed by & between parties to these presents that if, at any time hereafter the premises hereby conveyed or any part thereof, or the rents, profits, & issues of the same, or of any part thereof, shall be employed or converted to or for any other use or uses, interest or purposes then as are hereinbefore mentioned & specified,

then & from thenceforth the buildings, lands, & premises hereinbefore conveyed to the uses & upon the trusts hereinbefore mentioned shall revert to the right heirs of T., party hereto, anything herein contained to the contrary hereof in any wise notwithstanding." E. had entered into a contract with an agent acting for the majority of the trustees of the charity for the purchase of a portion of the freehold property. E. was willing to accept the title & a draft conveyance had been approved, when one of the trustees wrote to H.'s sons, stating in effect that, as heir-at-law of T. he had not concurred in the sale of the property & calling attention to the above proviso in the title deeds. E. took out this summons against the trustees asking for a declaration that a good title had not been shown to the hereditaments contracted to be sold:—*Held*: (1) the proviso constituted a common law condition subsequent; (2) the rule against perpetuities applied to such a condition; (3) the title was not one which should be forced on a purchaser.

If the clause in question ought to be construed as a limitation or as creating a shifting or springing use, it would be void as infringing the rule against perpetuities (BYRNE, J.).—*Re HOLLIS' HOSPITAL TRUSTEES & HAGUE'S CONTRACT*, [1899] 2 Ch. 540; 68 L. J. Ch. 673; 81 L. T. 90; 47 W. R. 691; 43 Sol. Jo. 644.

*Annotations*:—As to (2) *Consd. Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535. *Follid. Re Da Costa, Clarke v. Church of England Collegiate School of St. Peter*, [1912] 1 Ch. 337.

134. ———.—[*Held*:]—Testator devised all his real estate at Adelaide, South Australia, to trustees upon trust during the lives of successive tenants for life to apply the income in a particular manner, & on the falling in of the last life tenancy to convey the said real estate to the council of the Church of England Collegiate School of St. Peter, Adelaide. But this disposition was made on the express condition that the council published annually a statement of payments & receipts, & in case of default for six calendar months in the publication of such statement, the disposition in favour of the collegiate school was thenceforth to cease & to go over to & enure for the sole benefit of such person or persons & for such public purposes as the Governor in Chief of South Australia should in writing direct:—*Held*: the gift over & the condition were both bad, the former not being a good charitable gift & the latter being a common law condition subsequent, working a forfeiture on the condition coming into operation, & obnoxious to the rule against perpetuities; the council of the collegiate school were entitled to a clean conveyance from the trustees of the will, without reference to the condition or gift over.—*Re DA COSTA, CLARKE v. CHURCH OF ENGLAND COLLEGIATE SCHOOL OF ST. PETER*, [1912] 1 Ch. 337; 81 L. J. Ch. 293; 106 L. T. 458; 28 T. L. R. 189; 56 Sol. Jo. 240.

135. Application of rule—Provision for re-entry—On bankruptcy of alienee—Long lease.—A proviso in a lease for twenty-one years that the

landlord shall re-enter on the tenant's committing any act of bkpcy., whereon a commission shall issue, is good. If such a proviso as this were inserted in very long leases, it would be tying up property for a considerable length of time, & would be open to the objection of creating a perpetuity (BULLER, J.).—*ROE d. HUNTER v. GALLIERS* (1787), 2 Term Rep. 133; 100 E. R. 72.

*Annotations*:—*Reid. Doe d. Mitchinson v. Carter* (1798), 8 Term Rep. 57; *Doe d. Goodbehers v. Bevan* (1815), 3 M. & S. 353; *Stevens v. Copp* (1868), L. R. 4 Exch. 20.

136. ———.—On breach of restrictive covenant.—The grantee of land in fee covenanted not to carry on certain trades. A power of re-entry on breach of the covenant at any time was reserved to the grantor:—*Held*: the power was void as perpetuity.—*DUNN v. FLOOD* (1883), 25 Ch. D. 629; 53 L. J. Ch. 537; 49 L. T. 670; 32 W. R. 197; on appeal (1885), 28 Ch. D. 586, C. A.

*Annotation*:—*Appld. Re Hollis' Hospital Trustees & Hague's Contract*, [1899] 2 Ch. 540.

137. ———.—On breach of condition.—*Re HOLLIS' HOSPITAL TRUSTEES & HAGUE'S CONTRACT*, No. 133, *ante*.

138. ———.—Condition applicable only to devisee—Restriction on alienation.—Devise "to my brother J. on the condition that he never sells out of the family" followed by gifts to other relatives:—*Held*: the condition was valid.

The condition . . . is applicable merely to the devisee himself, & therefore is not void on any ground of remoteness. It has been suggested, however, . . . that you cannot restrict the right of an owner in fee of alienating in any way in which he may think fit. . . . According to Littleton the test is, does it take away all power of alienation? (JESSEL, M.R.).—*Re MACLEAY* (1875), L. R. 20 Eq. 186; 44 L. J. Ch. 441; 32 L. T. 682; 23 W. R. 718.

*Annotations*:—*Consd. Re Roshier, Roshier v. Roshier* (1884), 38 Ch. D. 801. *Appld. Re Hollis' Hospital Trustees & Hague's Contract*, [1899] 2 Ch. 540. *Reid. Dawkins v. Penrhyn* (1877), 3 Ch. D. 318; *Re Dugdale, Dugdale v. Dugdale* (1888), 38 Ch. D. 176; *Re Elliott, Kelly v. Elliott*, [1896] 2 Ch. 353. *Mentd. Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352.

139. ———.—Condition of publication of accounts—Gift over on breach.—*Re DA COSTA, CLARKE v. CHURCH OF ENGLAND COLLEGIATE SCHOOL OF ST. PETER*, No. 134, *ante*.

Provision against disentail.—*See* Nos. 221–224, *post*.

#### (d) Executory Devises.

140. Subject to rule.—A devise in fee to A. & if he die without issue in the lifetime of C. then to C. & his heirs, is a good executory devise, to take effect on the contingency of A. dying in the lifetime of C. without issue.—*PELLS v. BROWN* (1620), Cro. Jac. 590; J. Bridg. 1; 2 Roll. Rep. 217; 79 E. R. 504.

*Annotations*:—*Consd. Blunket v. Holmes* (1861), 1 Keb. 119. *Appld. Doe d. Barnfield v. Welton* (1800), 3 Bos. & P. 324. *Consd. Doe d. Cadogan v. Ewart* (1838), Ad. & El. 636. *Reid. Petty v. Goddard* (1662), O. Bridg. 35; *Snowe v. Cutler* (1664), 1 Lev. 135; *Wright v. Hancock* (1667), 2 Keb. 26; *Gardner v. Sheldon* (1671), 2 Keb. 781; *Fry's Case* (1672), 1 Vent. 199;

*v. CUMMINS* (1895), [1906] 1 I. R. 408.—IR.

b. ———.—*Restraint on alienation.*—*RANGIMOEKE v. STRACHAN* (1895), 14 N. Z. L. R. 477.—N. Z.

PART I. SECT. 2, SUB-SECT. 2.—A. (d).

140 i. Subject to rule.—*METERS v. HAMILTON PROVIDENT & LOAN CO.* (1890), 19 O. R. 358.—CAN.

140 ii. ———.—*IRWIN v. MUIRHEAD*, [1918] N. Z. L. R. 673.—N. Z.

PART I. SECT. 2, SUB-SECT. 2.—A. (c).

137 i. Application of rule—Provision for re-entry—On breach of condition.—*MATTHESON v. MITCHELL CORPN.* (1920), 46 O. L. R. 546; 51 D. L. R. 477; 17 O. W. N. 267.—CAN.

137 ii. ———.—*FOWLER v. FOWLER* (1866), 16 I. Ch. R. 507.—IR.

137 iii. ———.—*WALSH v. WRIGHTMAN*, [1927] N. 1.—IR.

138 i. ———.—Condition applicable only to devisee—Restrictions on alienation.—

A devisee of real estate under a will was restrained from selling or incumbering it for a period of twenty-five years after testator's death:—*Held*: as the restraint, if general, would have been void, the limitation as to the time did not make it valid.—*BLACKBURN v. MCCALLUM* (1903), 33 S. C. R. 65; 23 C. L. T. 133.—CAN.

138 ii. ———.—*Re MARTIN & DAGNEAU* (1906), 11 O. L. R. 349; 7 O. W. R. 191.—CAN.

a. ———.—To grant by letters patent—Of quit rents—Right to redeem.—A.—G.

**Sect. 2.—Interests subject to the rule: Sub-sect. 2, A.**  
**(d), & B. (a).**

*Brown & Benson v. Hudson* (1873), 3 Keb. 287; *Gibbons v. Summers* (1881), 3 Lev. 22; *Holmes v. Meynell* (1881), 1 T. Raym. 452; *Howard v. Norfolk* (1881), 2 Freem. Ch. 80; *Fairfax v. Heron* (1896), Prec. Ch. 67; *Luddington v. Kins* (1896), 1 Ld. Raym. 303; *Barker v. Slater* (1897), Comb. 433; *Scattergood v. Edge* (1899), 12 Mod. Rep. 278; *Anon.* (1704), 6 Mod. Rep. 241; *Roe v. Fludd* (1729), Fortes. Rep. 184; *Gurnett v. Wood* (1739), 7 Mod. Rep. 302; *Goodtitle d. Gurnall v. Wood* (1740), Willes, 211; *Gulliver v. Vaux* (1746), 8 De G. M. & G. 167; *Carr v. Singer* (1750), 2 Ves. Sen. 603; *Porter v. Bradley* (1789), 3 Term Rep. 143; *Roe d. Sheers v. Jeffery* (1798), 7 Term Rep. 589; *Barlow v. Salter* (1810), 17 Ves. 479; *Campbell v. Harding* (1831), 3 Russ. & M. 390; *Doe d. Todd v. Duesbury* (1841), 8 M. & W. 514; *Hardcastle v. Dennison* (1861), 10 C. B. N. S. 606.

141. —[—]—(1) Under a bequest of term of years "to A. & the heirs of his body, & to their heirs & assigns forever, but in default of such issue, then after his decease to B. & his heirs," the limitation over to B. is good by way of executory devise.

The rule respecting executory devises is extremely well settled; & a limitation by way of executory devise is good if it may take place after a life or lives in being, & within twenty-one years & the fraction of another year afterwards (LORD KENYON, C.J.).

(2) If personal property be so limited that, if it were an estate of inheritance, it would give an estate tail, the absolute interest vests in the first taker. But if the limitation be with a double aspect to A., & to the issue of his body, if there be any such issue living at his death, if not, then over, it is a good limitation (LORD KENYON, C.J.).—*WILKINSON v. SOUTH* (1798), 7 Term Rep. 555; 101 E. R. 1129.

*Annotations*.—As to (1) *Reid. Kinch v. Ward* (1825), 2 Sim. & St. 409. As to (2) *Conrad. Cadell v. Palmer* (1833), 10 Bing. 140. Generally, *Reid. Gawler v. Cadby* (1821), Jac. 346; *Garratt v. Cockerell* (1842), 1 Y. & C. Ch. Cas. 494; *Pye v. Linwood* (1842), 6 Jur. 618.

142. —[—]—Under a devise to F. & his heirs for ever, & in case he should depart this life & leave no issue then to E. & S. or the survivor or survivors of them, share & share alike, the devise to E. & S. is a good executory devise.

Nothing can be clearer in point of law, than that if an estate be given to A. in fee, & by way of executory devise, an estate be given over which may take place within a life or lives in being & twenty-one years & a fraction of a year afterwards, the latter is good by way of executory devise (LORD KENYON, C.J.).—*ROE d. SHEERS v. JEFFERY* (1798), 7 Term Rep. 589; 101 E. R. 1147.

*Annotations*.—*Apud. Doe v. Webber* (1818), 1 B. & Ald. 713. *Conrad. Campbell v. Harding* (1831), 3 Russ. & M. 390; *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636; *Feakes v. Standley* (1857), 24 Beav. 485; *Stuart v. Cockerell* (1869), L. R. 7 Eq. 363. *Dtd. Fisher v. Webster* (1879), L. R. 14 Eq. 283. *Reid. Wood v. Baron* (1801), 1 East, 259; *Barlow v. Salter* (1810), 17 Ves. 479; *Doe d. Jones v. Owens* (1830), 1 B. & Ad. 318; *Doe d. Todd v. Duesbury* (1841), 8 M. & W. 514; *Barnford v. Lord* (1854), 14 C. B. 708; *Parker v. Birks* (1854), 1 K. & J. 156; *Butt v. Thomas* (1855), 11 Exch. 235; *Ormsby v. Anderson* (1866), 14 W. R. 379; *Gatenby v. Morgan* (1876), 45 L. J. Q. B. 597.

143. —[—]—*THELLUSSON v. WOODFORD*, No. 67, ante.

144. —[—]—*CADELL v. PALMER*, No. 74, ante.

145. —[—]—Testator, by will made in 1821, after a gift of leaseholds to his daughter E., gave all the remainder of his property whatsoever to his wife D., the income to her for life, & at her death unto E., for her own benefit & her children, or one only child if she should have any, all that was given to E. being for her own benefit, & not to be subject to the debts, control, or disposition of any husband she might marry; but if E. should die without issue the leaseholds were to be

enjoyed by D. for life, & at her death to his sister S. for her life, & at her death, together with all that was left to D. for her life, to be equally divided between all the grandchildren of S. E. died without having had a child:—*Held*: E. was entitled absolutely both to the leasehold specifically bequeathed to her & to the residue given subject to D.'s life interest, & the limitations over, if E. "should die without issue," were void for remoteness.—*FISHER v. WEBSTER* (1872), L. R. 14 Eq. 283; 42 L. J. Ch. 156; 20 W. R. 765.

*Annotation*.—*Mentl. Re Seyton, Seyton v. Satterthwaite* (1887), 54 Ch. D. 511.

146. —[—]—*WHITBY v. MITCHELL*, No. 125, ante.

147. —[—]—*THOMAS v. THOMAS*, No. 31, ante.

148. —[—]—*EDWARDS v. EDWARDS*, No. 174, post.

Executory devises generally.]—See WILLS.

**B. Personal Estate.**

**(a) In General.**

149. Subject to rule.]—A lease devised to one for life, with several remainders over; the first devise was compelled to enter into a bond to let it go according to the devise; but if it were for a perpetual chattel, the ct. would not have done it.—*PRICE v. JONES* (1583), Toth. 122; 21 E. R. 142.

150. —[—]—It would be inconvenient that such manner of perpetuity should be made of a chattel, when of an inheritance neither by act executed by the common law, nor by limitation of an use, nor by devises in last wills, any perpetuity can be established.—*LAMPET'S CASE* (1612), 10 Co. Rep. 46 b; 77 E. R. 994; *sub nom. LAMPIT v. STARKEY*, 2 Brownl. 172.

*Annotations*.—*Reid. Child v. Bailly* (1622), W. Jo. 15; *Blunket v. Holmes* (1661), 1 Keb. 119; *Goring v. Bickerstaffe* (1663), Freem. Ch. 163; *Cookes v. Bellamy* (1664), 1 Sid. 187; *Burgis v. Burgis* (1674), 1 Mod. Rep. 114; *Kimpland v. Courtney* (1701), Freem. Ch. 250; *Gower v. Grosvenor* (1740), Barn. Ch. 54; *Beauchlerk v. Dormer* (1742), 2 Atk. 308; *Doe d. Shaw v. Steward* (1834), 1 Ad. & El. 300; *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1. *Mentl. Bartholomew v. Belfield* (1813), Cro. Jac. 332; *Sheffield v. Ratcliffe* (1815), Hob. 334; *Sheriff v. Wrotham* (1818), Cro. Jac. 509; *Pellis v. Brown* (1820), Cro. Jac. 590; *Marsh v. Newman* (1826), Poph. 183; *Kent v. Steward* & Scott (1834), Cro. Car. 358; *Baker v. Willis* (1837), Cro. Car. 476; *Pooler v. Haakey* (1863), O. Bridge. 364; *Seaman v. Warman* (1875), Freem. Ch. B. 306; *Hornbee's Petn.* (1891), Freem. Ch. B. 331; *Cage v. Acton* (1700), 1 Ld. Raym. 515; *Marks v. Marks* (1718), 10 Mod. Rep. 419; *Doe d. Hayes v. Sturges* (1816), 3 Marsh. 505; *Wilson v. Hirst* (1833), 4 B. & Ad. 780; *Wood v. Lambirth* (1841), 1 Ph. 8; *Fitzgerald v. Fitzgerald* (1868), 37 L. J. P. C. 44; *Re Bellamy, Elder v. Pearson* (1883), 25 Ch. D. 620; *Johns v. Pink*, [1900] 1 Ch. 296; *Re Francis, Francis v. Francis*, [1905] 2 Ch. 295.

151. —[—]—*CHILD v. BAYLIN* (1622), Palm. 333; Cro. Jac. 459; 1 Eq. Cas. Abr. 192; W. Jo. 15; 2 Roll. Rep. 129; 81 E. R. 1109, Ex. Ch.

*Annotations*.—*Dtd. Howard v. Norfolk* (1882), 3 Cas. in Ch. 38; *Lamb v. Archer* (1893), 1 Salc. 225. *Reid. Grig v. Hopkins* (1661), 1 Sid. 37; *Love v. Windham* (1670), 1 Sid. 450; *Burgis v. Burgis* (1673), 1 Mod. Rep. 114; *Huntbatch v. Lee* (1676), 3 Keb. 750; *Gibbons v. Summers* (1881), 3 Lev. 22; *Scattergood v. Edge* (1899), 12 Mod. Rep. 278; *Stanley v. Leigh* (1732), 3 P. Wms. 686; *Thellusson v. Woodford* (1799), 4 Ves. 227. *Mentl. East v. Eastington* (1702), Glib. 17.

152. —[—]—*BEAUCLERK v. DORMER*, No. 183, post.

153. —[—]—Devise of a personal estate to A. for life, & afterwards for her children, the yearly interest & produce to be for their maintenance, until the sons should be twenty-one, & the daughters eighteen, at which respective ages their respective portions to be paid them, & for want of such issue then to B. A. died without issue; the devise over to B. good, the words "for want of



such issue" being the same as "for want of such children."

A devise over of a lease for years or other personal estate after a death without issue or on failure of issue would have been void (LORD KING, C.).—*MADDOCK v. STAINES* (1727), 2 P. Wms. 421; 24 E. R. 796, L. C.; *affd. sub nom. STAINES v. MADDOCK* (1728), 3 Bro. Parl. Cas. 108, H. L.

*Annotations*.—*Reid. Stanley v. Leigh* (1732), 3 P. Wms. 686; *Studholme v. Hodgson* (1734), 3 P. Wms. 300; *Kelley v. Fowler* (1768), Wilm. 298.

154. —.]—J. by his will says, that if no legitimate son nor daughter of mine shall live to leave at any time the blessing of any child behind them, in such case of their dying thus, without leaving any issue behind them, I will & direct that C. H., & his issue, shall have all my estate. The limitation over to H., is not too remote, but warranted by rules of law.

It is clear & certain, that no limitation over of a personal thing can be admitted after a dying without issue generally (LORD HARDWICKE, C.).—*SHEFFIELD v. ORRERY* (LORD) (1745), 3 Atk. 282; 26 E. R. 965, L. C.

*Annotations*.—*Reid. Lethieullier v. Tracy* (1754), 3 Atk. 774; *Thellusson v. Woodford* (1805), 1 Bos. & P. N. R. 357; *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636; *Browne v. Hammond* (1858), John. 310. *Mentd. Doe d. Chattaway v. Smith* (1816), 5 M. & S. 126; *Webb v. Grace* (1848), 2 Ph. 701; *Meeds v. Wood* (1854), 19 Beav. 216; *Walpole v. Laslett* (1862), 1 New Rep. 180; *Underhill v. Roden* (1876), 45 L. J. Ch. 286; *Re Hewitt, Eldridge v. Lea*, [1918] 1 Ch. 468.

155. —.]—Personal effects not to be given in perpetuity to heirs of body & remainder void.—*STAFFORD (EARL) v. BUCKLEY* (1750), 2 Ves. Sen. 170; 28 E. R. 111, L. C.

*Annotations*.—*Mentd. Turner v. Turner* (1733), 1 Bro. C. C. 315; *Buckridge v. Ingram* (1795), 2 Ves. 652; *Doe d. Chattaway v. Smith* (1816), 5 M. & S. 126; *Radburn v. Jervis* (1841), 3 Beav. 450; *Taylor v. Martindale* (1841), 5 Jur. 648; *Re Wynch's Trusts, Ex p. Wynch* (1854), 5 De G. M. & G. 188; *Re Rivett-Carnac's Will* (1885), 30 Ch. D. 136.

156. —.]—Devise of personal to one for life & if he had no heirs over:—*Held*: he took an absolute interest.—*BODEN v. WATSON* (1761), Amb. 398; 27 E. R. 266; *subsequent proceedings, sub nom. BODENS v. GALWAY* (LORD) (1764), 2 Eden, 297, L. C.

157. —.]—A limitation that will create a perpetuity is void; therefore personalty cannot be bound.

The questions are, what was the intent of testator; & whether his intention will create a perpetuity; whatever may be his intention, no operation of law will give an estate tail in the premises (*SMYTHE, C.B.*).—*TOTHILL v. PITT* (1770), 2 Dick. 431; 21 E. R. 337, H. L.

*Annotation*.—*Reid. Re Wynch's Trusts, Ex p. Wynch* (1854), 5 De G. M. & G. 188.

158. —.]—*JEE v. AUDLEY*, No. 15, *ante*.

159. —.]—A bequest that £4,000 & a further sum of £1,500 shall pertain to J. after the death of R. without lawful issue is too remote & the whole shall vest in R.—*GLOVER v. STROTHOFF* (1786), 2 Bro. C. C. 33; 29 E. R. 18.

*Annotation*.—*Reid. Chandless v. Price* (1796), 3 Ves. 99.

160. —.]—Bequest to A. for life, remainder to his children, but if he shall die without children living at his death, to B. for life, remainder to her children; & if she shall die without children living at her death, then to her exors., administrators, & assigns. By a codicil the same is given over "after the decease of the before mentioned persons in my will, A. & his heirs for ever, & B. & her heirs for ever." The meaning of the word heirs in the codicil not to be confined to children, from comparison with the will, & the bequest over therefore too remote.

The present question applies only to personal property. . . . Now, if there had been no codicil, as this devise over is within the proper limits, it is perfectly legal (*PLUMER, M.R.*).—*GRIFFITHS v. GRIEVE* (1819), 1 Jac. & W. 31; 37 E. R. 287.

161. —.]—Testator gave the sum of £500 stock to S., to receive the interest during life, & then to her issue; but in case of her death without issue, the £500 stock to be divided between her father's children by his second wife; & in default of any children by his second wife being living at testator's death, over:—*Held*: S. took an absolute interest in the sum of £500 stock.

The effect of the gift of the sum of £500 stock to S. to receive the interest during her life & then to her issue, was to give her an absolute interest in that sum; & that such absolute interest was not affected by the subsequent words of the will, the limitation over in case of her death without issue, unrestricted by any words limiting the generality of the expression "without issue" being void for remoteness (*LORD LANGDALE, M.R.*).—*A.-G. v. BRIGHT* (1836), 2 Keen, 57; 5 L. J. Ch. 325; 48 E. R. 550.

*Annotations*.—*Consd. Re Wynch's Trusts, Ex p. Wynch* (1854), 5 De G. M. & G. 188. *Reid. Darley v. Martin* (1853), 13 C. B. 683; *Re Andrew's Will* (1859), 27 Beav. 608.

162. —.]—Testator, who was an American merchant, by his will, made in India in the year 1791, directed that his property of every description should be administered according to the law of England. He then gave various legacies & directed the residue of his estate & effects to be divided into sixteen shares, six of which were to be placed in the Govt. Funds of Great Britain, there to remain for ever in testator's name, & the interest thereof to be received by his three sons, A., J. & L., successively for life, & after the death of the survivor of his three sons the interest to be received by the first & other sons of A. & their issue in succession for life; & in default of issue of A. the interest to be received by the first & other sons of J. & their issue in succession for life, with a similar direction in default of issue of J. for the benefit of the issue of L.:—*Held*: after the life estates to testator's three sons, the rest of the gifts were void for remoteness.

Testator seemed to have thought that real estate in England would go from son to son for ever, & his object was to deal with stock in the funds in the same manner as real estate (*KINDERSLEY, V.-C.*).—*RAPHAEL v. BOEHM, COCKBURN v. RAPHAEL* (1852), 22 L. J. Ch. 299.

163. Gift of interest on money—Whether distinguished from gift of money.—Interest of money is devised to A. for life, & if he died without issue, then the principal to go over to another. The remainder over is good.—*SMITH v. CLEVER* (1688), 2 Vern. 88, 59; 23 E. R. 635, 647.

*Annotation*.—*Distd. Tothill v. Pitt* (1766), 1 Madd. 488.

164. —.]—Devise of £400 to be put out on good security for T. that he may have the interest for his life, & for the heirs of his body; if he die without issue, then over. The whole property vests in the first taker, & the limitation too remote.

I had no great doubt before, & think it too remote a limitation of a personalty, there being nothing to restrain it to heirs living at the death; for then it might take effect. . . .

The only objection is, that here is no gift, but only a direction to pay the interest to him for life; but that makes no difference; it being plainly given to the heirs of his body, & the profits being to him for life, it must necessarily vest the whole interest & property to him (*LORD HARDWICKE, C.*).

**Sect. 2.—Interests subject to the rule: Sub-sect. 2, B. (a) & (b); sub-sect. 3, A. & B.]**

—**BUTTERFIELD v. BUTTERFIELD** (1748), 1 Ves. Sen. 138, 154; 27 E. R. 938, 952, L. C.  
**Annotations:—***Apld.* *Glover v. Strothoff* (1786), 2 Bro. C. C. 33. *Consd.* *Lyon v. Mitchell* (1816), 1 Madd. 467. *Refd.* *Proctor v. Bath & Wells (Bp.)* (1794), 2 Hy. Bl. 358.  
*See, generally, PERSONAL PROPERTY.*

**(b) Leaseholds.**

**165. Term of years.]—***CHILD v. BAYLIE* (1622), Palm. 333; W. Jo. 15; Cro. Jac. 459; 2 Roll. Rep. 129; 1 Eq. Cas. Abr. 192; 81 E. R. 1109, Ex. Ch.

**Annotations:—***Consd.* *Gibbons v. Summers* (1681), 3 Lev. 22; *Norfolk's Case, Howard v. Norfolk* (1682), 3 Cas. in Ch. 1; *Thellusson v. Woodford* (1799), 3 Ves. 227. *Refd.* *Grig v. Hopkins* (1681), 1 Sid. 37; *Love v. Windham* (1670), 1 Sid. 450; *Burgis v. Burgis* (1674), 1 Mod. Rep. 115; *Huntbatch v. Lee* (1676), 3 Keb. 750; *Lamb v. Archer* (1693), 1 Salk. 225; *Scattergood v. Edge* (1699), 12 Mod. Rep. 278; *Stanley v. Leigh* (1732), 1 P. Wms. 686.

**166. —.]—**An executory devise of a term of years upon contingencies so remote as to create a possible perpetuity is void.—*SANDERS v. CORNISH* (1631), Cro. Car. 230; 79 E. R. 801.

**Annotations:—***Consd.* *Norfolk's Case, Howard v. Norfolk* (1681), 3 Cas. in Ch. 1. *Refd.* *Fry v. Porter* (1670), 1 Mod. Rep. 300; *Love v. Windham* (1670), 1 Sid. 450.

**167. —.]—**Devise of a term to J. & if he die not married, & without issue, to his sisters, & if J. be married, & has no issue living to enjoy it, to his sisters after the death of J.'s wife. The limitation to the sisters is void as being too remote.—*GIBBONS v. SUMMERS* (1681), 3 Lev. 22; 83 E. R. 557.

**Annotation:—***Distd.* *Lamb v. Archer* (1692), 12 Mod. Rep. 44.

**168. —.]—***NORFOLK'S (DUKE) CASE, HOWARD v. NORFOLK (DUKE)*, No. 181, *post*.

**169. —.]—***LAMB v. ARCHER* (1692), Carth. 266; Comb. 208; Holt, C. B. 227; Skin. 340; 12 Mod. Rep. 44; 1 Salk. 225; 90 E. R. 758.

**Annotations:—***Apld.* *Sheffield v. Ortery* (1745), 3 Atk. 282. *Refd.* *Stanley v. Leigh* (1732), 2 P. Wms. 686. *Mentd.* *Ammurst v. Litton, Litton v. Ammurst* (1729), 1 Barn. K. B. 217.

**170. —.]—***MADDOX v. STAINES*, No. 153, *ante*.

**171. Interesse terminl.]—**The *interesse termini* which a reversionary lease, for a term to commence more than twenty-one years after its date, confers on the lessee is not an executory but an immediate vested interest, a right *in rem* capable of alienation & which passes to the exor. It is not an estate in the land, but an absolute proprietary right to take possession of the land when the stipulated time for the commencement of the term arrives. Such a reversionary lease, therefore, does not offend the rule against perpetuities, & the lessee is entitled, where the Land Registry Acts apply, to be registered as the proprietor of the lease with a good leasehold title.—*MANN, CROSSMAN & PAULIN v. LAND REGISTRY (REGISTRAR)*, [1918] 1 Ch. 202; 87 L. J. Ch. 81; 117 L. T. 705; 62 Sol. Jo. 54; *sub nom.* *MANN, CROSSMAN & PAULIN, LTD. v. HIND*, 34 T. L. R. 39.

—.]—*See* Law of Property Act, 1925 (c. 20), s. 149; & *generally, LANDLORD & TENANT*, Vol. XXX., pp. 457, 458, Nos. 1185–1193.

**SUB-SECT. 3.—EQUITABLE INTERESTS.**

**A. In General.**

**172. General rule.]—**Testator devises his real estates to trustees, to several persons for life, with remainder to their first & other sons in tail male successively; but directs his trustees, upon the birth of every son of each tenant for life, to revoke

the uses before limited to their respective sons in tail male, & to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male:—*Held*: this clause of revocation & resettlement was void, as tending to a perpetuity, & being repugnant to the estate settled.

The common law seemed wisely to consider that the real property of this state ought, to a degree, to be put in commerce, to be left free to answer the exigencies of the possessors & their families, & therefore permitted no perpetuities by way of entails: a though it allowed contingent remainders, it afforded them no protection. . . .

If the law would permit the confinement of an estate beyond a life in being, & the time for a remainderman's minority to expire; as the law is a system, it would have certainly allowed it to be done by way of limitation, where, the estate being limited, the extent of the owner's dominion is visible to all who transact with him; . . . but to say the law does not allow this by direct limitation, & yet allows the same thing to be effected, by I know not what magic, in the modification of an equitable estate, would be productive of infinite suits & questions, tending to defeat the design of both law & equity (LORD NORTHINGTON, LORD KEEPER).

Though by the rules of law an estate may be limited by way of contingent remainder to a person not *in esse* for life, or as an inheritance; yet a remainder to the issue of such contingent remainderman as a purchaser, is a limitation unheard of in law, nor ever attempted, as far as I have been able to discover (LORD NORTHINGTON, LORD KEEPER).—*MARLBOROUGH (DUKE) v. GODOLPHIN (EARL)* (1759), 1 Eden, 404; 28 E. R. 741; *affd. sub nom.* *SPENCER (LORD) v. MARLBOROUGH (DUKE)* (1763), 3 Bro. Parl. Cas. 232.

**Annotations:—***Apld.* *Mainwaring v. Baxter* (1800), 5 Ves. 458. *Consd.* *Re Oliver's Settlement, Evered v. Leigh*, [1905] 1 Ch. 191. *Refd.* *Robinson v. Harcastle* (1786), 2 Bro. C. C. 22; *Routledge v. Dorril* (1794), 2 Ves. 257; *Ferrand v. Wilson* (1845), 4 Hare, 344; *Monypenny v. Dering* (1852), 2 De G. M. & G. 145; *Scarsdale v. Curson* (1860), 1 John. & H. 40; *Dawkins v. Penrhyn* (1877), 36 L. T. 680.

**173. —.]—***LONDON & SOUTH WESTERN RY. Co. v. GOMM*, No. 195, *post*.

**174. —.]—**Testator by will devised realty to his two sons as tenants in common in fee simple with a direction in a codicil to his sons & their heirs to make to each of his daughters for life " & afterwards to & amongst the children of each & their heirs " certain payments out of the royalties or out of the dead rent payable out of the coal under a specified farm & any other coal under any other land of testators' when worked or let:—*Held*: upon the true construction of the codicil testator intended to create executory limitations in land to arise at some future & indefinite period on a contingency which might or might not happen, & the direction was void for remoteness so far as related to testator's grandchildren.

What then is the meaning of the codicil construed (as the ct. is bound to construe it), just as if the rule against perpetuities did not exist, & as if the dispositions contained in the codicil, whatever their legal effect may really be, were good & valid in law? (LORD MACNAGHTEN).—*EDWARDS v. EDWARDS*, [1909] A. C. 275; 78 L. J. Ch. 504; 100 L. T. 84, H. L.

**175. Trust of a term.]—**Trust of a term governed by the same rules in equity, as the limitation of the legal estate of a term is at law. Perpetuities odious.—*NORFOLK (DUKE) v. HOWARD* (1683), 1 Vern. 163; 1 Eq. Cas. Abr. 192, pl. 7; 23 E. R. 388; *sub nom.* *NORFOLK'S (DUKE) CASE*,



**HOWARD v. NORFOLK (DUKE)**, 3 Cas. in Ch. 1; Poll. 223; *reversd.* on other grounds, **NORFOLK DUKE v. HOWARD (1685)**, 1 Vern. 164, H. L.

*Annotations*.—*Apud*. Heywood v. Maunder (1687), 2 Freem. Ch. 98. *Consd.* Stanley v. Leigh (1732), 2 P. Wms. 686; Bagshaw v. Spencer (1748), 1 Ves. Sen. 142. *Apud*. Jones v. Morgan (1783), 1 Bro. C. C. 206; Long v. Blackall (1797), 7 Term Rep. 100. *Consd.* Egerton v. Brownlow (1853), 4 H. L. Cas. 1. *Reid.* Lamb v. Archer (1892), Carth. 286; Scattergood v. Edge (1899), 12 Mod. Rep. 278; Gore v. Grosvenor (1740), Barn. Ch. 54; Beauchlerk v. Dormer (1742), 2 Atk. 308; Kelley v. Fowler (1768), Wilms. 298; Jee v. Audley (1787), 1 Cox, Eq. Cas. 324; Thellusson v. Woodford (1805), 1 Bos. & P. N. R. 357; Cadell v. Palmer (1833), 10 Bing. 140; Andrews v. Drever (1835), 9 Bll. N. S. 471; Dunganon v. Smith (1846), 12 Cl. & Fin. 546; Cole v. Sewell (1848), 2 H. L. Cas. 186; Greenwood v. Verdon (1854), 3 Eq. Rep. 181; *Re* Ashforth, Sibley v. Ashforth, [1905] 1 Ch. 535. *Mentd.* Gore v. Gore (1721), 10 Mod. Rep. 501; Garth v. Cotton (1753), 3 Atk. 751; Willoughby v. Willoughby (1787), 1 Term Rep. 763; Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt, [1893] 1 Ch. 630; Wigram v. Buckley, [1894] 3 Ch. 483; Hancock v. Watson (1901), 85 L. T. 729.

**176.** —[*—*]**HEYWOOD v. MAUNDER (1687)**, Freem. Ch. 98; 22 E. R. 1083.

**177. Equitable contingent remainders.]—MASSENBURGH v. ASH**, No. 182, *post*.

**178.** —[*—*]**Testator devised & bequeathed real & personal estate to trustees upon trust to pay the income to his wife during her life, & after her decease, if H. was then living, to retain the rents of the realty to their own use during his life, & to pay him the income of the personalty during his life, & after his death upon trust to convey & transfer the real & personal estate to such son of M. as should first attain the age of twenty-five years, upon condition that such son of M. as should become entitled to any property under the will should, within two years after he should so become entitled, take the name & arms of testator. At testator's decease M. was living & had no son who had attained twenty-five, but his eldest son attained that age during the lives of the widow & H. This son died in the lifetime of H. without having taken the name & arms of testator:—*Held*: (1) the limitation to such son of M. as should first attain the age of twenty-five years could not be treated as intended to give an immediately vested interest liable to be divested on death under twenty-five, but was a limitation contingent on the son's attaining the age of twenty-five years; (2) when the legal estate in fee is vested in trustees under the instrument which creates the beneficial limitations, the feudal rule by which a contingent remainder fails, if it does not vest before the determination of the particular estate, does not apply, & the limitation to such son of M. as should attain twenty-five years, assuming it to have been an equitable remainder, would still have been void for remoteness.—*Re* FINCH, ABBISS v. BURNEY (1881), 17 Ch. D. 211; 50 L. J. Ch. 348; 44 L. T. 267; 29 W. R. 449, C. A.**

*Annotations*.—*As to* (2) *Apud*. *Re* Willis, Crossman v. Kirkaldy, [1917] 1 Ch. 365. *Reid.* *Re* Ashforth, Sibley v. Ashforth, [1905] 1 Ch. 535; *Re* Clarke's Settlement Trust, Wanklyn v. Streetfield, [1910] 1 Ch. 467; *Re* Conyngham, Conyngham v. Conyngham, [1921] 1 Ch. 491. *Generally*, *Reid.* Marshall v. Gilling (1882), 47 L. T. 159; *Re* Frost, Frost v. Frost (1889), 43 Ch. D. 246; *Re* Bence, Smith v. Bence, [1891] 3 Ch. 242; *Re* Nash, Cook v. Frederick, [1910] 1 Ch. 1. *Mentd.* *Re* Middleton, Thompson v. Harris (1881), 19 Ch. D. 552.

**179.** —[*—*]**Re WILMER'S TRUSTS, MOORE v. WINGFIELD**, No. 69, *ante*.

**180.** —[*—*]**Re ASHFORTH, SIBLEY v. ASHFORTH**, No. 336, *post*.

### B. Trusts.

*See, generally*, TRUSTS & TRUSTEES.

**181. General rule.]—(1)** The limitation of the trust of a term, & the limitation of the estate of a term, all depends upon one & the same reason.

Everywhere, where there is not any inconvenience, any danger of a perpetuity, & whenever you stop at the limitation of a fee upon a fee, there we will stop in the limitation of a term of years (LORD NOTTINGHAM, C.).

(2) But on the other side, future interests, springing trusts, or trusts executory, remainders that are to emerge & arise upon contingencies, are quite out of the rules & reasons of perpetuities, nay, out of the reason upon which the policy of the law is founded in those cases, especially, if they be not of remote or long consideration; but such as by a natural & easy interpretation will speedily wear out, & so things come to their right channel again. . . . But it has been often agreed that where it is within the compass of one life, that the contingency is to happen, there is no danger of a perpetuity (LORD NOTTINGHAM, C.).

(3) If a term be devised, or the trust of a term limited to one for life with twenty remainders for life successively, & all the persons in esse & alive at the time of the limitation of their estates, these, though they look like a possibility upon a possibility are all good, because they produce no inconvenience, they wear out in a little time with an easy interpretation (LORD NOTTINGHAM, C.).—**NORFOLK'S (DUKE) CASE, HOWARD v. NORFOLK (DUKE) (1683)**, 3 Cas. in Ch. 1; 2 Swan. 454; Freem. Ch. 72, 80; Poll. 223; 22 E. R. 229; 22 E. R. 931, L. C.; *reversd. sub nom.* **NORFOLK (DUKE) v. HOWARD**, 1 Vern. 163; *reversd. sub nom.* **HOWARD v. NORFOLK (DUKE) (1685)**, 14 Lords Journals 49, H. L.

*Annotations*.—*As to* (1) *Consd.* Heywood v. Maunder (1687), Freem. Ch. 98. *Apud*. Lamb v. Archer (1892), Carth. 286. *Consd.* Stanley v. Leigh (1732), 2 P. Wms. 686; Egerton v. Brownlow (1853), 4 H. L. Cas. 1. *As to* (3) *Apud*. Thellusson v. Woodford (1805), 1 Bos. & P. N. R. 357. *Generally*, *Reid.* Scattergood v. Edge (1899), 12 Mod. Rep. 278; Gore v. Gore (1721), 10 Mod. Rep. 501; Mansell v. Mansell (1732), Cas. temp. Talb. 252; Gore v. Grosvenor (1740), Barn. Ch. 54; Beauchlerk v. Dormer (1742), 2 Atk. 308; Bagshaw v. Spencer (1748), 1 Ves. Sen. 142; Garth v. Cotton (1753), 3 Atk. 751; Kelley v. Fowler (1768), Wilms. 298; Jones v. Morgan (1783), 1 Bro. C. C. 206; Jee v. Audley (1787), 1 Cox, Eq. Cas. 324; Long v. Blackall (1797), 7 Term Rep. 100; Cadell v. Palmer (1833), 10 Bing. 140; Andrews v. Drever (1835), 9 Bll. N. S. 471; Dunganon v. Smith (1846), 12 Cl. & Fin. 546; Cole v. Sewell (1848), 2 H. L. Cas. 186; Greenwood v. Verdon (1854), 3 Eq. Rep. 181; Hancock v. Watson (1901), 85 L. T. 729. *Re* Ashforth, Sibley v. Ashforth, [1905] 1 Ch. 535. *Mentd.* Willoughby v. Willoughby (1787), 1 Term Rep. 763; Maxim Nordenfelt Guns & Ammunition Co. v. Nordenfelt, [1893] 1 Ch. 630; Wigram v. Buckley, [1894] 3 Ch. 483.

**182.** —[*—*](1) Trust of a term limited to the husband for life remainder to his first son: & if that son die leaving issue, then to such issue; but if the son die in the lifetime of the father without issue, then to the second son. This remainder is good.

(2) Contingent limitation of a term for years adjudged to be good, the contingency being to happen within the space of twenty-one years.—**MASSENBURGH v. ASH (1684)**, 1 Vern. 234, 304; 2 Rep. Ch. 275; 23 E. R. 437, 485.

*Annotations*.—*As to* (1) *Apud*. Andrews d. Jones v. Fulham (1738), And. 263. *Consd.* Gulliver v. Vaux (1746), 8 De G. M. & G. 167, n. *Reid.* Gore v. Grosvenor (1740), Barn. Ch. 54. *As to* (2) *Distd.* Stephens v. Stephens (1733), 2 Barn. K. B. 375. *Consd.* Roe d. Fulham v. Wickett (1741), Willes, 303. *Reid.* Gore v. Gore (1733), Kel. W. 254; Sabbarton v. Sabbarton (1734), Cas. temp. Talb. 55. Gulliver v. Wickett (1745), 1 Wils. 105. *Generally*, *Reid.* Whitmore v. Weld (1685), 1 Vern. 326; Bagshaw v. Spencer (1743), 2 Atk. 570; Exel v. Wallace (1751), 2 Ves. Sen. 117.

**183.** —[*—*]**Cts. of equity will carry the limitation of a personal chattel, or trust of it, no further than the judges have done in the case of legal limitations of terms for years.**

A limitation over of personal estate after the death of the first taker without issue generally is

**Sect. 2.—Interests subject to the rule: Sub-sect. 3, B.; sub-sect. 4, A.]**

**void.**—*BEAUFLEUR v. DORMER* (1742), 2 Atk. 308; 26 E. R. 588, L. C.

**Annotations.**—*Follid. Butterfield v. Butterfield* (1748), 1 Ves. Sen. 133. *Dict. Chamberlain v. Jacob* (1749), 1 Amb. 73; *Stafford v. Buckley* (1750), 2 Ves. Sen. 170. *Consd. Garth v. Baldwin* (1755), 3 Ves. Sen. 846. *Follid. Boden v. Watson* (1761), Amb. 398. *Reid. Shemeld v. Orery* (1745), 3 Atk. 323; *Erel v. Wallace* (1751), 2 Ves. Sen. 117; *Sheppard v. Lessingham* (1751), Amb. 132; *Gray v. Shawne* (1758), 1 Eden, 153; *Taylor v. Clarke* (1763), 2 Eden, 203; *Kelley v. Fowler* (1768), Wilm. 298; *Blede v. Bensley* (1783), 1 Bro. C. C. 188; *Chandless v. Price* (1786), 3 Ves. 99; *Doe d. Ellis v. Ellis* (1808), 9 East, 382; *Barlow v. Saiter* (1810), 17 Ves. 479; *Ward v. Bevil* (1827), 1 Y. & J. 512; *Campbell v. Harding* (1831), 3 Russ. & M. 390; *Garratt v. Cockerell* (1842), 1 Y. & C. Ch. Cas. 494; *Pye v. Linwood* (1842), 6 Jur. 618; *Parker v. Birks* (1854), 1 K. & J. 156.

**184. Trust of heirlooms.]—V. by his will bequeathed to trustees all his household goods, furniture, pictures, books, linen, etc., upon trust, to permit his wife to have the use of them during her life, & upon her death, to permit his son A. to have the use of the same goods, etc., for his life, & upon the decease of the survivor of his wife & son should be possessed, etc., in trust for such person as should from time to time be Lord V., it being his will that the goods, etc., after the decease of his wife, should from time to time go & be held & enjoyed with the title of the family as far as the rules of law & equity would permit:—*Held*: the limitation over was void as being too remote, & the estate vested absolutely in the eldest son of A., grandson of testator, who was living, at the date of his death.—*TOLLEMACHE v. COVENTRY* (EARL) (1834), 8 Bli. N. S. 547; 2 Cl. & Fin. 611; 5 E. R. 1045, H. L.; *revers. S. C. sub nom. DEERHURST* (LORD) *v. ST. ALBANS* (DUKE) (1820), 5 Madd. 232.**

**Annotations.**—*Consd. Ibbetson v. Ibbetson* (1840), 10 Sim. 495; *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Shelley v. Shelley* (1868), L. R. 6 Eq. 540; *Montague v. Inchiquin* (1875), 23 W. R. 592. *Follid. Re Hill, Hill v. Hill*, [1902] 1 Ch. 807. *Reid. Ferrand v. Wilson* (1846), 15 L. J. Ch. 41; *Rowland v. Morgan* (1848), 2 Ph. 764; *Scarsdale v. Curzon* (1860), 1 John & H. 40; *Harrington v. Harrington* (1871), L. R. 5 H. L. 87; *Re Roberts, Repton v. Roberts-Gawen* (1881), 19 Ch. D. 520; *Re Exmouth, Exmouth v. Praed* (1883), 23 Ch. D. 153; *Re Johnston, Cockerell v. Essex* (1884), 26 Ch. D. 538; *Re Harcourt, Portman v. Portman*, [1921] 2 Ch. 491. *Mentd. Deerhurst v. St. Alban's* (1831), 2 Russ. & M. 702.

**185. —.]—Testatrix bequeathed diamonds to her son Viscount H., who survived her, "until he shall die, & after his death to each & every of the persons who shall in turn succeed to the title & dignity of Viscount H., severally & successively as they shall in turn succeed to such title & dignity as aforesaid, my intention being that the diamonds shall descend as heirlooms as far as the rules of law & equity will permit":—*Held*: the case was governed by *Tollemache v. Coventry* (Earl), No. 184, *ante*, & notwithstanding the words "as far as the rules of law & equity will permit," on the death of Viscount H., the son of testatrix, his successor in the title became absolutely entitled to the diamonds.—*Re Hill, Hill v. Hill*, [1902] 1 Ch. 807; 71 L. J. Ch. 417; 86 L. T. 336; 50 W. R. 434; 18 T. L. R. 487, C. A.**

**186. Executory trusts.]—NORFOLK'S** (DUKE) CASE, *HOWARD v. NORFOLK* (DUKE), No. 181, *ante*.

**187. —.]—Devise in trust for a son of testator's nephew A. at the age of twenty-four; if he has no son, to a son of testator's great-nephew B. but, if neither have a son, then to a son of testator's great-niece's daughter, taking his name; whoever should take not to be put in possession of any of testator's effects until twenty-four; nor the exors. to give up their trust "till a**

proper entail be made to the male heir by him." An executory trust in tail for an only son of A. *en ventre* at testator's death; not void for uncertainty, nor too remote.

It is perfectly settled that a child *en ventre sa mère* is to be considered as in existence for his benefit (SIR WILLIAM GRANT, M.R.).—*BLACKBURN v. STABLES* (1814), 2 Ves. & B. 367; 35 E. R. 358.

**Annotations.**—*Apld. Marshall v. Bousfield* (1817), 3 Madd. 166; *Re Wilmers Trusts, Moore v. Wingfield*, [1903] 1 Ch. 874. *Reid. Parker v. Bolton* (1835), 5 L. J. Ch. 98; *Shelton v. Watson* (1849), 18 L. J. Ch. 323; *Holloway v. Collier* (1853), 1 W. R. 366; *Sackville-West v. Holmesdale* (1870), L. R. 4 H. L. 543. *Mentd. Silcocks v. Silcocks*, [1916] 2 Ch. 161.

—**Construction of.]—See SETTLEMENTS; WILLS.**

**188. Trust for sale.]—(1) The doctrine of *cy-près* is not to be extended.**

(2) The *cy-près* doctrine is inapplicable when the limitation to unborn children gives them a fee.

(3) Trusts for sale on failure of a series of prior limitations:—*Held*: on the context, to be too remote.

(4) The trust for sale arises only after the failure of such issue as is before mentioned [*i.e.* total failure of issue]. I entertain no doubt that this limitation for the sale of the property is too remote & void. The heir is therefore entitled (ROMILLY, M.R.).—*HALE v. PERW* (1858), 25 Beav. 335; 53 E. R. 665.

**Annotation.**—*Reid. Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502.

**189. —.]—For the purposes of the rule against perpetuities there is no difference between a trust for sale and a power of sale where the sale is intended to be completed by a conveyance to the purchaser of the legal estate vested in the trustees.**

A trust for sale contained in a will was void as infringing the rule against perpetuities, but the trusts of the property & the rents & profits thereof until sale were good, & the interests of the beneficiaries did not fail:—*Held*: the real & not the personal representatives of a deceased beneficiary were entitled to the proceeds of a sale of the real estate made under the order of the ct.—*GOODRIER v. EDMUNDS*, [1893] 3 Ch. 455; 62 L. J. Ch. 649; 37 Sol. Jo. 526.

**Annotations.**—*Consd. Re Wood, Tullett v. Colville*, [1894] 2 Ch. 310. *Reid. Re Davenport, Bowen v. Churchill*, [1893] 3 Ch. 421. *Re Appleby, Walker v. Lever, Walker v. Nisbet*, [1903] 1 Ch. 565. *Mentd. Re Douglas & Powell's Contract*, [1902] 2 Ch. 296.

**190. —.]—Re DAVIES & KENT'S CONTRACT, No. 390, *post*.**

*See, also*, Nos. 283, 284, *post*.

**191. Discretionary trust—For maintenance.]—**

Testator bequeathed to trustees the residue of his personal estate, upon trust for investment & to apply the whole income, or such part thereof as his trustees or trustee for the time being in their absolute discretion should think fit, in or towards the maintenance, education, apprenticeship, or in any other manner for the benefit of the child or children of testator's sister, until they should respectively attain the age of twenty-three, & to accumulate & invest as capital any unapplied portion of the income; & upon further trust, as to both capital & income of the investments, to stand possessed thereof upon trust for the child, if only one, or all the children, if more than one, of the sister who, either before or after her decease, should attain twenty-three, such children, if more than one, to take in equal shares as tenants in common, & the issue of such of the children of the sister as might be then dead, such issue taking only as tenants in common the share which their respective parents would have taken if living. Testator died in Feb. 1888. His

sister, who was a widow, had only two children, a daughter who attained twenty-three on Mar. 10, 1892, & a son who was born on May 28, 1874. On Jan. 30, 1889, upon a summons issued by the trustees of the will, the sister's two children being defts., the ct. was of opinion that the bequest of the residuary personalty to her children was void for remoteness, but that the persons to take the residuary personalty could not be determined till her death; & it was ordered that the trustees should accumulate the surplus income until further order. The trustees had never applied any part of the income under the discretionary trust for maintenance, etc., but had accumulated the whole in accordance with the order. Upon a summons in 1895 by the sister's two children:—*Held*: the trust for maintenance was distinct from the trust of the capital of the residuary personalty, & was valid; the trustees could now exercise the discretion given to them by the will; in their absolute discretion they might now apply all or any part of the income which accrued down to Mar. 10, 1892, & of the accumulations thereof, in or towards the maintenance, etc., of two plffs., & similarly might apply all or any part of the income from Mar. 10, 1892, & of the accumulations thereof, & of the future income & accumulations until younger pltf. should attain twenty-three, for his maintenance, etc.—*Re WISE, JACKSON v. PARROTT*, [1896] 1 Ch. 281; 65 L. J. Ch. 281; 73 L. T. 743; 44 W. R. 310.

*Annotations*:—*Dttd. Re Blew, Blew v. Gunner*, [1906] 1 Ch. 624. *Consd. Re Cooper, Cooper v. Cooper*, [1913] 1 Ch. 350.

192. — [Testator by his will devised & bequeathed certain real & personal estate to trustees upon trust to apply the income thereof in such proportions & generally in such manner as to them in their absolute discretion should seem best for the support of his "son W. & his wife & children, or any of them," or to accumulate the same or any part thereof at their like discretion for the benefit of the children of his son who should become entitled to the corpus of the property under the trust thereafter contained; & subject to such discretionary trust he directed his trustees to pay the income to his son during his life & after his decease to his widow during her life or widowhood, & after the death of the survivor to stand possessed of as well the corpus as the income upon trust for the children of his son who should attain twenty-one:—*Held*: the discretionary trust for maintenance was limited to the life of W., but, if not so limited, was void for remoteness.—*Re BLEW, BLEW v. GUNNER*, [1906] 1 Ch. 624; 75 L. J. Ch. 373; 95 L. T. 382; *sub nom. Re BLEW, GUNNER v. BLEW*, 54 W. R. 481.

*Annotations*:—*Dttd. Re Cassel, Public Trustee v. Mountbatten*, [1926] Ch. 358. *Re Kennedy v. Kennedy*, [1914] A. C. 215.

193. — [Unlimited in duration.]—Testator by his will appointed his son, applt., & his two granddaughters as exors. & trustees, & devised a dwelling-house & its contents to applt. subject to each of his said granddaughters being entitled to live therein as a home until she married. The will, after other devises & bequests bequeathed the residue of the estate to the trustees to be used by them in maintaining the house & premises. It gave them power to make sales of any real estate, the proceeds to be devoted "to maintain my said residence in the manner in which

it has been heretofore maintained"; & it further provided that if it should be necessary to sell the house, the residuary estate then remaining was to be equally divided among the several pecuniary legatees under the will:—*Held*: the trust constituted by the will offended against the perpetuity rule & was void.—*KENNEDY v. KENNEDY*, [1914] A. C. 215; 83 L. J. P. C. 63; 109 L. T. 833, P. C. *Annotation*:—*Consd. Re Cassel, Public Trustee v. Mountbatten*, [1926] Ch. 358.

194. *Imperative trust*—To maintain house & contents—While in possession of devisees—With interests vesting within period.]—By his will testator bequeathed Brook House & contents & the stables held therewith, the leases of which would expire in 1995, to trustees upon trust to permit his granddaughter E. to have the use & enjoyment thereof during her life, & after her death upon trust for such one or more of her children or issue as she should by will or deed appoint, & in default of such appointment for the first of her sons or, failing any son, the first of her daughters attaining twenty-one. Subject to these trusts the trustees were to hold Brook House & contents upon similar successive trusts in favour of his granddaughter R. & her family, his nephew & his family, & his niece & her family. Testator then directed that: the rent, outgoings, rates & taxes for the time being payable in respect of the messuages & premises & keeping the same & the contents thereof insured against fire & burglary & in a proper state of preservation shall be always paid by my trustees out of the income of my residuary personal estate:—*Held*: (1) the clause charged the income of the residuary personal estate, during (a) the term of the leases, & (b) such time as the leases remained the property of a beneficiary deriving his or her title directly under the will, with the payment of an annual sum for the personal benefit of such beneficiary, the sum varying in amount according to ascertainable facts; (2) the direction did not violate the rule against perpetuities, because the right to the annual sum must vest within the legal period; (3) The duration of the right beyond that period was no infringement of the rule, which was concerned with the creation & vesting of interests & not with their duration. The uncertainty of the quantum of the annual sum did not render the disposition void, because the interest arose & was vested within the legal period, & although the amount necessary to satisfy it was expressed in uncertain terms, it was capable of being rendered certain; & because the whole property—namely, the interest in question & the property subject to that interest, was vested in some person or persons during the legal period.—*Re CASSEL, PUBLIC TRUSTEE v. MOUNTBATTEN*, [1926] Ch. 358; 95 L. J. Ch. 281; 134 L. T. 724; 42 T. L. R. 338; 70 Sol. Jo. 504.

#### SUB-SECT. 4.—CONTRACTS.

##### A. In General.

195. *General rule*.]—(1) By a deed dated in Aug. 1865, which recited that the plff. co. were seized in fee simple of certain land which was no longer required for the purposes of their railway, the co. conveyed the land to G. in fee for £100, & G. covenanted with the co. that he, his heirs or assigns, would at any time thereafter whenever

PART I SECT. 2, SUB-SECT. 4.—A. *Agent for sale*—Under Irish Land Act, 1903.]—The fact that, in an agreement for sale under the above Act

in the prescribed form, there is no limit of time fixed within which the conditions on which the carrying out of the agreement depends, are to be

performed, does not render the agreement void as violating the rule against perpetuities.—*Re DOYLE'S ESTATE*, [1907] 1 I. R. 204; 41 I. L. T. 47.—IR.

**Sect. 2.—Interests subject to the rule: Sub-sect. 4, A., B., C. & D.]**

the land might be required for the railway or works of the co., & whenever thereunto requested by the co. on a six calendar months' notice, & upon receiving £100, reconvey the land to the co. In 1879 deft. purchased the land from G.'s heir, with notice of the above covenant. In 1880 the co. gave deft. notice to reconvey the land, & upon his refusal to do so this action was brought for specific performance of the covenant. The co. had power in 1865 by their special Act to purchase land by agreement, though not compulsorily, & that power was extended to the present time by subsequent Acts:—*Held*: as the covenant gave to the co. an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness, it was invalid on the ground of remoteness.

(2) It appears to me therefore plain that the option is unlimited in point of time. If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule. . . . But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest on equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, & an option for repurchase is not different in its nature (JESSEL, M.R.).

(3) It appears to me therefore that this covenant plainly gives the co. an interest in the land, & as regards remoteness there is no distinction that I know of, unless the case falls within one of the recognised exceptions such as charities, between one kind of equitable interest & another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period. It was suggested that the rule has no application to any case of contract, but in my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift or contract can make no difference (JESSEL, M.R.).—LONDON & SOUTH WESTERN RY. CO. v. GOMM (1882), 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620, C. A.

*Annotations*.—As to (1) *Fold*. Trevelyan v. Trevelyan (1885), 53 L. T. 853. *Consd*. Savill v. Bethell, [1902] 2 Ch. 523; Woodall v. Clifton, [1905] 2 Ch. 257. *Distd*. Worthing Corp. v. Heather, [1906] 2 Ch. 532. *Apprvd*. Edwards v. Edwards, [1908] A. C. 275. *Distd*. S. E. Ry. v. Associated Portland Cement Manufacturers (1900), Ltd., [1910] 1 Ch. 12. *Reid*. Re Harvey, Peek v. Savory (1888), 39 Ch. D. 289; Mackenzie v. Childers (1889), 43 Ch. D. 265; Re Hargreaves, Midgley v. Tatley (1890), 59 L. J. Ch. 384; Re Bowen, Lloyd Phillips v. Davis, [1893] 2 Ch. 491; Goodier v. Edmunds, [1893] 3 Ch. 455; Borland's Trustee v. Steel, [1901] 1 Ch. 279; Smith v. Colbourne, [1914] 2 Ch. 533. As to (2) *Apld*. Re Nisbet & Potts' Contract, [1906] 1 Ch. 386. *Distd*. S. E. Ry. v. Associated Portland Cement Manufacturers' (1900), Ltd., [1910] 1 Ch. 12. As to (3) *Consd*. Thomas v. Thomas (1902), 87 L. T. 58. *Generally*. *Reid*. Dunn v. Flood (1883), 25 Ch. D. 629; Re Ashforth, Sibley v. Ashforth, [1905] 1 Ch. 535; Mason v. Fulham Corp., (1910), 103 L. T. 188. *Mentd*. Austerberry v. Oldham Corp., (1885), 39 Ch. D. 750; Re Thackway & Young's Contract (1888), 40 Ch. D. 34; Ray v. Walker, [1892] 2 Q. B. 88; Manchester Ship Canal Co. v. Manchester Racecourse Co., [1900] 2 Ch. 352; Rice v. Noakes, [1900] 1 Ch. 213; Rogers v. Hosegood, [1900] 2 Ch. 388; Formby v. Barker, [1903] 2 Ch. 539; Osborne v. Bradley, [1903] 2 Ch. 446; Wilkes v. Spooner, [1911] 2 K. B. 473; Long v. Gray (1913), 58 Sol. Jo. 48; L. C. C. v. Allen, [1914] 3 K. B. 642; Barker v. Stickney, [1919] 1 K. B. 121; Kelly v. Barrett, [1924] 2 Ch. 378; Lord Strathcona S.S. Co. v. Dominion Coal Co., [1926] A. C. 108.

**196. Contract giving executory interest.]—**LONDON & SOUTH WESTERN RY. CO. v. GOMM, No. 195, *ante*.

**197. Contract giving equitable interest—Land.]—**LONDON & SOUTH WESTERN RY. CO. v. GOMM, No. 195, *ante*.

**B. Personal Contracts.**

**198. Not subject to rule.]—**LONDON & SOUTH WESTERN RY. CO. v. GOMM, No. 195, *ante*.

**199. —.]—**The rule against perpetuity has no application to personal contracts.—BORLAND'S TRUSTEE v. STEEL BROTHERS & CO., LTD., [1901] 1 Ch. 279; 70 L. J. Ch. 51; 49 W. R. 120; 17 T. L. R. 45.

*Annotations*.—*Reid*. S. E. Ry. v. Associated Portland Cement Manufacturers (1900), Ltd., [1910] 1 Ch. 12. *Mentd*. Hickman v. Kent or Romney Marsh Sheep-Breeders' Assn., (1915), 84 L. J. Ch. 688; Brown v. British Abrasive Wheel Co., [1919] 1 Ch. 290.

**200. — Although connected with land.]—**By an accommodation works agreement of May 31, 1847, a railway co., who were purchasing a strip of land for their line, agreed that the landowner, his heirs, appointees, or assigns, might at any time thereafter at his or their own expense make a tunnel thereunder to join the lands severed thereby. The co. also agreed to make a certain defined level crossing.

On Dec. 31, 1847, the landowner conveyed the strip to the railway co., reserving to himself, his heirs, appointees, & assigns, the defined level crossing & the right to make a tunnel at his or their own expense, the level crossing & the privilege of making a tunnel being accepted in lieu of all other accommodation works. The site of the tunnel was in no way defined:—*Held*: as against the original covenants, the railway co., the provision in the agreement as to the tunnel was a personal contract & was not obnoxious to the rule against perpetuities.

The fact that there is some connection with a reference to land does not make a personal contract by A. less a personal contract binding on him, with all the remedies arising thereout, unless the ct. can by construction turn it from a personal contract into a limitation of land, & a limitation of land only. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, & he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant (FAREWELL, L.J.).—SOUTH EASTERN RY. CO. v. ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1900), LTD., [1910] 1 Ch. 12; 79 L. J. Ch. 150; 101 L. T. 865; 74 J. P. 21; 26 T. L. R. 61; 54 Sol. Jo. 80, C. A.

*Annotations*.—*Apld*. Sharpe v. Durrant (1911), 55 Sol. Jo. 423. *Mentd*. County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251; S. E. Ry. v. Cooper, [1924] 1 Ch. 211.

**201. Conferring no interest in land—Payment of mining royalties.]—**WITHAM v. VANE (1883), Challis's Real Property, App. V., H. L.; *reversg*. (1881), 44 L. T. 718, C. A.

*Annotations*.—*Apld*. S. E. Ry. v. Associated Portland Cement Manufacturers (1900), Ltd., [1910] 1 Ch. 12. *Reid*. Borland's Trustee v. Steel, [1901] 1 Ch. 279. *Mentd*. Barber v. Blaisberg (1882), 30 W. R. 368; Barton v. L. & N. W. Ry. (1888), 38 Ch. D. 144.

**202. — Mere licence—Right to enter.]—**SMITH v. COLBOURNE, No. 274, *post*.

**Covenant to pay sum of money.]—**See Sub-sect. 4, C., *post*.

## C. To Pay Money.

**Personal contracts.]—**See Sub-sect. 4, B., *ante*.

**203. On failure of issue.]—**PINBURY v. ELKIN (1719), 1 P. Wms. 563; Prec. Ch. 483; 2 Vern. 758, 760; 24 E. R. 518, L. C.

**Annotations.]—***Distd.* Beaulock v. Dormer (1742), 2 Atk. 308. *Consd.* Donn v. Penny (1815), 1 Mer. 26. *Refd.* King v. Withers (1735), Cas. temp. Talb. 117; Wealthy d. Manley v. Bosville (1736), Lee temp. Hard. 258; A.-G. v. Milner (1744), 3 Atk. 112; Wingfield v. Newton (1744), 9 Mod. Rep. 428; Sheffield v. Orrery (1745), 3 Atk. 282; Gray v. Shawne (1758), 1 Eden, 153; Tothill v. Pitt (1766), 1 Madd. 488; Kelley v. Fowler (1768), Wilm. 298; Benyon v. Maddison (1786), 2 Bro. C. C. 75; Bell v. Phyn (1802), 7 Ves. 453; Campbell v. Harding (1831), 2 Russ. & M. 390; Garratt v. Cockerell (1842), 1 Y. & C. Ch. Cas. 494; Pye v. Linwood (1842), 6 Jur. 618; Turner v. Frampton (1846), 2 Coll. 331; Parker v. Birks (1854), 1 K. & J. 156; *Re* Cresswell, Parkin v. Cresswell (1883), 24 Ch. D. 102. *Mentd.* Monkhouse v. Holme (1783), 1 Bro. C. C. 298.

**204. —.]—**Devise of £400 to A. & if A. die without issue, then to B.; this is good, & must be intended if A. die without issue living at his death.

There is a great difference between a limitation of a trust of a term for years in such a manner as that all power of alienation may be thereby restrained, & consequently a perpetuity introduced, & a limitation of a trust of a sum of money, which may be subject to more remote contingencies; for in the latter case I should think a bond to pay a sum of money upon the death of A. B. without issue of his body would be good, & for the same reason the trust of money limited upon such contingency would be allowed also (LORD MACCLESFIELD, C.). —PLEYDELL v. PLEYDELL (1721), 1 P. Wms. 748; 24 E. R. 597, L. C.

**Annotations.]—***Refd.* Kelley v. Fowler (1768), Wilm. 298; De Beauvoir v. De Beauvoir (1852), 3 H. L. Cas. 524.

**205. Royalty on minerals raised.]—**WITHAM v. VANE (1883), Challis's Real Property, App. V., H. L.; *reussg.* (1881), 44 L. T. 718, C. A.

**Annotations.]—***Apld.* S. E. Ry. v. Associated Portland Cement Manufacturers (1900), Ltd., [1910] 1 Ch. 12. *Refd.* Borland's Trustees v. Steel, [1901] 1 Ch. 279. *Mentd.* Barber v. Blalberg (1882), 30 W. L. 362; Barton v. L. & N. W. Ry. (1888), 38 Ch. D. 144.

## D. Options to Purchase and Rights of Pre-emption or Repurchase.

**206. Right of pre-emption—Unlimited in extent.]—**A right of pre-emption held limited to the life of the owner of the property. *Semble:* a right of pre-emption, "at all times thereafter," cannot be enforced after the death of the owner of the property.

The other agreement is this. It is at all times thereafter to give *pltf.* his trustees & assigns, the right of pre-emption. . . . If I could treat it as a distinct & separate contract, I should require much more argument to convince me that a contract which gives a right of pre-emption, "at all times hereafter," is one which could be enforced after the death of the owner of the property (ROMILLY, M.R.). —STOCKER v. DEAN (1852), 16 Beav. 161; 51 E. R. 739.

**207. —.]—**BIRMINGHAM CANAL CO. v. CARTWRIGHT, No. 258, *post*.

**208. —.]—**LONDON & SOUTH WESTERN RY. CO. v. GOMM, No. 195, *ante*.

**209. — Covenant by purchaser to reconvey.]—**By his will testator devised his property to trustees upon trust for his eldest son for life, with remainder in trust for his first & other sons in tail male, with remainder in trust for testator's second & third sons successively for life with the like

limitations to their first & other sons, respectively, with remainder in trust for his grandson for life, with remainder to his first & other sons in tail male, with remainders over. In accordance with a power to that effect in the will, the trustees sold a portion of the settled land to a tenant for life, & by a separate deed he covenanted with the trustees that he would not, "during the continuance of the strict settlement," sell or dispose of the land otherwise than as therein mentioned; & that he would, in case he should at any time thereafter "during the continuance of the aforesaid settlement" be called upon by the trustees so to do, & upon being re-imbursed the purchase money & costs, reconvey all such of the lands so sold to him as might then remain unsold or undisposed of:—*Held:* the covenant was void as tending to a perpetuity. —TREVELYAN v. TREVELYAN (1885), 53 L. T. 853.

**210. Option to purchase—First refusal.]—**(1) A racecourse co. agreed with a canal co., that if it should be at any time proposed to use their racecourse for dock purposes the racecourse co. should give the canal co. the first refusal thereof:—*Held:* a proposed user by any intending purchaser, including the canal co., entitled the canal co. to a first refusal.

In an agreement *inter partes* between these two cos. clause 3 [right of first refusal] would clearly be void for perpetuity because there is no limitation in point of time (FARWELL, J.).

(2) When the legislature declares an agreement valid, it is valid *in toto*, & I am not at liberty to hold it partly invalid. That disposes of the argument on the ground of perpetuity (FARWELL, J.). —MANCHESTER SHIP CANAL CO. v. MANCHESTER RACECOURSE CO., [1900] 2 Ch. 352; 69 L. J. Ch. 850; 83 L. T. 274; 16 T. L. R. 420; 44 Sol. Jo. 515; *affd.*, [1901] 2 Ch. 37, C. A.

**Annotations.]—***As to* (1) *Refd.* Sharpe v. Durrant (1911), 55 Sol. Jo. 423. *As to* (2) *Refd.* Talbot v. Scarborough (1908), 77 L. J. Ch. 436. *Generally, Mentd.* Crossfield v. Manchester Ship Canal Co. (1904), 73 L. J. Ch. 345; *Re* Wilton's S. E., [1907] 1 Ch. 50; Ryan v. Thomas (1911), 55 Sol. Jo. 364.

**211. —.]—**A lease of land for ninety-nine years granted in 1867 contained a proviso that in case the lessee, his heirs or assigns, should at any time during the term be desirous of purchasing the fee simple of the land at the rate of £500 per acre, the lessor, his heirs or assigns, on receipt of the purchase-money, would execute a conveyance of the land in favour of the lessee, his heirs & assigns.

In 1904 an action was brought by an assignee of the lease, who had given notice of his desire to exercise the option, against assigns of the lessor to compel a conveyance of the land accordingly:—*Held:* the option to purchase was invalid on the ground of remoteness. —WOODALL v. CLIFTON, [1905] 2 Ch. 257; 74 L. J. Ch. 555; 92 L. T. 292; 53 W. R. 203; 21 T. L. R. 78; *affd.*, [1905] 2 Ch. 266, C. A.

**Annotations.]—***Refd.* Worthing Corp'n. v. Heather, [1906] 2 Ch. 532. *Mentd.* Dewar v. Goodman, [1908] 1 K. B. 94; *Re* Woods & Batley Breweries & Bradbury's Lease, Bradbury v. Grimble, [1920] 2 Ch. 548; Sherwood v. Tucker, [1924] 2 Ch. 440.

**212. — Option for charitable purpose.]—**In 1878 land was demised to *pltf's* predecessors for thirty years from Sept. 29, 1870, to be used as a public park; & the lease contained a proviso that at any time during the term the lessor, her heirs or assigns would, on receiving notice from

## PART I. SECT. 2, SUB-SECT. 4.—D.

**206 i. Right of pre-emption—Unlimited in extent.]—**A contract of pre-emption, with reference to sale of lands, which fixes no time within which

the agreement to convey is to be performed cannot be enforced against the heirs of the person who entered into the contract as it infringes the rule against perpetuities. —KOLATHU AYYAR

v. RANGA VADHYAR (1912), I. L. R. 38 Mad. 114.—IND.

*d.* — Valid during life of grantee.] —KENNICK v. DEMPSEY (1856), 5 Gr. 584.—CAN.

*Sect. 2.—Interests subject to the rule: Sub-sect. 4, D.; sub-sect. 5, A. & B.; sub-sect. 6, A. & B.]*

pltf. of their desire to purchase the land, convey it to them for £1,325. The lessor died in 1902. In 1905 pltf. served on her devisees notice of their desire to purchase. The devisees maintained that the option was void as infringing the rule against perpetuities; & the corpn. brought this action against them & the lessor's exor. for specific performance of the contract to sell, or in the alternative, damages for breach of contract:—*Held*: the option to purchase was void for remoteness, & could not be enforced by specific performance; this defect was not cured by the fact that the option was given for charitable purposes, inasmuch as the interest of the charity did not become effective till the happening of the future event; but pltf. were entitled to recover damages from defts. for breach of the covenant to convey.

The act, therefore, which the covenant binds the covenantor to perform is not an illegal act. What alone is illegal is the limitation of land which is to take effect at a period too remote (*WARINGTON, J.*).—*WORTHING CORPN. v. HEATHER* [1906] 2 Ch. 532; 75 L. J. Ch. 761; 95 L. T. 718; 22 T. L. R. 750; 50 Sol. Jo. 668; 4 L. G. R. 1179.

#### SUB-SECT. 5.—COVENANTS.

##### A. Covenants Running with the Land.

*See, generally, LANDLORD & TENANT, Vol. XXXI., pp. 141–148; REAL PROPERTY; SALE OF LAND.*

**213. General rule.**—D., who was sub-lessee of certain premises, demised the same to F. for the residue of the term then vested in him less the last days thereof, & covenanted for himself, his exors., administrators & assigns, that in case he should obtain from the freeholder, his heirs or assigns, any extension of the term for which he then held the premises, then he, his exors., administrators or assigns, would grant to F. a new lease for such extended term as would include the unexpired residue of the original term granted to F., & the further term less the last days thereof, which might be granted to D. by the freeholder, his heirs or assigns. D. died, & his reversion became vested in deft., who surrendered his term to the freeholder & obtained from him a new lease for an extended term, subject to existing underleases. F. having died, pltf. acquired from his exors. his interest in the premises, & then claimed specific performance of D.'s covenant with F.:—*Held*: the covenant was not strictly a covenant for renewal, & did not on that account run with the land; but assuming that it did run with the land, the doctrine of perpetuity had no application.

Perpetuity has no application to covenants which run with the land, because they are so annexed to the land as to create something in the nature of an interest in the land (*FARWELL, J.*).—*MULLER v. TRAFORD*, [1901] 1 Ch. 54; 70 L. J. Ch. 72; 49 W. R. 132.

*Annotation*:—*Consd. Woodall v. Clifton*, [1905] 2 Ch. 257.

**214. Application of rule—Restrictive covenant—Building scheme.**—J. having divided freehold land into lots, by three deeds agreed to sell certain lots to A., B. & C. for building purposes, reserving a portion thereof for himself. In all the deeds of agreements were covenants between J. & A., B. &

C., respectively, that the latter should, within a certain period, erect dwelling-houses upon their respective lots, in a uniform row, & with a specified frontage, etc.; & then J. covenanted for himself, his heirs & assigns, that in case he or they should build on the ground he had reserved, the same uniformity was to be maintained in the building. J. afterwards conveyed the land he had reserved to T., & the deed of conveyance recited the before-mentioned deeds of agreement, & contained a covenant by J. that he would, in the conveyance to A., B. & C. require them to enter into covenants with T., similar to those contained in the deeds of agreement. T. also covenanted with J. that in case he should build upon the ground purchased by him, he would build the front in a line. Afterwards J. executed a conveyance to A. of the land comprised in the lot he had purchased, & entered into the covenants contained in his deed of agreement; & this lot was afterwards conveyed to pltf. The lot purchased by T. afterwards became vested in defts., who, in June, 1853, commenced building a chapel, which projected eighteen feet beyond the proper frontage, whereupon pltf., by his solr., told defts. that the building was, he believed, contrary to certain covenants contained in his deed which he requested, but defts. refused to allow him, to see. On Sept. 2, 1853, pltf. obtained drafts of some of the building agreements, & on Sept. 21 gave notice to defts. not to proceed with the building; & in Oct., on their non-compliance with the notice, filed a bill, & obtained an injunction upon an interlocutory motion:—*Held*: the covenant was binding upon the land, notwithstanding the objections taken to it as tending to a perpetuity.—*COLES v. SIMS* (1854), 5 De G. M. & G. 1; 2 Eq. Rep. 951; 23 L. J. Ch. 258; 22 L. T. O. S. 277; 18 Jur. 683; 2 W. R. 151; 43 E. R. 768, L. JJ.

*Annotations*:—*Reid, Mackenzie v. Childers* (1889), 43 Ch. D. 265. *Mentd. Child v. Douglas* (1854), Kay, 560; *Johnstone v. Hall* (1856), 2 K. & J. 414; *Howard v. Woodward* (1864), 29 J. P. 3; *Western v. Macdermott* (1866), 2 Ch. App. 72; *Tulk v. Metropolitan Board of Works* (1867), 8 B. & S. 777; *Keates v. Lyon* (1869), 4 Ch. App. 218; *Cornwall v. Hawkins* (1872), 20 W. R. 653; *Luker v. Dennis* (1877), 26 W. R. 167; *Renals v. Cowlishaw* (1878), 9 Ch. D. 125; *Patman v. Harland* (1881), 17 Ch. D. 353; *Nottingham Patent Brick & Tile Co. v. Butler* (1885), 15 Q. B. D. 261; *Russell v. Watts* (1885), 55 L. J. Ch. 158; *Sheppard v. Gilmore* (1887), 57 L. J. Ch. 6; *Rogers v. Hosegood*, [1900] 2 Ch. 388; *General Accident Assce. Corpn. v. Noel*, [1902] 1 K. B. 377; *Holloway v. Hill*, [1902] 2 Ch. 612; *Brigg v. Thornton* (1903), 73 L. J. Ch. 301.

**215.** — — — — —]—A restrictive covenant or contract not being a limitation of property is not obnoxious to the rule against perpetuities.—*MACKENZIE v. CHILDERS* (1889), 43 Ch. D. 265; 59 L. J. Ch. 188; 62 L. T. 98; 38 W. R. 243.

*Annotations*:—*Mentd. Davis v. Leicester Corpn.*, [1894] 2 Ch. 208; *Rowell v. Satchell*, [1903] 2 Ch. 212.

##### B. Covenants for Renewal of Lease.

*See LANDLORD & TENANT, Vol. XXXI., p. 68, Nos. 2157, 2158.*

**216. Perpetual renewal—Covenant by lessor.**—In a lease the lessor covenants, that if, at the expiration of the term, the lessee should be desirous of taking a further lease, the lessor would grant such further lease, without any fine, & under the same rent & covenants only, as in this lease. A new lease is desired & prepared, but it contains a covenant to grant a further lease at the end of the new term; the lessor objected to this covenant as being in the nature of a perpetuity upon

#### PART I. SECT. 2, SUB-SECT. 5.—B.

**216 1. Perpetual renewal—Covenant by lessor.**—*REDINGTON v. BROWNE* (1893), 32 L. R. Ir. 347.—IR.  
a. *For successive lives—Covenant in peculiar form.*—*POLLOCK v. BOOTH* (1875), 9 I. R. Eq. 607.—IR.



his estate; but the objection was overruled.—**BRIDGES v. HITCHCOCK** (1715), 5 Bro. Parl. Cas. 6; 2 E. R. 498.

*Annotations* :—**Dird.** **Tritton v. Foote** (1789), 2 Cox, Eq. Cas. 174; **Iggulden v. May** (1807), 2 Bos. & P. N. R. 449. **Mentl.** **Furnival v. Crow** (1744), 3 Atk. 83; **Cooke v. Booth** (1778), 3 Cowp. 819.

217. ———.]—Although, *prima facie*, a lessor shall not be taken to have intended to enter into a covenant for perpetual renewal, yet if there be in the lease expressions indicative of such an intention, the ct. will give effect thereto.

Lease for lives, with a covenant on the death of either of the *cestuis que vie* to execute a renewed lease at the same rent & subject to the same covenants "including this present covenant":—**Held**: a covenant for perpetual renewal, & lessee entitled to have inserted in the renewed lease a covenant for renewal *totidem verbis* with that contained in the original lease, but with the name of the new *cestui que vie* substituted for that of deceased.

The notion of its [the covenant] being objectionable on the ground of tending to a perpetuity is out of the question (**PAGE-WOOD, V.-C.**).—**HARE v. BURGESS** (1857), 4 K. & J. 45; 27 L. J. Ch. 86; 30 L. T. O. S. 255; 22 J. P. 84; 3 Jur. N. S. 1294; 6 W. R. 144; 70 E. R. 19.

*Annotations* :—**Reid.** **L. & S. W. Ry. v. Gomm** (1882), 20 Ch. D. 562; **Swinburne v. Milburn** (1884), 9 App. Cas. 844; **Wynn v. Conway Corpn.**, [1914] 2 Ch. 705.

———.]—**See CHARITIES**, Vol. VIII., p. 361, Nos. 1604, 1605.

218. Construction of covenant—No presumption against perpetuities.]—A lessor demised hereditaments to the lessee, his heirs & assigns for the natural lives of the lessee & two other persons & the longest liver of them, with a covenant that the lessor, his heirs & assigns, upon the lessee, his heirs or assigns "surrendering this present demise as hereinafter mentioned," should at any time thereafter at the request of the lessee his heirs or assigns, "as often as one or two life or lives of & in the hereditaments" should drop & be determined, renew & grant a further term "for any other life or two lives of any other person or persons to be nominated by the lessee his heirs or assigns in the stead of the persons life or lives so dropping or determining"; the lessee his heirs or assigns paying to the lessor his heirs or assigns "for every such renewal for every life or lives of such person or persons so to be renewed as aforesaid the sum of 40s. only, & at the same time surrendering this present demise to be cancelled":—**Held**: upon the true construction of the covenant the right of renewal was neither perpetual, nor limited to one renewal for not more than two new lives, but was a right of renewal as often as any of the three original lives should drop, so that any such renewal might take place either on the dropping of any one of the three lives, or after the dropping of any two of them, as the lessee might from time to time request.

I am not inclined to adopt the language which is to be found in some authorities to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind (**LORD SELBORNE, C.**).—**SWINBURNE v. MILBURN** (1884), 9 App. Cas. 844; 54 L. J. Q. B. 6; 52 L. T. 222; 33 W. R. 325, H. L.

*Annotations* :—**Reid.** **Wynn v. Conway Corpn.**, [1914] 2 Ch. 705. **Mentl.** **Sherwood v. Tucker**, [1924] 2 Ch. 440; **Batchelor v. Murphy**, [1925] 1 Ch. 220.

## SUB-SECT. 6.—LIMITATIONS DEFEASIBLE BY DISSENTAIL.

### A. In General.

219. Estate tail—Nature.]—**NICOLLS v. SHEPHERD**, No. 239, *post*.

220. ———.]—**Re STAMFORD & WARRINGTON (EARL)**, **PAYNE v. GREY**, No. 50, *ante*.

221. Provision against dissentail—Void.]—**POOLE'S CASE** (prior to 1610), cited in **Moore**, K. B. p. 810; 72 E. R. 920.

*Annotations* :—**Consd.** **Jervis v. Bruton** (1691), 2 Vern. 251. **Reid.** **Worthing Corpn. v. Heather**, [1906] 2 Ch. 532.

222. ———.]—A devise to "A. in tail until such time as A., or any issue of his body, shall effectually assent, conclude, do, or go about to do, or make any act to alter or discontinue the estate tail, & that then I give the lands to B." & so under the same limitation to C. D. & E. the remainder over is void; for the law will not encourage such perpetuities or permit an estate tail to be determined by such ambiguous limitation.—**FOY v. HYNDE** (1624), Cro. Jac. 697; Benl. 151; W. Jo. 56; 79 E. R. 605; *sub nom.* **HURD v. FOY**, 2 Roll. Rep. 346, 484.

223. ———.]—**BISHOP v. BISHOP** (1639), 1 Rep. Ch. 142; Toth. 17; 21 E. R. 532.

224. ———.]—Trust by deed, creating estates tail, after any contract for alienation to raise a sum of money for the persons next in the course of limitation, declared void, as tending to a perpetuity, & inconsistent with the rights of the tenants in tail.—**MAINWARING v. BAXTER** (1800), 5 Ves. 458; 31 E. R. 681.

*Annotations* :—**Consd.** **Dawkins v. Penrhyn** (1877), 36 L. T. 680; **Re Olivers' Settlement**, **Evered v. Leigh**, [1905] 1 Ch. 191. **Reid.** **Re Frost**, **Frost v. Frost** (1889), 43 Ch. D. 246.

*See, also*, No. 246, *post*.

Common law conditions.]—**See Sub-sect. 2, A. (c), ante**.

### B. Limitations on Determination of Estate Tail.

225. General rule.]—Lands, held in fee simple, were by settlement made in 1752, conveyed to trustees, to the use of the settlor for life; remainder to the use of his three daughters for their lives, as tenants in common; remainder to the use of trustees to preserve; remainder, as to the share of each daughter, to the use of her first & other sons successively in tail male; remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor, during their or her respective lives or life, as tenants in common in case of two survivors, with remainder, in like manner as to the original share, to the use of the first & other sons of such surviving daughters or daughter in tail male; remainder, in case all the daughters should die without issue male, as to the share of each, to the use of their daughters as tenants in common in tail; & in case one or two of the settlor's daughters should die without issue, the share or shares of such daughter or daughters to go to the use of the daughters of the survivors or survivor, as tenants in common in tail general, & in case all three should die without issue, then remainder over, with ultimate remainder to the use of the settlor in fee. He died soon after without disposing of the reversion:—**Held**: the limitation, in case of the failure of issue, generally, of any of the daughters, to the daughters of the survivors or survivor, was

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a good contingent remainder, & therefore not void for remoteness.

It is said that this last limitation is too remote, because, there being no previous limitation to issue generally, there might be a failure of all the prior limitations, & yet issue, as in the case of a son or of a daughter, might exist, so that this last limitation would not take effect. But if this be a remainder, it would be barrable, & the objection, therefore, would not arise (LORD COTTENHAM, C.).—*COLE v. SEWELL* (1848), 2 H. L. Cas. 186; 12 Jur. 927; 9 E. R. 1062, H. L.

**Annotations:—***Consd. Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535. *Reid, Monypenny v. Dering* (1852), 2 De G. M. & G. 145; *Wolley v. Jenkins* (1856), 23 Beav. 53; *Re Finch, Abbas v. Burney* (1881), 17 Ch. D. 211; *Re Frost, Frost v. Frost* (1889), 43 Ch. D. 246; *Whitby v. Mitchell* (1890), 44 Ch. D. 85; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1. *Mentd, Doe d. Davies v. Davies* (1851), 16 Q. B. 951; *Smith v. Osborne* (1857), 30 L. T. O. S. 67; *Re Palmer's Settltmt. Trusts* (1875), L. R. 19 Eq. 320; *Re Friend's Settltmt., Cole v. Allcot*, [1906] 1 Ch. 47.

**226. —.]—**(1) No limitation after an estate tail is void for remoteness; & it makes no difference whether the limitation be directly to a class or to trustees to sell & divide among such class, provided the legal & beneficial interests be ascertainable at the determination of the estate tail.

No limitation after estates tail is . . . too remote; & it appears to us clear that whether the limitation be directly to a class of issue to be ascertained at the determination of the estate tail, or a gift to a trustee for such class, or upon trust to convey to such class, or to sell & to divide the proceeds among such class, is wholly immaterial, if the legal & beneficial interests should be both ascertainable at the moment of the determination of the estate tail (JAMES, L.J.).

(2) If a clause in a will offends against the rule against perpetuities, yet, in construing the will, such clause cannot be disregarded, but must be read as the expression of testator's intention as though no such rule existed.—*HEASMAN v. PEARSE* (1871), 7 Ch. App. 275; 41 L. J. Ch. 705; 26 L. T. 299; 20 W. R. 271, L. J.

**Annotations:—***As to (1) Apld. Re Haygarth, Wickham v. Holmes*, [1912] 1 Ch. 510. *Reid, Goodier v. Edmunds*, [1893] 3 Ch. 455. *Generally, Mentd. Re Hudson, Hudson v. Hudson* (1882), 20 Ch. D. 406; *Re Yates, Bostock v. D'Eyncourt*, [1891] 3 Ch. 53; *Re Burnham, Carrick v. Carrick*, [1918] 2 Ch. 196.

**227. —.]—**The testator directs his trustees to convey the fee simple in equal shares to the tenants in tail in possession in each line on marriage or at majority. That is a perfectly good direction. Being subsequent to the estate tail, & taking effect during its continuance, it is not too remote. The estate tail would not merge in the fee. It would be protected by statute de Donis, 1285 (c. 1). The heirs of the body would still claim *per formam doni*, though the ancestor by levying a fine might bar his issue, & acquire a base fee which would merge (LORD MACNAGHTEN).—*VAN GRUTTEN v. FOXWELL, FOXWELL v. VAN GRUTTEN*, [1897] A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170; 46 W. R. 426, H. L.; *subsequent proceedings* (1898), 79 L. T. 617, C. A.

**Annotations:—***Reid. Re Lawrence, Lawrence v. Lawrence*, [1915] 1 Ch. 129. *Mentd. Re Adams & Perry's Contract*, [1899] 1 Ch. 554; *Pelham Clinton v. Newcastle*, [1902] 1 Ch. 34; *Re Buckton, Buckton v. Buckton*, [1907] 2 Ch. 406; *Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips*, [1907] 2 Ch. 236; *Re Simcoe, Vowler-Simcoe v. Vowler*, [1913] 1 Ch. 552; *Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 569; *Re Hussey & Green's Contract, Re Hussey, Hussey v. Simper*, [1921] 1 Ch. 566.

**228. —.]—**The 13th Viscount Mountgarret by his will devised his Irish estates upon trusts for

his son H. for life, remainder for his (testator's) grandson S. for life, remainder for "his first & other sons in tail male for the respective terms of their respective lives successively & in remainder one after the other so that such son only as shall be entitled to & bear the title of Viscount Mountgarret shall be entitled to such rents & profits & in default of such issue upon trust as hereinafter set out for the holder for the time being of the Mountgarret title & in the event of such title becoming extinct," then upon trust for testator's right heirs living at the death of the last holder of said title. The will contained a residuary devise. The Mountgarret title was created by King Edward VI., who conferred it upon R., & the heirs male of his body. Testator died in 1900 & H. became the 14th Viscount. He was twice married. By his first marriage in 1868 he had one son only, namely, S.; & by his second marriage in 1902 he had one child only, *pltf.* H. died in 1912, & S. became the 15th Viscount & died without issue in 1918. On the death of S. *pltf.* became the 16th Viscount, & questions arose as to what interest he took under the will of the 13th Viscount in the Irish estates:—*Held*: the true effect of the devise was to create estates in tail male & not merely life estate in the first & other sons successively of the 15th Viscount, & consequently the gift over in default of his male issue was not void for remoteness.—*Re MOUNTGARRET, MOUNTGARRET v. INGILBY*, [1919] 2 Ch. 294; 88 L. J. Ch. 405; 121 L. T. 414; 35 T. L. R. 585; 63 Sol. Jo. 620.

**229. Application of rule—Term after estate tail.]—***GOODIAR v. CLARKE* (1863), 1 Sid. 102; 1 Keb. 462; 1 Lev. 35; 82 E. R. 990.

**Annotations:—***Consd. Benson v. Hudson* (1874), *Freem. K. B.* 362; *Andrews v. Stroud* (1706), *Holt, K. B.* 623.

**230. —.]—**Carved out of settlor's term.]—One possessed of a term for two thousand years in land, grants the land to A. without mentioning any term. It is void for uncertainty.

One seised in fee may create a term for years, to commence after his death without issue; but one possessed of a term for two thousand years, cannot out of that term carve a future term to commence after the determination of an estate in tail.—*KIRSLEY v. DUCK* (1712), 2 Vern. 684; 23 E. R. 1044.

**231. —.]—**To raise legacies.]—Testatrix devises to A. for life, remainder to A.'s first & other sons in tail male, remainder to A.'s daughters as tenants in common in tail, with cross remainders between them in tail; remainder to trustees for a term of years upon trust, to raise & pay such legacies as she had thereafter given, or should give by any codicil: &, in a subsequent part of the will, she bequeaths various legacies from & immediately after the decease, & failure of issue of A.:—*Held*: "failure of issue" in the gift of the legacies must be considered "failure of such issue, as were included in the limitation of the estate," &, therefore, the bequests were not too remote.—*MORSE v. ORMONDE (MARQUIS)* (1826), 1 Russ. 382; 4 L. J. O. S. Ch. 158; 38 E. R. 148, L. C.

**Annotations:—***Consd. Ellicombe v. Gompertz* (1837), 3 My. & Cr. 127. *Distd. Case v. Drosler* (1839), 5 My. & Cr. 246. *Reid, Egerton v. Jones* (1830), 3 Sim. 409; *Lewis v. Templer* (1864), 33 Beav. 625. *Mentd. Tarbuck v. Tarbuck* (1835), 4 L. J. Ch. 129; *Eno v. Eno* (1847), 6 Hare, 171; *Baker v. Tucker* (1850), 3 H. L. Cas. 106; *Bryan v. Mansion* (1852), 5 De G. & Sm. 737; *Key v. Key* (1853), 4 De G. M. & G. 73; *Pride v. Fooks* (1858), 3 De G. & J. 252.

**232. —.]—**Charge.]—Testator, by his will, charged his debts & legacies upon his real & personal estate, & gave such real & personal estate to trustees upon trust for his nephew for



life, to whom also he gave a legacy, with remainder to the first & other sons of the nephew successively in tail male, with remainder to the second & every other son of testator's brother successively in tail male, remainder to testator's own right heirs; & added: " & upon this last-mentioned contingency, failing heirs male of my said brother, & of my said estate going to my right heirs more remote as aforesaid, then I do hereby charge, subject & make liable my said estate with the payment of the sum of £5,000 to my niece." Testator died in 1775, leaving his brother his heir-at-law. The nephew entered into possession to the real estate which consisted of a plantation in Jamaica, subject to a mtge. created by testator in 1765. The brother afterwards died, leaving the nephew, his only son, & then heir-at-law of testator; the nephew died in 1822 without issue male. The bill was filed in 1837 against the mtgees. & the devisees of the nephew to obtain payment of the niece's legacy of £5,000:—*Held*: on the death of the nephew without issue male, the event happened on which the niece would become entitled to the legacy of £5,000; & it was not too remote.

The will of testator, for the purpose of ascertaining the persons who are to take, speaks from his death (WIGRAM, V.-C.).—*FAULKNER v. DANIEL* (1843), 3 Hare, 190; 67 E. R. 355.

*Annotations*.—*Mentl. Davis v. Chantor* (1848), 2 Ph. 545.  
*Byam v. Sutton* (1854), 10 Beav. 556; *Dowdeswell v. Dowdeswell* (1878), 9 Ch. D. 294.

233. — *Gift over in strict settlement.*—Testator gave his freehold & copyhold estates & his personal estate to certain persons, whom he appointed his exors., in trust, out of his personal estate & by sale or mtge. of his freehold & copyhold estates, to raise money sufficient to pay his debts, funeral expenses & legacies, & out of the rents & interest of so much of his real & personal estate as should not be sold or disposed of for those purposes, to pay certain annuities & such sums as his trustees should think sufficient for the maintenance of his son J. & his children, if he should have any, & to accumulate the residue of the rents & interest during the life of J., & after J.'s decease, to stand seised of his real estates, in trust for J.'s first son & the heirs of the body of such first son, successively as they should be in priority of birth, & for the several & respective heirs of the body & bodies of every such son, & for default of such issue, for A. for life, with remainder to his sons in tail, with remainder to B. & his sons, & to C. & D. & their sons in like manner, with remainder to his own right heirs for ever; & he declared that his trustees & exors. should stand possessed of his personal estate after J.'s death, in trust for such person or persons, in the same order & succession, & for such & the same estates & interests as were thereby declared concerning his real estates, so far as the nature of the property, the rules of law & equity, the deaths of parties & other contingencies would admit. Testator died in 1780; his son J. was his heir-at-law & customary heir. J. & A., B., C. & D., died without issue:—*Held*: the trusts subsequent to the trust for the first son of J. were not void for remoteness, & the ultimate trust of the personal estate, as well as of the freehold & copyhold estates, vested, on testator's death, in his son J., as his heir-at-law at his death.—*BOYDELL v. GOLIGHTLY* (1844), 14 Sim. 327; 9 Jur. 2; 60 E. R. 384; *sub nom. BOYDELL v. GOLIGHTLY*, 14 L. J. Ch. 109.

*Annotation*.—*Mentl. De Beauvoir v. De Beauvoir* (1852), 3 H. L. Cas. 524.

234. — *Gift to a class—Trust of proceeds of sale.*—*HEASMAN v. PEARSE*, No. 226, *ante*.

235. — *Persons & shares ascertained.*—Testator devised his real estate unto & to the use of his trustees & their heirs upon trust to pay the net rents & profits to his brother during his life, & after his death to stand seised of his real estate upon trust for the first & other sons of his brother successively in tail with remainder upon trust for the first & other daughters of his brother successively in tail, & if the trusts for his brother for life, & for his issue in tail should fail or determine, then testator directed his trustees on such failure or determination to sell his real estate & hold the net proceeds of sale thereof upon trust for such of testator's five cousins, naming them, as should be living when said direction for sale should come into operation, each share to be retained upon the usual trusts of a settled share for such cousin for life, & after his or her death for his or her children, provided always that if any of his said five cousins should die before the aforesaid direction for sale should come into operation leaving a child or children living when such direction should come into operation who being male should attain twenty-one, or being female should attain twenty-one or marry, then & in every such case the last-mentioned child or children should take, & if more than one equally between them, the share to which his, her, or their parent would have been entitled for life, if such parent had not died before the direction for sale had come into operation.

Testator died in 1902. His brother died without issue in 1911. Three out of the five cousins had died before the brother's death, one of them leaving a child still an infant. On a summons to determine whether the above trusts were void for remoteness:—*Held*: inasmuch as all the persons to take & the shares in which they were to take must necessarily be ascertained, if not at or before the determination of the estates tail, at any rate within a life in being at testator's death & twenty-one years after, the trusts of the proceeds of sale subsequent to the determination of the estates tail did not offend against the rule against perpetuities, & were valid.—*Re HAYGARTH, WICKHAM v. HOLMES*, [1912] 1 Ch. 510; 81 L. J. Ch. 255; 106 L. T. 93; 56 Sol. Jo. 239.

236. — *Trust or power of sale.*—*GOODIER v. EDMUNDS*, No. 189, *ante*.

#### C. Shifting Clause in Defeasance of Estate Tail.

237. *General rule.*—(1) Testator by codicil, after appointing two persons trustees, as also their heirs & assigns, to his will & codicil, desired that his sister A. should do what she pleased with his remaining property after payment of certain legacies, excepting a tenement at W., & a sum of stock, of which she should only receive the interest & rent during her natural life, & afterwards to his sister's eldest son, on his taking the name of M.; but should he refuse to take the name of M., or his sister A. depart this life without a son, then the tenement at W. & stock should go to P., on his taking the name of M., & so on to his heirs, each taking the name of M., none of them being allowed to touch the principal, & no one should, after his sister A., inherit the said property or enjoy the interest who did not take or possess the name of M.:—*Held*: the trustees took an estate in fee by virtue of their appointment, & A. was entitled to an estate for life in the tenement & stock, with a remainder in fee in the tenement, & an absolute interest in stock to the first born of A. vested on his birth & baptism by the name of M.

(2) The ct. will not necessarily hold a condition

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as to name & arms a condition subsequent, although it inclines to hold it so.

(3) It is well settled that, if there be a gift to A. for life, with remainder to B. in fee, with a shifting clause by which in a certain event, the estate is to shift from B. to another; unless the event must necessarily take effect within the prescribed limits, it is void for remoteness; although it is different where such a shifting clause is attached to an estate tail, because the power of barring the estate tail is a sufficient protection against perpetuity (*KINDERLEY, V.-C.*).—*BENNETT v. BENNETT* (1864), 2 Drew & Sm. 266; 34 L. J. Ch. 34; 11 L. T. 362; 10 Jur. N. S. 1170, 13 W. R. 66, 62 E. R. 623.

*Annotation*.—As to (2) *Reid. Re Greenwood, Goodhart v. Woodhead*, [1902] 2 Ch. 198

**238. On succession to family estate.]**—*ST. GEORGE v. ST. GEORGE* (1767), *Gilbert on Uses*, 3rd ed. by Sugden, p. 157, H. L.

**239. —.]**—Proviso in a will that, in case the devisee should come into possession of the family estate, the trustees should stand seised of the devised estate, to the use of the next person in remainder, valid. The eldest son of the tenant in possession is the next person in remainder.

There is no doubt with respect to the validity of the proviso: several estates are held under similar limitations. No rule of law is contradicted by it: & if no recovery was suffered, it might take place at any distance of time. I might as well be told that an estate tail is an illegal estate, because it may endure for ever, & must, where the remainder is in the Crown (*KENYON, M.R.*).—*NICOLLS v. SHEFFIELD* (1787), 2 Bro. C. C. 215; 29 E. R. 121.

*Annotations*.—*Reid. Cole v. Sewell* (1848), 2 H. L. Cas. 186; *Wolley v. Jenkins* (1856), 23 Beav. 53.

**240. —.]**—By indenture of settlement, two estates, A. & B., were limited to the father for life & subject thereto, the estate A. was limited to the first & other sons in tail male & the estate B. was limited to the second & other sons in like manner; & it was provided that if the second son should become an eldest son & as such should become entitled to the actual possession or to the receipt of the rents & profits of the estate A., the limitations of the estate B. should cease & determine as if such second son were dead without issue. The second son, by the death of his elder brother, became the eldest son & joined his father in suffering a recovery of the estate A. the uses of which were declared to the joint appointment of the father & son & subject thereto to the old uses: in exercise of this power, the father & son by a mtge. in fee of the estate A. raised a sum of money which was paid to the father & son:—*Held*: on the death of the father, the estate B. shifted from the second son under the terms of the proviso contained in the settlement; the recovery suffered by the father & son did not by itself prevent the operation of the proviso, & the mtge. had not that effect, but, notwithstanding both the recovery & the mtge., the second son came on the death of his father into possession of the estate A. within the meaning of the terms of the settlement; the party entitled to the estate A. might previously to the happening of the event mentioned in the proviso have so exercised his rights over the estate as to have prevented it from ever coming into the possession of the second son within the meaning of the terms of the settlement.

As regards a question that has been alluded to, namely, whether the proviso did not create a perpetuity, I am clearly of opinion that no valid

objection can be raised on that ground (*LORD ST. LEONARDS, C.*).—*HARRISON v. ROUND* (1852), 2 De G. M. & G. 190; 22 L. J. Ch. 322; 20 L. T. O. S. 118; 17 Jur. 568; 1 W. R. 26; 42 E. R. 844, L. C.

*Annotations*.—*Consd. Macoubrey v. Jones* (1856), 2 K. & J. 684; *Re Wright's Trustees & Marshall* (1884), 28 Ch. D. 93; *Re Constable's S. E.*, [1919] 1 Ch. 178; *Re Meeking, Meeking v. Meeking*, [1922] 2 Ch. 523; *Parr v. A.-G.*, [1926] A. C. 239. *Reid. Wyndham v. Fane* (1853), 11 Hare, 287; *Langdale v. Briggs* (1856), 3 Sm. & G. 255; *Curson v. Curson* (1859), 1 Giff. 248; *Collingwood v. Stanhope* (1869), L. R. 4 H. L. 43; *Meyrick v. Laws, Meyrick v. Mathias* (1874), 9 Ch. App. 237; *Re Fitzgerald's S. E., Saunders v. Boyd*, [1891] 3 Ch. 394; *Shuttleworth v. Murray*, [1900] 1 Ch. 795.

**241. On succession to title.]**—One devised lands to trustees in fee, subject to the uses of a certain term of one thousand years, to the use of W. for life, second son of the devisor's daughter E., subject to the proviso after mentioned, remainder to trustees to preserve contingent uses during W.'s life, but to permit him to take the rents, etc.; & after his decease to the use of his first & other sons successively in tail male, subject to the same proviso, etc., & in default of such issue, remainder to the use of the third & other sons of E. successively in tail male, subject to the same proviso, etc.; & in default of such issue, with like remainders. to the second son of E.'s eldest son, etc., & in default of such issue, to the use of the devisor's granddaughter C. for life, subject to the proviso, etc.; remainder to trustees to preserve contingent uses, etc.; remainder to the use of her first son, plff., in tail male, with other remainders over; all subject to the same proviso; which was, that if W. or either of the persons to whom the estate was limited should become Earl of E., the use limited to such person & his issue male should cease & be void, as if such person were dead without issue of his body. The devisor's daughter E. at the time of his death had only two sons, her eldest, afterwards Lord E., & said W., but she had afterwards a third who died under age; & W. was let into possession at twenty-three, & had one son:—*Held*: on the death of his eldest brother without issue, by which event W. became the Earl of E., plff. who was then next in remainder, supposing W. had in fact died without issue, was entitled under the will to take an estate in tail male in possession subject to the trusts of the term of one thousand years.—*CARR v. ERROLL (EARL)* (1805), 6 East, 59; 2 Smith. K. B. 575; 102 E. R. 1209; *subsequent proceedings* (1808), 14 Ves. 478.

*Annotations*.—*Consd. Stanley v. Stanley* (1809), 16 Ves. 491; *Morrice v. Langham* (1840), 11 Sim. 260; *Lambard v. Peach* (1859), 4 Drew. 553. *Apud. Re Harcourt Fitzwilliam v. Portman*, [1920] 1 Ch. 492. *Reid. Gardiner v. Jellicoe* (1862), 12 C. B. N. S. 568.

**242. Name & arms clause.]**—*Re STAMFORD & WARRINGTON (EARL), PAYNE v. GREY*, No. 50, ante.

See, further, SETTLEMENTS.

**D. Term Prior to Estate Tail.**

**243. Trusts of term contrary to rule—Void.]**—(1) The trusts of a term, limited previous to an estate tail, for raising extra portions on the death of a party without issue, was held invalid, as tending to a perpetuity: because, being limited antecedently to the estate tail, it could not be defeated by a recovery.

(2) Two estates were devised to trustees, for five hundred years, with remainder, as to one estate, to A. for life, with remainder to his first & other sons, in tail, with remainder to A.'s daughters, equally, in tail general, with remainder to B., for life, with remainder to his first & other sons, in

tail, with remainder to his daughters equally, in tail general. The other estate was, *mutatis mutandis*, similarly settled on B. & his issue, with remainder to A. & his issue. The trusts of the term were declared to be, to raise £2,000 each, for C. & D., " & if A. or B. should depart this life without issue, whereby the survivor of them would become entitled to " the two estates, to raise a further sum of £2,000 apiece, for C. & D. B. died leaving issue, & afterwards C. died without issue, whereby the two estates centred in the issue of B. :—*Held* : the trust for raising the further sums of £2,000 did not take effect.—*CASE v. DROSER* (1837), 2 Keen, 764; 6 L. J. Ch. 353; 1 Jur. 352; 48 E. R. 824; *affd.* (1839), 5 My. & Cr. 246, L. C.

*Annotations* :—*As to* (1) *Folld. Sykes v. Sykes* (1871), L. R. 13 Eq. 56. *Reid. Housman v. Pearse* (1871), L. R. 11 Eq. 522.

244. ———.]—Testator directed a settlement of certain estates to be made, so far as the rules of law & equity would allow, to certain uses, as to part, it was to be settled to the use of trustees for 2,000 years in his W. estate, in trust to pay any child of his body, or the issue of such child, who, under the limitations of the will, should be entitled to the possession of the rents of his W. estate, & who, having attained twenty-one, should be under the age of twenty-five, an annual sum of £800 till he should have attained twenty-one or die under that age; & to accumulate the surplus, as well during the minority, or respective minorities of every person so for the time being entitled, as during such time as any child of his body so being entitled as aforesaid should be under the age of twenty-five, & at the end of every period of accumulation to apply the accumulated fund towards payment of his debts :—*Held* : this trust for accumulation was void.—*SCARISBRICK v. SKELMERSDALE* (1850), 17 Sim. 187; 19 L. J. Ch. 126; 14 Jur. 562; 60 E. R. 1100.

*Annotation* :—*Reid. Thellusson v. Rendlesham* (1859), 28 L. J. Ch. 948.

245. ———.]—Testator in 1802 devised estates to his eldest son R. for life, with remainders to his grandson R. for life; to trustees to preserve contingent estates; to other trustees for 500 years upon certain trusts; to the first & other sons of his grandson R. in tail male; & in default of issue, to the second & other sons of his son R. in tail male; & in default of issue to his son N. for life; to the same trustees to preserve contingent estates: to the first & other sons of N. in tail male; with remainders over in favour of other sons for life & their issue in tail. The limitation of the term was for the purpose of enabling the trustees, by mtge. or otherwise, in case any one or more of testator's younger sons, or their issue, should become seised in possession by virtue of the limitations of the estates devised to his son R. for life, with remainders over, to raise a sum of £5,000 for the benefit of such of testator's sons, except the son in possession of the estates, as should be then living, or their issue. Testator's eldest son had no son other than testator's grandson, R., who died on Feb. 24, 1870, without issue, & the estates devolved upon the infant deff., a grandson of testator's son, N. Pltfs. were a younger son of N., & the son of testator's younger son H. :—*Held* : according to the true construction of the will, & the events which had happened, the sum of £5,000 was validly charged upon the estates, & was now raisable with interest at 4 per cent. from Feb. 24, 1870, & the charge failed for remoteness.—*SYKES v. SYKES* (1871), L. R. 13 Eq. 56; 41 L. J. Ch. 25; 25 L. T. 560; 20 W. R. 90.

### *E. Powers Annexed to Settlement.*

246. To alter estate tail into life estate.—On coming into esse.]—Power of alteration of estates tail as they were to come in *esse* into tenancies for life :—*Held* : to be void.—*HEATH v. HEATH* (1765), 2 Eden, 330; 28 E. R. 925, L. C.

*See, also*, Nos. 221–224, *ante*.

247. Power to trustees of settlement.—Sale.—With consent of tenant in possession.—Trusts of leaseholds to follow settlement.]—*WARE v. POLHILL*, No. 466, *post*.

248. ———.]—*BIDDLE v. PERKINS* (1829), 4 Sim. 135; 58 E. R. 52.

*Annotation* :—*Apld. Lantsbery v. Collier* (1856), 2 K. & J. 709.

249. ———.]—A power of sale, to be exercised during the continuance of successive estates tail, is good.

The power is co-extensive only with the estates tail, & may, like them, be destroyed (*LEACH, M.R.*).—*WARING v. COVENTRY* (1833), 1 My. & K. 249; 39 E. R. 675.

*Annotation* :—*Reid. Lantsbery v. Collier* (1856), 2 K. & J. 709.

250. ———.]—A father, on the marriage of his daughter in 1806, settled real estate upon trusts for the separate use of his daughter for life, with remainder in case she survived her husband, which event happened, to her children, as tenants in common in tail, & limited the reversion to himself in fee. The settlement contained a collateral power of sale not in terms restricted as to time. In 1850, the daughter's issue being spent, & the daughter being a widow & more than seventy years of age, the trustees executed a deed purporting to be made in exercise of the power, & to be a conveyance of the fee simple :—*Held* : the power was valid & subsisting at the date of the deed of 1850, it was well exercised by that deed, although, under the trusts of the settlement, the effect of its exercise was to change the devolution of the property, passing it, in the events which had happened, to the daughter absolutely.

The ct. looks to the whole intent & purpose of the settlement, & whether the reversion or remainder in fee simple be limited after estates tail or after estate for life, will hold the power to be a valid & subsisting power until the estates tail, if any, are barred, or the fee simple vested in possession : in either of which events the purpose of the settlement is spent, & the power ceases.

A collateral power of sale contained in a settlement by which estates tail are created, is manifestly good in its creation, inasmuch as it is in the power of any of the tenants in tail to destroy by means of a recovery the power so created (*PAGEWOOD, V.-C.*).—*LANTSBERY v. COLLIER* (1856), 2 K. & J. 709; 25 L. J. Ch. 672; 28 L. T. O. S. 35; 4 W. R. 826; 69 E. R. 967.

*Annotations* :—*Apld. Taite v. Swinstead* (1859), 26 Beav. 525. *Consd. Peters v. Lewes & East Grinstead Ry.* (1861), 18 Ch. D. 429; *Re Hornsall, Womersley v. Hornsall*, [1909] 1 Ch. 631. *Apld. Re Allott, Hammer v. Allott*, [1924] 2 Ch. 498. *Reid. Re Sudeley & Baines*, [1894] 1 Ch. 334; *Re Stamford & Warrington, Payne v. Grey*, [1911] 1 Ch. 255.

251. ——— To grant lease.—With consent of parties beneficially interested.]—An estate was devised to O. for life, with remainder to trustees to preserve, etc., with remainder to O.'s first & other sons successively, in tail, with remainder to the trustees & their heirs, in trust for the separate use of testator's niece, for her life, with remainder to the use of her children, in tail, with remainder to testator's right heirs :—*Held* : though the power was given for an indefinite period, yet as either of the tenants for life might concur with his or her children in destroying it, it was not void.—

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**WALLIS v. FREESTONE** (1839), 10 Sim. 225; 59 E. R. 599.

**252. —To cut timber—Proceeds in discharge of incumbrances.]—**By a settlement, family estates were vested in trustees, upon trusts to raise moneys towards the discharge of incumbrances; & subject thereto, upon trust for a father for life, with remainder to his eldest son for life, without impeachment of waste, subject to a power thereafter given to the trustees, with remainder to the first & other sons of the son in tail male, with remainder to the heirs & assigns of the father in fee. The power given to the trustees was, that it should be lawful for them at any time or times thereafter, so long as there should be any mtge. upon the estates, but, after the death of the father, not without the consent of the son, if living, in writing, to fell timber upon the estates, & to apply the proceeds in discharge of the incumbrances:—*Held*: (1) the power in the trustees to cut timber, so long as any mtge. debt remained, was paramount to any right in the son to cut timber; (2) the power was not to any extent invalid as tending to perpetuity.—**BRIGGS v. OXFORD (EARL)** (1852), 1 De G. M. & G. 303; 21 L. J. Ch. 829; 18 L. T. O. S. 341; 10 Jur. 558; 42 E. R. 502, L. J.J.

*Annotation*.—*Reid*, *Re Stamford & Warrington*, *Payne v. Grey*, [1912] 1 Ch. 343.

**253. —To manage property—During minority of person entitled.]—**By a settlement real estate was assured to the use of trustees for a term of five hundred years, & subject thereto, to the use of A. for life, with remainder to his first & other sons in tail, with remainder to B. for life, with remainder to his first & other sons in tail, with divers remainders over; & a power was given to the trustees during the minority of any person who should from time to time be entitled under the limitations of the settlement to the immediate freehold as tenant for life or in tail, to enter into possession of & manage the estates:—*Held*: the power was void for remoteness.—**FLOYER v. BANKES** (1809), L. R. 8 Eq. 115.

*Annotations*.—*Reid*, *Re Stamford & Warrington*, *Payne v. Grey* (1911), 105 L. T. 913. *Mentd.* *Re Leigh's Estate* (1871), 6 Ch. App. 889, n.

#### F. Minority Clauses.

**254. Suspension of possession—Unborn tenant in tail—To age of twenty-six.]—**A proviso in a will to suspend the possession of an unborn tenant in tail, till he shall arrive at the age of twenty-six, is void.—**LADE v. HOLFORD** (1763), 1 Wm. Bl. 428; Amb. 479; 3 Burr. 1416; 96 E. R. 244.

*Annotations*.—*Reid*, *Southampton v. Hertford* (1813), 2 Ves. & B. 54. *Mentd.* *Doe d. Hodsden v. Staple* (1788), 2 Term Rep. 684; *England d. Syburn v. Slade* (1792), 4 Term Rep. 682; *Doe d. Bowerman v. Sybourn* (1796), 7 Term Rep. 2; *Goodtitle d. Jones v. Jones* (1796), 7 Term Rep. 43; *Roe d. Reade v. Roade* (1799), 8 Term Rep. 118; *Peaceable d. Hornblower v. Read* (1801), 1 East, 568; *Hillary v. Waller* (1805), 12 Ves. 239; *Doe d. Hammond v. Cooke* (1829), 6 Bing. 174; *M'Queen v. Meade* (1873), 28 L. T. 768.

**Trust for accumulation—During minority of cestui que trust.]—**See Nos. 697, 703, 705, *post*.

**Power of management to trustees.]—**See No. 253, *ante*.

#### SUB-SECT. 7.—INTERESTS SUBJECT TO RELEASE.

**255. Alienee with power to release—Whether subject to rule.]—**(1) A covenant by the lessees of certain iron works that they, their exors. or assigns, should convey limestone & iron stone by a parti-

cular railroad, is not repugnant to the law concerning perpetuities, nor to that avoiding stipulations in restraint of trade, although the leaning of the law is against such a covenant.

I do not at all doubt that the enjoyment of property may be tied up, & an illegal perpetuity created, by annexing conditions to grants, or by executing covenants whereby, whoever happens to be in possession shall be restrained from using that which is the subject of the grant or covenant, in all but a certain prescribed way; provided always that the restraint so constituted is not reserved in favour of some other party, who may release it at his pleasure; & therefore all such conditions & covenants are void if they go beyond the period allowed by law (**LORD BROUGHAM, C.**).

(2) So of a rent issuing out of an estate, & which may nearly absorb its profits—no one ever deemed this objectionable on the ground of perpetuity (**LORD BROUGHAM, C.**).—**KEPPEL v. BAILEY** (1834), 2 My. & K. 517; *Coop. temp. Brough.* 298; 39 E. R. 1042, L. C.

*Annotations*.—*Generally*, *Mentd.* *Tulk v. Moxhay* (1848), 11 Beav. 571; *Ackroyd v. Smith* (1850), 10 C. B. 164; *Rowbotham v. Wilson* (1857), 8 E. & B. 123; *Bailey v. Stevens* (1862), 31 L. J. C. P. 226; *Hill v. Tupper* (1863), 2 H. & C. 121; *Norval v. Pascoe* (1864), 4 New Rep. 390; *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300; *Richards v. Harper* (1866), 35 L. J. Ex. 130; *Limmer Asphaltic Paving Co. v. I. R. Comrs.* (1872), L. R. 7 Exch. 211; *Aspden v. Seddon*, *Preston v. Seddon* (1876), 34 L. T. 906; *Luker v. Dennis* (1877), 7 Ch. D. 227; *Haywood v. Brunswick Permanent Benefit Bldg. Soc.* (1881), 45 L. T. 699; *Werderman v. Soc. Générale d'Electricité* (1881), 19 Ch. D. 246; *Zetland v. Hislop* (1882), 7 App. Cas. 427; *G. N. Ry. v. I. R. Comrs.*, [1901] 1 K. B. 416; *Whitmores (Edenbridge) v. Stanford*, [1909] 1 Ch. 427; *L. C. C. v. Allen*, [1914] 3 K. B. 642; *Re Woking Urban Council (Basingstoke Canal) Act*, 1911, [1914] 1 Ch. 300; *Barker v. Stickney*, [1919] 1 K. B. 121; *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108.

**256. ———.]—Qu.**: whether the rule as to perpetuities applies to a case where the party who is to take is ascertained, & who can dispose of, release or alienate the estate limited to him.—**GILBERTSON v. RICHARDS** (1860), 5 H. & N. 453; 29 L. J. Ex. 213; 6 Jur. N. S. 672, Ex. Ch.

*Annotations*.—*Follid.* *Birmingham Canal Co. v. Cartwright* (1879), 11 Ch. D. 421. *Consd.* *L. & S. W. Ry. v. Gonn* (1882), 20 Ch. D. 562; *Morgan v. Davey* (1883), Cab. & Kl. 114. *Reid*, *Blight v. Hartnoll* (1881), 18 Ch. D. 204. *Mentd.* *Nash v. Ash* (1862), 1 H. & C. 160.

**257. ———.]—Tenant for life alienating contingent right.]—**(1) Testator bequeathed personal property in remainder to the unborn issue of A. & B. for their lives & the life of the longest liver, with an ultimate limitation to the exors., administrators, & assigns of the survivor of A. & B. or their issue male or female who should happen to be such survivor:—*Held*: the ultimate limitation was good.

(2) Each of the tenants for life in this case had as much right to alien his contingent right to the absolute interest as to alien his life estate; & the person claiming under an assignment of the whole estate & interest of the tenant for life would, as soon as his assignor became the survivor of the other tenants for life, be entitled to the possession & enjoyment as absolute owner. It seems obvious that such a case is not within the principle in which the law against perpetuity rests, & that the limitation in question of the absolute interest does not fail as being too remote (**STUART, V.-C.**).—**AVERN v. LLOYD** (1868), L. R. 5 Eq. 383; 37 L. J. Ch. 489; 18 L. T. 282; 16 W. R. 009.

*Annotations*.—*As to* (1) *Consd.* *Stuart v. Cookerell* (1869), L. R. 7 Eq. 363. *Distd.* *Re Hargreaves, Midgley v. Tatley* (1890), 43 Ch. D. 401. *Reid*, *Re Harvey, Peek v. Savory* (1888), 39 Ch. D. 289. *Generally*, *Reid*, *Re Fane, Fane v. Fane*, [1913] 1 Ch. 404.

**258. ———.]—Concurrence of person subject to contingent right.]—**In a conveyance of a plot of

land, reserving the mines under it to the vendor, there was a covenant by the vendor with the purchaser that, in case the vendor, his heirs or assigns, should at any time thereafter sell, or agree to sell, to any person the mines under some adjoining lands belonging to him, he, his heirs or assigns, would at the same time offer to the purchaser of the plot of land, his heirs or assigns, the mines under that plot, & give him & them the refusal of the same for one month from the time such offer should be made, at the same price per acre as the vendor, his heirs or assigns, should have agreed to sell the adjoining mines, & if the purchaser, his heirs or assigns, should accept such offer, & within such month agree to purchase the mines so offered, at the price at which they should be offered, the vendor, his heirs or assigns, should convey the same to the purchaser, his heirs or assigns:—*Held*: this covenant was not obnoxious to the rule against perpetuities.

The rule is aimed at preventing the suspension of the power of dealing with property—the alienation of land or other property. But when there is a present right of that sort, although its exercise may be dependent upon a future contingency, & the right is vested in an ascertained person or persons, that person or persons, concurring with the person who is subject to the right, can make a perfectly good title to the property (FRY, J.).—*BIRMINGHAM CANAL CO. v. CARTWRIGHT* (1879), 11 Ch. D. 421; 48 L. J. Ch. 552; 40 L. T. 784; 27 W. R. 597.

*Annotations*:—*Overd. L. & S. W. Ry. v. Gomm* (1882), 20 Ch. D. 562. *Reid. Re Blight, Blight v. Hartnall* (1881), 45 L. T. 524.

259. ———.]—In my opinion a present right to an interest in property which may arise at a period beyond the legal limit is void notwithstanding that the person entitled to it may release it (KAY, J.).—*LONDON & SOUTH WESTERN RY. CO. v. GOMM* (1881), 20 Ch. D. 502; 51 L. J. Ch. 193; 45 L. T. 505; 30 W. R. 321; *on appeal* (1882), 20 Ch. D. p. 576, C. A.

*Annotations*:—*Reid. Dunn v. Flood* (1883), 25 Ch. D. 629; *Trevelyan v. Trevelyan* (1885), 53 L. T. 853; *Re Harvey, Peek v. Savory* (1888), 39 Ch. D. 289; *Mackenzie v. Childers* (1889), 43 Ch. D. 265; *Re Hargreaves, Midgley v. Tatley* (1890), 59 L. J. Ch. 384; *Re Bowen, Lloyd Phillips v. Davis*, [1893] 2 Ch. 491; *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352; *Borland's Trustee v. Steel*, [1901] 1 Ch. 279; *Savill v. Bethell*, [1902] 2 Ch. 523; *Thomas v. Thomas* (1902), 87 L. T. 58; *Re Ashforth, Sibley v. Ashforth*, [1905] 1 Ch. 535; *Woodall v. Clifton*, [1905] 2 Ch. 257; *Worthing Corp'n. v. Heather*, [1906] 2 Ch. 532; *Edwards v. Edwards*, [1909] A. C. 275; *Mason v. Fulham Corp'n.* (1910), 102 L. T. 188; *S. E. Ry. v. Associated Portland Cement Manufacturers* (1900), Ltd., [1910] 1 Ch. 12; *Smith v. Colbourne*, [1914] 2 Ch. 533. *Mentd. Austerberry v. Oldham Corp'n.* (1885), 29 Ch. D. 750; *Re Thackwray & Young's Contract* (1888), 40 Ch. D. 34; *Ray v. Walker*, [1892] 2 Q. B. 88; *Rice v. Noakes*, [1900] 1 Ch. 213; *Rogers v. Rosegood*, [1900] 2 Ch. 384; *Formby v. Barker*, [1903] 2 Ch. 539; *Osborne v. Bradley*, [1903] 2 Ch. 446; *Re Nisbet & Potts' Contract*, [1906] 1 Ch. 386; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *Long v. Gray* (1913), 58 Sol. Jo. 46; *L. C. v. Allen*, [1914] 3 K. B. 642; *Barker v. Stickney*, [1919] 1 K. B. 121; *Kelly v. Barrett*, [1924] 2 Ch. 379; *Lord Strathcona S.S. Co. v. Dominion Coal Co.*, [1926] A. C. 108.

260. ———.]—*Re HARGREAVES, MIDGLEY v. TATLEY*, No. 27, *ante*.  
See, also, No. 289, *post*.  
Interests defeasible by disentail.—See Sub-sect. 6, *ante*.

#### SUB-SECT. 8.—PROVISIONS FOR RAISING DEBTS AND INCUMBRANCES.

261. Whether valid.—Accumulation for payment of debts.—*SOUTHAMPTON (LORD) v. HERTFORD (MARQUIS)*, No. 40, *ante*.

262. ———.]—*BACON v. PROCTOR*, No. 658, *post*.

263. ———.]—Payment of mortgages on estate.]—*BATEMAN v. HOTCHKIN*, No. 659, *post*.

264. ———.]—Proviso arising at end of void period.]—*SCARISBRICK v. SKEIEMERSDALE*, No. 244, *ante*.

265. ———.]—*Re STAMFORD & WARRINGTON (EARL)*, *PAYNE v. GREY*, No. 50, *ante*.

266. ———.]—Power to trustees to fell timber.]—*BRIGGS v. OXFORD (EARL)*, No. 252, *ante*.

267. Vesting suspended pending payment of debts.—Suspended interest void.]—*BAGSHAW v. SPENCER* (1748), as reported in 1 Ves. Sen. 142; 2 Atk. 579; 27 E. R. 944, L. C.

*Annotations*:—*Consd. Rimington v. Cannon* (1853), 12 C. B. 18. *Mentd. Exel v. Wallace* (1751), 2 Ves. Sen. 318; *Theobridge v. Kilburne* (1751), 2 Ves. Sen. 233; *Lister v. Lister* (1753), 3 Keny. 1; *Garth v. Baldwin* (1755), 2 Ves. Sen. 646; *Sayer v. Masterman* (1757), Wilms. 386; *Wright v. Pearson* (1758), Amb. 358; *King v. Burchell* (1759), 1 Eden, 424; *Doe d. Long v. Laming* (1760), 2 Burr. 1100; *Le Rousseau v. Rode* (1761), 2 Eden, 1; *Rooke v. Rooke* (1761), 2 Eden, 8; *Strong v. Teat* (1769), 2 Burr. 912; *Hodgson v. Ambrose* (1780), 1 Doug. K. B. 337; *Jones v. Morgan* (1783), 1 Bro. C. C. 206; *Thong v. Bedford* (1783), 1 Bro. C. C. 313; *Goodright v. Herring* (1785), 4 Doug. K. B. 298; *Phillips v. Brydges* (1796), 3 Ves. 120; *Harton v. Harton* (1798), 7 Term Rep. 652; *Goodtitle d. Sweet v. Herring* (1801), 1 East, 264; *Kenrick v. Beauchlorck* (1802), 3 Bos. & P. 175; *Poole v. Poole* (1804), 3 Bos. & P. 620; *Roe v. Bedford* (1815), 4 M. & S. 362; *Jervoise v. Northumberland* (1820), 1 Jac. & W. 559; *Scarsdale v. Curzon* (1860), 1 John. & H. 40; *Re Brooke, Brooke v. Dickson*, [1923] 2 Ch. 265.

268. ———.]—*Re BEWICK, RYLE v. RYLE*, No. 299, *post*.

269. Devise subject to payment of debts.—No direction to accumulate.—Not void for remoteness.]—By his will, A. devised certain freehold & personal property to trustees, whom he also named exors., for payment of debts & legacies; &, in the event of the property so devised being insufficient for that purpose, he devised all other his messuages, etc., to the same trustees, in trust to sell the same to satisfy the debts & legacies, & to divide the residue, if any, amongst all his children. "Provided, that, in case my personal estate & my lands, etc., herein first above devised, shall be sufficient to pay all my debts as aforesaid, then & in such case I give & devise to my son B., my dwelling-house, lands, etc., in F., for & during the term of his natural life," remainder to his issue, &, in default of issue, to testator's heir or heirs-at-law:—*Held*: the will gave B. an estate tail in the lands in F.; & the devise was not void for remoteness, by reason of its being postponed till after payment of debts; but, inasmuch as the estate was given to B., not absolutely, but only in the event of the estate first devised to the trustees proving sufficient for the payment of debts, the allegation in the count, which imported an absolute devise to B., was not proved.—*RIMINGTON v. CANNON* (1853), 12 C. B. 18; 22 L. J. C. P. 153; 1 W. R. 291; 138 E. R. 806, Ex. Ch.

*Annotations*:—*Reid. Austin v. Llewellyn* (1853), 9 Exch. 276; *Abergavenny v. Braco* (1872), L. R. 7 Exch. 146.

270. Accumulation to pay legacy.—Legatee ascertained.]—*ODDIE v. BROWN*, No. 285, *post*.

271. ———.]—Testator gave certain leaseholds to trustees for a term of thirty years, to receive rents & profits, & pay debts & legacies, to accumulate the rents, etc.; to permit his son B. to take the rents for his own use "until the son of my son B., if he shall have a son, shall attain twenty-one; & then I give & bequeath the premises to trustees, to preserve contingent remainders, but to permit such son to receive the rents & profits for his natural life, & after his decease to the heirs male of such son & the heirs male of their bodies; & for default of such

**Sect. 2.—Interests subject to the rule: Sub-sects. 8, 9, 10, 11 & 12.]**

issue, I give the premises to the trustees to permit my son L.," & then follow the same provisions with respect to L. as those which had been previously made with respect to B., & in default, etc., the premises were again given to trustees to preserve remainders, & then came a repetition of the former provisions in favour of "the son of my daughter A." B. & L. successively entered into possession of the leaseholds, & died without male issue; A. had a son, who attained twenty-one:—*Held*: (1) the devise over after B. was not void for remoteness, but A.'s son took an estate tail, the rule as to freeholds being in this case properly applicable to leasehold estates; (2) the direction to accumulate in respect of the term of thirty years was not void, for the legacies payable by the will were only legacies given to persons then in being.—*WILLIAMS v. LEWIS* (1859), 6 H. L. Cas. 1013; 28 L. J. Ch. 505; 33 L. T. O. S. 23; 5 Jur. N. S. 323; 7 W. R. 349; 10 E. R. 1594, H. L.; *affg.* S. C. sub nom. *LEWIS v. HOPKINS* (1856), 3 Drew. 668, L. C.

*Annotations*.—As to (1) *Reid*. *Re Lowman*, *Dovenish v. Pester*, [1895] 2 Ch. 348. *Generally*, *Mentid*. *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276.

**272. Accumulation to replace value—Void.]**—Testator, who died in 1844, devised to trustees a moiety of his real estates upon trusts for his son for life, with remainder to his grandson for life & his sons in tail & to pay all his debts & sums of money as he should owe at the time of his decease, whether by way of mtge., bond, or otherwise, including a sum of £8,000 charged upon the estates; & he directs that the rents & profits of the estates should be received by the trustees & be applied in liquidation of the debts until the whole, including the £8,000, should be paid; that no person to whom any estate for life or in tail was limited should be entitled to the rents & profits until the estates were totally disincumbered & clear of debts; & that they should invest the moneys which come to their hands upon good security at interest until the same should be applied in payments under the trusts. A receiver had been appointed. The whole of the debts had been paid excepting the £8,000 by sales of parts of the estates under the orders of the ct., & there was an accumulation fund in ct. sufficient to pay the £8,000:—*Held*: the receiver must be discharged, & the tenant for life be let into possession of the estates.

I am now asked in reality to create a new trust & a new scheme; to say what might have been attempted to have been said by testator to the effect following: "provided that if any part of my estates shall be sold . . . then I direct an accumulation of rents to go on until there shall have been got together a fund equal to the value of the property sold, or the equity of redemption of which has been foreclosed; & such fund shall be dealt with as constituting part of the estate which is to be subject to the limitations of my will" . . . that certainly would, to say the least, raise a very grave question indeed whether such a provision as that was valid (*HULL, V.-C.*).—*TEWART v. LAWSON* (1874), L. R. 18 Eq. 490; 43 L. J. Ch. 673; 22 W. R. 822.

*Annotations*.—*Apld.* *Norton v. Johnstone* (1885), 30 Ch. D. 649; *Re Green*, *Baldock v. Green* (1888), 40 Ch. D. 610. *Foll.* *Re Heathcote*, *Heathcote v. Trench*, [1904] 1 Ch. 328. *Reid*. *Honywood v. Honwood*, [1902] 1 Ch. 347; *Re Webster*, *Thompson v. Thompson* (1910), 102 L. T.

905; *Re Crosswell*, *Linham v. Crosswell* (1913), 57 Sol. Jo. 578; *Re Stamford & Warrington*, *Payne v. Grey*, [1925] Ch. 162.

**Vesting of interest subject to accumulation for payment of debts.]—See WILLS.**

*See, also*, Part III., Sect. 3, sub-sect. 1.

**SUB-SECT. 9.—CHARITABLE GIFTS.**

*See CHARITIES*, Vol. VIII., pp. 321, 325–329, Nos. 1030, 1031, 1078–1116.

**SUB-SECT. 10.—EASEMENTS.**

**273. Right of way—Easement in futuro—Coming into force beyond period.]**—In 1889 deft. conveyed to pltf.'s predecessors in title a strip of land for a tramway, the deed containing a reservation by the vendors of the right to cross the line at two points to be selected by them, & a covenant by the purchasers to make & provide crossings at the points selected by the vendor on notice being given. In 1892 defts. gave notice of one point selected, & from that date crossed the line there from time to time, but no crossing was ever constructed. In 1910 pltf. obstructed the crossing, & sought to restrain deft from using it:—*Held*: the reservation was void as breaking the rule against perpetuities, but that the covenant contained an implied personal obligation not to interfere with deft.'s crossing, which obligation became fixed & attached to the land as soon as the point was selected, & pltf. had notice thereof, & was bound thereby.

The effect of the reservation is said to be that it reserves to the vendors, their heirs & assigns, the right of passage over the tramway at two points to be selected, but there is no specified time within which the selection is to be made. Until the selection is made there is no easement; the reservation is of an easement *in futuro*, which may come into force at a time beyond the period allowed by the rule against perpetuities. The reservation therefore is bad (*WARRINGTON, J.*).—*SHARPE v. DURRANT* (1911), 55 Sol. Jo. 423; *affd.*, [1911] W. N. 158, C. A.

**274. Agreement as to light—Right of adjoining owner to enter—Revocable licence—No perpetuity unless interest in land.]**—A clause in an agreement that the adjoining owner may enter & build up the windows in default of the owner of the buildings doing so is a mere revocable licence & does not give the adjoining owner any interest in the land, & if it did give such an interest it would be void for perpetuity.—*SMITH v. COLBOURNE*, [1914] 2 Ch. 533; 84 L. J. Ch. 112; 111 L. T. 927; 58 Sol. Jo. 783, C. A.

**SUB-SECT. 11.—INTERESTS DERIVED BY STATUTE.**

**275. General rule—Lease.]**—An Act of Parliament has power to create interests which were unknown to the common law & which could not be created between individuals by contract. Now we have not by law any such thing as a lease in perpetuity. We have a fee simple subject to a rentcharge, & we have a lease for years, but we have no such thing as a lease in perpetuity; & therefore when we find a perpetuity of this kind, if it carries, as I think it does carry, the

**PART I. SECT. 2, SUB-SECT. 10.**

**h. Easement created by deed—Present & not future easement.]**—*CAMERON v. DALGETY*, [1930] N. Z. L. R. 155.—N.Z.



right to possession, that could not be properly described as a lease or as a fee simple . . . But it is to my mind equivalent to a lease (JESSEL, M.R.).—SEVENOAKS, MAIDSTONE & TUNBRIDGE RY. CO. v. LONDON, CHATHAM & DOVER RY. CO. (1879), 11 Ch. D. 625; 48 L. J. Ch. 513; 40 L. T. 545; 27 W. R. 672.

*Annotations*.—*Reid*. Manchester Ship Canal Co. v. Manchester Racecourse Co., [1900] 2 Ch. 352; Taft Vale Ry. v. Amalgamated Soc. of Ry. Servants, [1901] A. C. 426; Foley's Charity Trustees v. Dudley Corp., [1910] 1 K. B. 517.

276. ———.]—A lease in perpetuity is unknown at common law, but such a lease granted by one railway co. to another when confirmed by the legislature becomes valid & binding (FARWELL, J.).—TAFT VALE RY. CO. v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS, [1901] A. C. 426; 70 L. J. K. B. 905; 85 L. T. 147; 65 J. P. 596; 50 W. R. 44; 17 T. L. R. 698; 45 Sol. Jo. 690, H. L.

*Annotations*.—*Mentd*. Linaker v. Pilcher (1901), 70 L. J. K. B. 396; Giblan v. National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600; Airey v. Weighill (1905), 49 Sol. Jo. 279; South Wales Miners' Federation v. Glamorgan Coal Co. (1905), 74 L. J. K. B. 526; Yorkshire Miners' Assocn. v. Howden, [1905] A. C. 256; Bussy v. Amalgamated Soc. of Ry. Servants & Bell (1908), 24 T. L. R. 437; Conway v. Wade, [1908] 2 K. B. 844; Amalgamated Soc. of Ry. Servants v. Osborne, [1910] A. C. 87; Markl v. Knight S.S. Co., Sale & Frazar v. Knight S.S. Co., [1910] 2 K. B. 1021; Russell v. Amalgamated Soc. of Carpenters & Joiners, [1912] A. C. 421; Parr v. Lancashire & Cheshire Miners' Federation, [1913] 1 Ch. 366; Vacher v. London Soc. of Compositors, [1913] A. C. 107; Walker v. Sur, [1914] 2 K. B. 930; Kelly v. National Soc. of Operative Printers' Assistants (1915), 84 L. J. K. B. 2236; Mercantile Marine Service Assocn. v. Toms, [1916] 2 K. B. 243; Bloom v. National Federation of Discharged & Demobilised Sailors & Soldiers (1918), 35 T. L. R. 50; McLuskey v. Cole, [1922] 1 Ch. 7; Marshal Shipping Co. v. Board of Trade, [1923] 2 K. B. 343; Ideal Films v. Richards, [1927] 1 K. B. 374.

277. ——— Trust.]—The trust, being created by statute, cannot be held invalid on the ground of perpetuity or on any other ground (LINDLEY, L.J.).

—*Re* CHRISTCHURCH INCLOSURE ACT (1888), 38 Ch. D. 520; 57 L. J. Ch. 564; 58 L. T. 827; 4 T. L. R. 392, C.A.; *on appeal, sub nom.* A.-G. v. MEYRICK, [1893] A. C. 1, H. L.

*Annotations*.—*Reid*. *Re* Norwich Town Close Estate Charity (1888), 40 Ch. D. 298. *Mentd*. I. R. Comrs. v. Scott, *Re* Bootham Ward Strays, York, [1892] 2 Q. B. 152; *Simcoe v. Pethick*, [1898] 2 Q. B. 555; *Verge v. Somerville*, [1924] A. C. 496.

278. ——— Contract.]—MANCHESTER SHIP CANAL CO. v. MANCHESTER RACECOURSE CO., No. 210, *ante*.

279. Application of rule.—Interests held by corporate body.]—In an action by some, on behalf of all, of the freemen of a borough to establish the right of all the individual freemen to share for their private benefit the net proceeds of certain properties vested in the corp.,—*Held*: the effect of the saving of rights in 5 & 6 Will. 4, c. 76, s. 2, was to legalise the beneficial interests therein, mentioned, without reference to the legality of their origin, &, in particular, to obviate any objection which might otherwise arise in respect of the tendency towards a perpetuity of any such beneficial interest.

An action to establish such rights as aforesaid may be brought by parties claiming to be entitled, without an information by the A.-G.

In such an action it was held on demurrer that in order to enable plffs. to avail themselves of such saving of rights as aforesaid, it was sufficient for them, after stating the title of the corp., by charter or otherwise to the property in question, to aver that at the time of the passing of the Act the rents, tolls, & profits claimed by them were not, nor ever had been, nor ought to have

been, held & applied to public purposes, but then were, & always had been, held & applied for the particular benefit of the freemen, & without pleading that such rents, tolls, & profits had been enjoyed or acquired by virtue of any specific statute, charter, by-law or custom, or expressly to aver that any custom to such effect as aforesaid existed.—*PRESTNEY v. COLCHESTER CORPN.* & A.-G. (1882), 21 Ch. D. 111; 51 L. J. Ch. 805; 48 L. T. 353.

*Annotation*.—*Reid*. Stanley v. Norwich Corp. (1887), 3 T. L. R. 506.

280. ———.]—Appl., in 1910, purchased a house & garden, as to which his predecessor in title had, in 1892, by agreement with the then local board under Local Board Act, 1890, a local Act, undertaken whenever required by the board to give up so much of the garden as the local board might require for widening a lane on which it abutted. Before the completion of his purchase applt. had received a letter from the clerk of the Wallasey urban district council, in answer to his inquiry, that the lane was a highway repairable by the inhabitants at large, & that the council had no outstanding charges for private improvement expenses against the property. In 1911 he received notice from resp. corp., successors of the local board & urban district council, to carry out the agreement of 1892 in pursuance of the local Act.

*Qu.*: whether the agreement created such an interest in land within the rule against perpetuities as would, but for the local Act, have rendered it void for remoteness.—*CRANE v. WALLASEY CORPN.* (1912), 107 L. T. 150; 76 J. P. 326; 10 L. G. R. 523, D. C.

Gift over to person entitled by operation of law.]—*See* CHARITIES, Vol. VIII., p. 329, Nos. 1111–1112.

#### SUB-SECT. 12.—OTHER CASES.

281. Estate tail in copyholds.]—If copyholds might be entailed, then the perpetuity of such estates must be maintained; for a fine cannot be levied of copyhold lands to bar the entail (*per* CUR.).—*ROWDEN v. MALTSTER* (1621), as reported in Cro. Car. 42; 79 E. R. 641.

*Annotations*.—*Reid*. Doe d. Wightwick v. Truby (1774), 2 Wm. Bl. 944. *Mentd*. Harrington v. Smith (1658), 2 Sid. 73; Glover v. Cope (1692), Skin. 305; Carr d. Dagwell v. Singer (1750), 2 Vos. Sen. 603; Holloway v. Berkeley (1826), 9 Dow. & Ry. K. B. 83.

—.]—*See* COPYHOLDS, Vol. XIII., pp. 59–62, Nos. 720–768.

282 Estates necessarily expiring with period.—Limitations of estate *pur autre vie*.]—*Low v. BURTON*, No. 57, *ante*.

283. ——— Trust for sale.—During continuance of settlement.]—Here there is a trust purposely inserted in the settlement in order that the property may be sold & the proceeds divided, & to hold that that is a trust which is obnoxious to the rule against perpetuities would be to introduce a rule which has never yet been laid down (PEARSON, J.).—*Re* TWEEDIE & MILES (1884), 27 Ch. D. 315; 54 L. J. Ch. 71; 33 W. R. 193.

*Annotations*.—*Mentd*. *Re* Sudeley & Baines, [1894] 1 Ch. 354; *Re* Douglas & Powell's Contract, [1902] 2 Ch. 296; *Re* Hornsall, Womersley v. Hornsall, [1909] 1 Ch. 631; *Dodd v. Cattell*, [1914] 2 Ch. 1.

284. ———.]—*Semble*: an immediate trust for sale, the parties to take under the will which creates it being all lives in being at its date, is not void for perpetuity, though the exercise of it is not confined within the proper limit.—*Re*

*Sect. 2.—Interests subject to the rule: Sub-sect. 12. Sect. 3: Sub-sects. 1, 2 & 3, A.]*

**DOUGLAS & POWELL'S CONTRACT**, [1902] 2 Ch. 296; 71 L. J. Ch. 850.

*Annotations:—Mentd.* *Re* Grimthorpe, *Beckett v. Grimthorpe*, [1908] 1 Ch. 666; *Re* Sturt, *De Bunsen v. Hardinge* [1922] 1 Ch. 416.

**285. Accumulation for particular individual—Person entitled to stop accumulation.]—**Testator directed his trustees to invest his residuary estate & suffer the interest to accumulate until the principal together with the accumulation of interest should amount to £3,000 or thereabouts, & then to place out the same at interest, & pay the interest equally among certain specified legatees named in the will in equal shares during their lives & the life of the survivor; & in case any of them should happen to die leaving lawful issue, the issue were to be entitled to the same share in the interest to which their parents would, if living, have been entitled, & immediately after the decease of the survivor of the legatees specifically named, then, upon trust, to pay the £3,000 or thereabouts equally among the lawful issue of the specified legatees to whom testator gave & bequeathed the same, but in case any of them should happen to be then dead leaving lawful issue, such issue were to be entitled to the share to which the parent or parents of such issue would, if living, have been entitled:—*Held*: the gift of the £3,000 or thereabouts was not void for uncertainty or remoteness, but the disposition of the income accruing between the expiration of the period allowed by Accumulations Act, 1800 (c. 98), & the end of the time required to accumulate the £3,000 was invalid, & the income for that period was undisposed of, & belonged to the next of kin.

Suppose that a fund was directed to be accumulated simply for the benefit of a particular individual until a certain amount was reached which might not be reached within the period allowed by law for the suspension of vesting, it surely could not be said that the disposition was void for remoteness, when the individual might, at any time, stop the accumulation & dispose of the fund (*TURNER, L.J.*).—*ODDIE v. BROWN* (1859), 4 De G. & J. 179; 28 L. J. Ch. 542; 33 L. T. O. S. 174; 5 Jur. N. S. 635; 7 W. R. 472; 45 E. R. 70. L. C. & L. J.J.

*Annotations:—Distd.* *Williams v. Lewis* (1859), 6 H. L. Cas. 1013. *Consd.* *Re* Wood, *Tullett v. Colville*, [1894] 2 Ch. 310. *Reid.* *Talbot v. Jevers* (1875), L. R. 20 Eq. 255; *Ralph v. Carriek* (1877), 2 Ch. D. 984; *Wharton v. Masterman* (1895), 43 W. R. 449. *Mentd.* *Scott v. Cumberland* (1874), L. R. 18 Eq. 578.

**286. Crown grant—Whether within rule.]—***COOPER v. STUART*, No. 120, *ante*.

**287. Proceeds of working minerals—Interest in land.]—***THOMAS v. THOMAS*, No. 31, *ante*.

**288. Provision for payment of rentcharge—In event of minerals being worked.]—**Where in a deed of grant of land there was a clause that a rentcharge should be paid by the purchaser, his heirs or assigns, to the vendor, his heirs & assigns, if the purchaser, his heirs or assigns should at any time dig & work, etc., any mines, etc., on the property granted:—*Held*: the rentcharge was validly created, & the clause not void as violating the rule against perpetuities.—*MORGAN v. DAVEY* (1883), 1 Cab. & El. 114.

**289. Gift to limited company—Competent to dispose of property—Bequest to secular society.]—**Testator by his will gave the residue of his estate, after the death of his wife, to a co. limited by guarantee & formed to promote the principle "that all human conduct should be based upon

natural knowledge, & not upon supernatural belief," together with ancillary objects, all having an anti-religious tendency:—*Held*: the gift was valid as being neither subversive of morality nor contrary to the law of blasphemy, nor did it create a perpetuity.

No question of perpetuity arose because plffs. were a limited co., & in the view of the law competent to dispose of what was given (*LORD COZENS-HARDY, M.R.*).—*Re* *BOWMAN, SECULAR SOCIETY, LTD. v. BOWMAN*, [1915] 2 Ch. 447; 85 L. J. Ch. 1; 113 L. T. 1095; 31 T. L. R. 618; 59 Sol. Jo. 703, C. A.; *on appeal, sub nom.* *BOWMAN v. SECULAR SOCIETY, LTD.*, [1917] A. C. 406, H. L.

*Annotations:—Mentd.* *Cotman v. Brougham*, [1918] A. C. 514; *Bourne v. Keane*, [1919] A. C. 815; *Re* *Tetley, National Provincial & Union Bank of England v. Tetley*, [1923] 1 Ch. 258.

## SECT. 3.—APPLICATION OF RULE IN GENERAL.

### SUB-SECT. 1.—PERIOD OF VESTING.

**290. General rule—No remoteness after vesting—Description of legatees immaterial.]—**Gift of real & personal estate, to trustees, upon trust to apply the rents & dividends, or so much as they should think fit, to the maintenance, etc., of W. until twenty-five; then to permit him to receive the same during his life; & after his death, to apply the same or so much, etc., to the maintenance, etc., of all & every the children of W. until twenty-five respectively; then upon trust, to assign & transfer to such children so attaining twenty-five; & in case W. shall die without leaving issue living at the time of his death, or leaving such, & all die before twenty-five, upon trust, to pay, etc., unto & among all and every the brothers & sisters of W., share & share alike, upon their attainment of twenty-five, or marriage, respectively. Followed by a gift of residue, upon trust, as to one moiety, to permit testator's daughter A. & her husband to receive the rents, etc., during their lives in succession & after the death of the survivor, to the children, except W., in the same manner as with respect to the former gift. As to the other moiety, upon like trusts for testator's daughter B., her husband & family; with survivorship between the respective grandchildren; & in case of the death of either of the daughters without leaving issue living at her decease, then to the children of the surviving daughter:—*Held*: (1) the limitation to the brothers & sisters of W. in default of issue living to attain twenty-five, was intended to include all his brothers & sisters living at his death, & was consequently void for remoteness; (2) vested interests at twenty-five in every instance, notwithstanding different expressions, there being no antecedent gift, of which it could have been testator's intention merely to postpone the enjoyment; the gift being only the direction to pay at twenty-five.

It is the period of vesting, & not the description of the legatees, that produces the incapacity (*GRANT, M.R.*).

(3) A. having died, leaving issue, the moiety of the residue intended for her children held undisposed of, as being void for remoteness. The other moiety held to rest in contingency during the life of B.; & if she should die without issue, to be well given over to the children of A.

I have always understood that, with regard to personal estate, everything which is ill given by the will does fall into the residue (*GRANT, M.R.*).—



**LEAKE v. ROBINSON** (1817), 2 Mer. 363; 35 E. R. 979.

*Annotations.*—As to (1) *Apld.* Bull v. Pritchard (1826), 1 Russ. 213. *Follid.* Vawdry v. Geddes (1830), 1 Russ. & M. 203. *Distd.* Kevern v. Williams (1832), 5 Sim. 171. *Consd.* Bland v. Williams (1834), 3 L. J. Ch. 218. *Apld.* Portor v. Fox (1834), 6 Sim. 485; Comport v. Anston (1841), 12 Sim. 218. *Consd.* Davies v. Fisher (1842), 5 Beav. 201. *Apld.* Dunganon v. Smith (1846), 12 Cl. & Fin. 546; Blagrove v. Hancock (1848), 10 Sim. 371; Boughton v. Boughton, Boughton v. James (1848), 1 H. L. Cas. 406. *Consd.* Greenwood v. Roberts (1851), 15 Beav. 92. *Distd.* Peard v. Kekowich (1852), 15 Beav. 166. *Apld.* Walker v. Mower (1852), 16 Beav. 365. *Expld.* Gosling v. Townsend (1853), 22 L. T. O. S. 125. *Apld.* Merlin v. Blagrave (1858), 25 Beav. 125. *Distd.* Evers v. Challis (1859), 7 H. L. Cas. 532. *Apld.* Thomas v. Wilberforce (1862), 31 Beav. 299; *Re* Bulley's Trust Estate (1865), 13 L. T. 264. *Consd.* Christie v. Gosling (1866), L. R. 1 H. L. 279. *Follid.* Smith v. Smith (1870), 18 W. R. 742. *Apld.* Hale v. Hale (1876), 3 Ch. D. 643. *Consd.* Pearks v. Moseley (1880), 5 App. Cas. 714. *Distd.* *Re* Bevan's Trusts (1887), 34 Ch. D. 716. *Reid.* Brown v. Houghton (1840), 10 Jur. 747; Williams v. Teale (1847), 6 Hare, 239; Lassence v. Tiorney (1849), 1 Mac. & G. 561; Storrs v. Benbow (1853), 3 De G. M. & G. 390; Courtier v. Oram (1855), 21 Beav. 91; Baker v. Pugh (1857), 28 L. T. O. S. 317; Knapping v. Tomlinson (1864), 34 L. J. Ch. 3; Picken v. Matthews (1878), 10 Ch. D. 264; Watson v. Young (1885), 28 Ch. D. 436. *As to* (2) *Distd.* Doe d. Dolley v. Ward (1839), 9 Ad. & El. 582. *Consd.* Dunganon v. Smith (1846), 12 Cl. & Fin. 546; Cattlin v. Brown (1853), 11 Hare, 372; Hobbs v. Parsons (1854), 23 L. T. O. S. 47. *Apld.* Seaman v. Wood (1856), 22 Beav. 591. *Distd.* Wilkinson v. Duncan (1861), 30 Beav. 111. *Consd.* *Re* Moseley's Trusts (1871), L. R. 11 Eq. 499. *Apld.* Pearks v. Moseley (1880), 5 App. Cas. 714. *Consd.* Hancock v. Watson (1901), 71 L. J. Ch. 149. *Reid.* Vanderplank v. King (1843), 3 Eare, 1; Harris v. Davis (1844), 1 Coll. 416; *Re* Bartholomew (1849), 1 Mac. & G. 354; Barker v. Barker (1852), 5 De G. & Sm. 753; James v. Wynford (1852), 1 Sm. & G. 40; Monypenny v. Derink (1852), 2 De G. M. & G. 145; East v. Twyford (1853), 4 H. L. Cas. 517; Stead v. Platt (1853), 18 Beav. 50; Cowley v. Smith (1854), 2 W. R. 327; Read v. Gooding (1856), 21 Beav. 478; Bernard v. Minshull (1859), John. 276; Spencer v. Wilson (1873), L. R. 16 Eq. 501; Bolding v. Strugnell, *Re* Holt (1876), 24 W. R. 339; *Re* Grimshaw's Trusts (1879), 11 Ch. D. 406; Patching v. Barnett (1880), 49 L. J. Ch. 665. *As to* (3) *Consd.* Evans v. Jones (1846), 2 Coll. 516. *Apld.* Goring v. Howard (1848), 16 Shu. 395. *Generally.* *Reid.* Tollemache v. Coventry (1834), 8 Hll. N. S. 547; *Re* Finch, Abbies v. Burney (1880), 43 L. T. 20; *Re* Howlby, Rowlby v. Howlby, [1904] 3 Ch. 685; Bhagabati Barmanya v. Kali Charan Singh (1911), 27 T. L. R. 267. *Mentd.* Jones v. Mackilwain (1826), 1 Russ. 220; Watson v. Hayes (1839), 5 My. & Cr. 125; Packham v. Gregory (1845), 4 Hare, 396; Smith v. Barneby (1846), 2 Coll. 728; Stone v. Harrison (1846), 2 Coll. 715; Laxton v. Eedle (1854), 19 Beav. 321; Reynolds v. Kortright (1854), 18 Beav. 417; Hodgson v. Smithson (1856), 21 Beav. 354; *Re* Sanderson's Trust (1857), 3 K. & J. 497; *Re* Hart's Trusts (1858), 32 L. T. O. S. 98; Sonatun Bysack v. Sreemutty Juggutsoondree Donsee (1859), 8 Moo. Ind. App. 66; McLachlan v. Taitt (1860), 28 Beav. 407; *Re* Grove's Trusts (1862), 3 Giff. 575; West v. West (1863), 4 Giff. 198; Holmes v. Prescott (1864), 3 New Rep. 559; Locke v. Lamb (1867), L. R. 4 Eq. 372; Merry v. Hill (1869), L. R. 8 Eq. 619; *Re* Bunn, Isaacson v. Webster (1880), 16 Ch. D. 47; *Re* Martin, Tuke v. Gilbert (1887), 57 L. T. 471; *Re* Harvey's Estate, Harvey v. Gillow, [1893] 1 Ch. 567; *Re* Wintle, Tucker, v. Wintle, [1896] 2 Ch. 711.

291. ———.]—*ODDIE v. BROWN*, No. 285, ante.

292. ———.]—*Re CASSEL*, PUBLIC TRUSTEE v. MOUNTBATTEN, No. 194, ante.

293. ———.]—Commencement & not cesser of limitations.]—By a settlement made in 1847, on the marriage of W. property was settled upon trust to pay the income to W. for life & after her death for such one or more of the children of the marriage in such shares & subject to such conditions & limitations & in such manner as W. should appoint by deed. There were three children of the marriage, T., J. & H., & in 1890 W. by deed appointed that after her death one-third of the property should be held in trust for T., another third in trust for J. & as to the remaining third upon trust to pay the income to H., if not then a member of the Roman Catholic Church, or of any sisterhood, or until she should

become a member of either, & subject as aforesaid, as to the capital & income to T. & J. W. died in 1893 & in 1895 H. became a member of a sisterhood:—*Held*: the appointment was not open to objection on the ground of remoteness.

I was also referred to a passage in *Lewis on Perpetuity*, p. 173, where the author says the remoteness against which the rule for prevention of perpetuities is directed is remoteness in commencement, or first taking effect of limitations, & not in the cesser or determination of them . . . that is a direct statement of the view of the author, which is in accordance with the view taken by KNIGHT BRUCE, L.J. [in *Boughton v. Boughton*, *Boughton v. James*, No. 753, post], & I think it is correctly stated (BYRNE, J.).—WAINWRIGHT v. MILLER, [1897] 2 Ch. 255; 66 L. J. Ch. 616; 76 L. T. 718; 45 W. R. 652; 41 Sol. Jo. 561.

*Annotation.*—*Distd.* *Re* Gage, Hill v. Gage, [1898] 1 Ch. 498. **Ascertainment of vesting.**—*See* SETTLEMENTS; WILLS.

#### SUB-SECT. 2.—TIME FOR ASCERTAINMENT OF FACTS.

**Disposition by will.**—*See, generally*, WILLS.

**Appointment under power.**—*See* Sect. 4, subsects. 2 & 3, post.

#### SUB-SECT. 3.—EVIDENCE.

##### A.

*See, generally*, EVIDENCE, Vol. XXII., pp. 53-138.

294. That woman past child-bearing.—At date of will.]—Gift to a married woman for life, with remainder to her children for life, & a gift over to the grandchildren:—*Held*: that evidence that at the date of the will the married woman was past the age of childbearing was not admissible for the purpose of showing that children then living were meant, so as to make valid the gift over, which otherwise was void for remoteness.—*Re* SAYER'S TRUSTS (1868), L. R. 6 Eq. 319; 36 L. J. Ch. 350; 18 L. T. 787; *previous proceedings* (1867), 10 L. T. 203.

*Annotations.*—*Follid.* *Re* Dawson, Johnston v. Hill (1888), 39 Ch. D. 155. *Apprvd.* Ward v. Van Der Loeff, Burnyeat v. Van Der Loeff, [1924] A. C. 653. *Reid.* Stuart v. Cockrell (1860), L. R. 7 Eq. 363; Heasman v. Pearse (1871), L. R. 11 Eq. 522.

295. — At testator's death.]—Testator by his will, dated Sept. 1866, gave all his estate to trustees upon trust to pay an annuity to his daughter, pltf., for life, & on her decease he declared that they should stand possessed of the residue of the trust funds in trust for such child or children of pltf. as had attained or should live to attain the age of twenty-one years or, being a daughter or daughters, should have attained or should live to attain that age, or have married or marry, & also for such child or children or any son of pltf. who should die under the age of twenty-one, as should live to attain the age of twenty-one years, or, being a daughter or daughters, should live to attain that age or marry, & if more than one, in equal shares & proportions as between brothers & sisters. Testator died in Jan. 1875, & at his death pltf., who was then over sixty years of age, had one son & five daughters living:—*Held*: the trust in favour of the grandchildren of pltf. was void for remoteness, & evidence was not admissible to show that at testator's death pltf. was past the age of child bearing.—*Re* DAWSON, JOHNSTON v.

**Sec. 3.—Application of rule in general: Sub-sect. 3, A. & B.; sub-sect. 4, A. & B.]**

HILL (1888), 39 Ch. D. 155; 57 L. J. Ch. 1001; 59 L. T. 725; 37 W. R. 51.

**Annotations:—**Apprvd. *Ward v. Van Der Loeff, Burnyeat v. Van Der Loeff*, [1934] A. C. 653. *Apld. Re Deloitte, Griffiths v. Deloitte*, [1928] Ch. 58. *Rd. Re Wood, Tullett v. Colville*, [1894] 3 Ch. 381; *Re Lowman, Devenish v. Pester*, [1895] 2 Ch. 348; *Re Hocking, Michell v. Loe*, [1898] 2 Ch. 567.

— **Presumption.**—See Sub-sect. 3, B., *post*.

**296. As to person predeceasing testator.**—*Re Dawson, Johnston v. Hill*, No. 295, *ante*.

**297. Facts existing at death of testator.**—Testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel pits were worked out, & then to sell them, with power for his sons, or any of them, to bid at the sale; & he directed his trustees to hold the proceeds of sale in trust for such child or children of his "then living," & such issue living of any child or children then deceased, as should, being a son or sons, attain twenty-one, or, being a daughter or daughters, attain that age or marry, in equal shares *per stirpes*, & he declared it to be his wish that, until such sale, his sons should continue to be employed in the business.

Testator directed his trustees to hold all the residue of his real & personal estate upon trusts for sale & investment, & to divide the income thereof equally amongst all his children during their respective lives, & upon the death of any such child, whether before or after his own death, to hold the *corpus* whereof the income was or would have been payable to such child, upon trust for all or any the child or children of such child, who, being a son or sons, should attain twenty-one, or, being a daughter or daughters, should attain that age or marry, & if more than one in equal shares:—*Held*: both the trust for the sale of the gravel pits & the trust declared of the proceeds of sale were void for remoteness.

The ct. can look at evidence of facts existing at the death of testator, but not at evidence of opinion or probability (DAVEY, L.J.).—*Re Wood, Tullett v. Colville*, [1894] 3 Ch. 381; 63 L. J. Ch. 790; 71 L. T. 413; 7 R. 495, C. A.

**Annotation:—***Apld. Re Bewick, Ryle v. Ryle*, [1911] 1 Ch. 116.

**298. Evidence of probability—Or opinion.**—*Re Wood, Tullett v. Colville*, No. 297, *ante*.

**299.**—[A trust by will of the proceeds of sale of real estate which is subject to mtge. charges & rates, taxes & outgoings, for the payment of which the rents & income are first liable, in favour of a class to be ascertained as soon as all the charges on such real estate are cleared, is too remote, notwithstanding the existence of a legal obligation to pay the charges within twenty one years from testator's death, since the ct. is not at liberty to speculate about probabilities.—*Re Bewick, Ryle v. Ryle*, [1911] 1 Ch. 116; 80 L. J. Ch. 47; 103 L. T. 634; 55 Sol. Jo. 109.

**B. Presumption as to Impossibility of Issue.**

See EVIDENCE, Vol. XXII., pp. 173–176, Nos. 1505–1525.

**300. Whether presumption made—Persons aged seventy years.**—*JEE v. AUDLEY*, No. 15, *ante*.

**301. — Woman aged sixty years.**—Testator gave his property to trustees to pay the income to two persons for life, & after the death of the survivor to divide the capital between the children of A. & C., two females, the shares of sons to be paid on their attaining twenty-one, & the shares of daughters to be invested, & the interest paid to such daughters for life for their respective shares

out power of anticipation, & on their deaths the capital to go as the daughters should by will appoint. A. was dead at the date of the will, & C. was sixty years of age, & therefore past child-bearing:—*Held*: if the children of A. & C. had not necessarily been lives *in esse* at the date of the will, the restraint on anticipation in respect of the daughters' shares would have been bad, as infringing the rule against perpetuities; but as A. was dead & C. past child-bearing, all the children were lives *in esse*, & the restraint on alienation was valid.

I am informed, & all the counsel agree, that she was at an age past child-bearing, namely, sixty years of age, & it is to be concluded therefore that she could never have another child (MALINS, V.-C.).—*COOPER v. LAROCHE* (1881), 17 Ch. D. 368; 43 L. T. 794; 29 W. R. 438.

**Annotation:—***W.F. Re Dawson, Johnston v. Hill* (1888), 39 Ch. D. 155.

**302. — Persons aged sixty-six years.**—Testator's father & mother were then each upwards of sixty-six years of age; to them after a family of five no child had been born for more than thirty years. It was nevertheless necessary that they should have another child. Alternatively it was necessary that their marriage should be dissolved otherwise than by the death of the father, & that he should marry again & have a child by that second marriage (LORD BLANESBURGH).—*WARD v. VAN DER LOEFF, BURNYEAT v. VAN DER LOEFF*, [1924] A. C. 653; 93 L. J. Ch. 397; 131 L. T. 292; 40 T. L. R. 493; 68 Sol. Jo. 517, H. L.; *varying S. C. sub nom. Re BURNYEAT, BURNYEAT v. WARD*, [1923] 2 Ch. 52, C. A.

**Admissibility of evidence.**—See Nos. 294, 295, *ante*.

**SUB-SECT. 4.—LIFE INTERESTS TO UNBORN PERSONS AND LIMITATIONS AFTER LIVES OF UNBORN PERSONS.**

**A. Life Interests to Unborn Persons.**

**303. Validity of.**—*MARLBOROUGH (DUKE) v. GODOLPHIN (EARL)*, No. 172, *ante*.

**304. —**—*HAY v. COVENTRY (EARL)*, No. 547, *post*.

**305. — Whether subsequent vested interest necessary.**—*ROUTLEDGE v. DORRIL*, No. 567, *post*.

**306. —**—Wherever land, or any interest in land, which would descend to the heir-at-law, is devised for purposes which the law will not permit to take effect, the heir-at-law shall have the benefit of the interest so devised as undisposed of, whether testator intended that he should have it or not; for there is this distinction between the case of a devisee & that of an heir-at-law, that the devisee takes by force of the intent of testator, & can only take what is given him by the will; whereas the heir-at-law takes whatever is undisposed of, not by force of the intent, but by the rule of law. Therefore where A. devised lands to his son B. for life, remainder to the first & other sons of B. in tail male, remainder to the second, third, & other sons of A. successively in tail male; & in case there should be no such issue male of A.'s body, or the same should become extinct, then to trustees for a term of sixty years, to retain the rent, etc., & apply them in the purchase of lands to be conveyed to such person as should then be in possession by virtue of his will of certain other estates therein mentioned, for life, with such remainder as would

name & blood; & after the trusts should be executed or the term expired, the estate was limited to C. for life, with remainders over; & it happened that the person so in possession at the time when the conveyance could have been made of the lands to be purchased as above was one not in existence at the time of A., testator's death, & the uses were considered as in the event too remote & void:—*Held*: the consequence of the failure of the intermediate devise was, not that the next devisee became entitled as if there had been no such intermediate devise, which was the opinion of the Ct. of Exchequer, but that the trusts of the lands to be purchased as above resulted to the heir-at-law.

The point at which the illegality commences is where testator limits for life to persons not in existence at the time of his death, as these could not be made tenants for life, at least not with remainders to their first & other sons, but must take a larger estate, so that I am strongly impressed with the idea that the trusts were not originally void, & that the directions to purchase were good (LORD REDESDALE).—*TREGONWELL v. SYDENHAM* (1815), 3 Dowd, 194; 3 E. R. 1035.

*Annotations*:—*Consd.* *Cogan v. Stephens* (1835), 5 L. J. Ch. 17. *Reid.* *Sidney v. Shelley* (1815), 19 Ves. 352; *Oddie v. Brown* (1859), 33 L. T. O. S. 174; *Re Conyngham, Conyngham v. Conyngham*, [1920] 2 Ch. 495. *Mentd.* *Re Cooper's Trusts* (1853), 23 L. J. Ch. 27, n.; *Smith v. Lomas* (1864), 33 L. J. Ch. 578; *Simmons v. Pitt* (1873), 21 W. R. 860.

307. ———.]—A limitation to an unborn child for life is not good, unless the remainder vests in interest at the same time. Testatrix after expressing her desire that certain stock should remain in the three per cents. for ever, bequeathed the dividends to her seven children for their lives, with survivorship among them; & directed, that, after the decease of all of them, their children should succeed to the annuity of their deceased parent, & that, after the decease of the seven children's children, the dividends of the stock should devolve in annuities upon the lawful heirs of testatrix:—*Held*: all the gifts were void, except the life interests given to the seven children.—*HAYES v. HAYES* (1828), 4 Russ. 311; 6 L. J. O. S. Ch. 141; 38 E. R. 822.

*Annotations*:—*N.F.* *Williams v. Teale* (1847), 6 Hare, 239; *Hampton v. Holman* (1877), 5 Ch. D. 183. *Reid.* *Patching v. Barnett* (1880), 28 W. R. 886.

308. ———.]—*EVANS v. WALKER*, No. 335, *post*.

309. ———.]—Testator directed that on his daughter attaining twenty-one his trustees should pay the income of his freeholds & copyholds to her during her life; & should she live to become marriageable, & die leaving a child or children behind her born in lawful wedlock, then that his trustees should apply the income to the support & maintenance of such child, if only one, or, if more than one, equally among such children during their lives, & in like manner to their children & children's children, each family having the father or mother's share; or should his said daughter die previous to being married, or after marriage leaving no child or children behind born in lawful wedlock, or, if leaving children as afore-described, upon them or their families becoming extinct, then over. Testator's daughter survived him & attained twenty-one she being his sole heiress-at-law & a spinster. The following questions then arose; first, whether the gift over after her life estate was not void for remoteness; secondly, if not, whether she was not entitled to an immediate estate tail in possession; & thirdly, whether admitting that she took an estate for life, & that her children, if any, took life estates in remainder,

she did not take an estate tail in remainder expectant on those life estates:—*Held*: (1) the gift over after the daughter's life estate was not void for remoteness; (2) she did not take an estate tail in possession; but that the third question could not be decided at present, as it related to future rights.

You might always give a life interest to an unborn person being a child of a person in being, & it did not matter what the gift over was after the death of such unborn child; it did not affect his interest (JESSEL, M.R.).

The doctrine is not properly *cy-près* at all; it is merely a rule of construction—a rule of construction that is by which you sacrifice the particular intent to the general intent. . . . The rule [of *cy-près*] applies just as much to direct devises as to executory trusts (JESSEL, M.R.).—*HAMPTON v. HOLMAN* (1877), 5 Ch. D. 183; 46 L. J. Ch. 248; 36 L. T. 287; 25 W. R. 459.

*Annotations*:—*As to* (2) *Apld.* *Re Rising, Rising v. Rising*, [1904] 1 Ch. 533. *Reid.* *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502. *Generally*, *Reid.* *Re Harvey, Peek v. Savory* (1888), 39 Ch. D. 289.

310. ———.]—*WILLIAMS v. TEALE*, No. 18, *ante*.

311. ———.]—*BOUGHTON v. BOUGHTON, BOUGHTON v. JAMES*, No. 753, *post*.

312. ———.]—*GOOCH v. GOOCH*, No. 60, *ante*.

313. ———.]—*CATTILIN v. BROWN*, No. 95, *ante*.

314. ———.]—*STUART v. COCKERELL*, No. 96, *ante*.

315. ———.]—*Re HARGREAVES, MIDGLEY v. TATLEY*, No. 27, *ante*.

316. ———.]—*Re ASHFORTH, SIBLEY v. ASHFORTH*, No. 330, *post*.

317. ———.]—Testator by his will devised "all my real estate to P. for his life, with remainder to his first & other sons successively in tail, with remainder to the eldest and every other son of C. for life, with remainder to the first & other sons of such sons of C. in tail, with remainder to my own right heirs."

C. had several sons, of whom P. was the second. P. died without issue:—*Held*: the first & other sons of C. took successive life estates one after the other, & the remainder to the first & other sons of the eldest son of C. did not take effect till after the deaths of all the successive tenants for life.

All resps. . . . were born after the death of testator. As I understand the law of real property in this country, it is a rule *positivi juris* & not one depending on considerations of the ordinary rule against perpetuities, that you cannot limit a possibility upon a possibility. . . . I am not prepared to affirm, that a life estate to an unborn person can be limited after a life estate to an unborn person, any more than a limitation to an unborn issue (LORD DAVEY).—*HONYWOOD v. HONYWOOD* (1905), 92 L. T. 814, H. L.

Future husband not necessarily in being.]—*See* No. 322, *post*.

Construction.]—*See* SETTLEMENTS; WILLS.

#### B. Future Husbands or Wives of Alienees.

318. Husband or wife whom child might marry —Life not necessarily in being.—Issue dying in such life.]—Testator gave all his real & personal estate to trustees, their heirs, exors., etc., in trust to pay, divide & distribute the income, rents, interest, & profits unto & equally amongst all his children, whose names he mentioned, & such other children as he might have, or as should be *en ventre de sa mère*, at his death, share & share alike; the shares of his daughters to be paid to them half-yearly for their separate use; & if any of his

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annuity of £50 *per annum* for her life, & after her decease to the children she might have, born in wedlock, equally to be divided between them during their lives, & after the decease of the survivor to go to his nephew & his two nieces equally between them. A. having died without issue:—*Held*: the gift to the nephew & nieces was not void for remoteness, & they took the capital whence the annuity proceeded absolutely, in equal shares as tenants in common.

Property may be given by will or secured by settlement to an unborn person for life, or to several unborn persons successively for life, with remainders over, provided that the vesting of the remainders, or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons (MALINS, V.-C.).—EVANS v. WALKER (1876), 3 Ch. D. 211; 25 W. R. 7.

**Annotations:—***Dtd.* Blight v. Hartnoll (1881), 19 Ch. D. 294. *Consd.* *Re* Morgan, Morgan v. Morgan (1893), 69 L. T. 407. *Appl.* *Re* Ashforth, Sibley v. Ashforth, [1905] 1 Ch. 636. *Re* Harvey, Peek v. Savory (1888), 39 Ch. D. 289; *Wainwright v. Miller*, [1897] 2 Ch. 255.

**336.** ————.]—(1) The rule against perpetuities applies to legal contingent remainders as well as to equitable limitations.

Testatrix devised her real estate to trustees & their heirs upon trust to receive rents & profits & divide same as soon as they conveniently could after Lady Day & Michaelmas Day in each year into three equal parts, & pay sam. as therein mentioned to A., B. & C., & the survivors & survivor of them during their lives & the life of the survivor; & after the decease of such survivor, upon trust to pay & divide said rents & profits, as soon as conveniently could be after said days thereinbefore appointed, equally amongst all such of the children, born in her lifetime or within twenty-one years of her death, of the said A., B., & C. as should be living on the Lady Day or Michaelmas Day preceding such payment & division; & after the death of all such children, except one, testatrix devised said real estate to such surviving child in tail, with remainder over. C. survived A. & B. & died leaving no issue. B. also left no issue; but A. left children who were born within due limits & who survived C.:—*Held*: the estate tail limited to the survivor of the children of A., whether regarded as an equitable limitation or as a legal contingent remainder, infringed the rule against perpetuities & was void for remoteness.

(2) Property may be given to an unborn person for life or to several unborn persons successively for life, with remainders over, provided that such remainders be indefeasibly vested in persons ascertained or necessarily ascertainable within the limits prescribed by the rule against perpetuities (FARWELL, J.).

(3) It is plain, moreover, that the cts. have acted upon the principle that the rule against perpetuities is to be applied where no other sufficient protection against remoteness is attainable. Thus, inasmuch as equitable contingent remainders never failed for want of a particular

estate, it was held that the rule must apply to them (FARWELL, J.).—*Re* ASHFORTH, SIBLEY v. ASHFORTH, [1905] 1 Ch. 535; *sub nom.* *Re* ASHFORTH'S TRUSTS, ASHFORTH v. SIBLEY, 74 L. J. Ch. 361; 92 L. T. 534; 53 W. R. 328; 21 T. L. R. 329; 49 Sol. Jo. 350.

**Annotations:—***As to* (1) *Re* Nash, Cook v. Frederick, [1909] 2 Ch. 450. *As to* (2) *Re* *Reid*, *Re* Stamford & Warrington, Payne v. Grey, [1912] 1 Ch. 343.

**337. Application of rule—Succession of estates for life.]**—W. Clare declares his term of one thousand years, in trust for his son T. for so many years of she term as he should live; & after his death in trust for the issue male of T. lawfully begotten, for to many years, etc., as such issue male should live; & when the issue male of T. should happen to be extinct, then in trust for his second son, A. for life, remainder in trust for the issue male of A. for so many years as they should happen to live; the eldest to be preferred before the youngest; & after the death of A. & from the time his issue male should happen to be extinct, then the premises to descend & continue in the issue male of the name & family of the Clares, which should be next of kin, for all the residue of the term; & made his son T. sole exor. & residuary legatee. Testator died, & T. died without issue male. The residue of the term shall go to the representative of T. contrary to the will, in which there is a plain affectation of a perpetuity.

A succession of estates for life to persons not in *esse*, is as much a perpetuity, & as little to be endured, as would be that of an estate tail, of which no recovery could be suffered (LORD TALBOT, C.).—CLARE v. CLARE (1734), Cas. temp. Talb. 21; 25 E. R. 638, L. C.

**Annotations:—***Consd.* Lyon v. Mitchell (1816), 1 Madd. 467. *Re* *Gower v. Grosvenor* (1740), Barn. Ch. 54; *Hodgeson v. Bussey* (1740), 2 Atk. 89; *Theobridge v. Kilburne* (1751), 2 Ves. Sen. 233; *Knight v. Ellis* (1789), 2 Bro. C. C. 570; *Philips v. Mulgrave* (1798), 3 Ves. 613; *Greenwood v. Verdon* (1864), 3 Eq. Rep. 181; *Re* Wynch's Trusts, *Ex p.* Wynch (1854), 5 De G. M. & G. 188; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013.

**338. ————Remainder to issue of unborn person.]**—MARLBOROUGH (DUKE) v. GODOLPHIN (EARL), No. 172, *ante*.

**339. ————.]**—HAY v. COVENTRY (EARL), No. 547, *post*.

**340. ————.]**—CATTLIN v. BROWN, No. 95, *ante*.

**341. ————.]**—HONYWOOD v. HONYWOOD, No. 317, *ante*.

**Rule against double possibilities.]—See Part II., *post*.**

**Whether vested remainder necessary for limitation to unborn issue.]—See Nos. 305–309, *ante*.**

**Limitation after life of future husband or wife possibly unborn.]—See Nos. 318–321, *ante*.**

**Construction of limitations.]—See SETTLEMENTS; WILLS.**

**SUB-SECT. 5.—GIFTS TO CLASSES AND TO MEMBERS OF CLASS.**

**A. Gift to a Class.**

**Gifts to a class generally.]—See WILLS.**

**342. Some members incapable of taking—Void as to class.]**—LEAKE v. ROBINSON, No. 290, *ante*.

**PART I. SECT. 3, SUB-SECT. 5.—A.**

**342 i. Some members incapable of taking—Void as to class.]—KER v. HAMILTON** (1880), 6 V. L. R. (Eq.) 173.—AUS.

**342 ii. ————.]—REID v. GARLE** (1914), 18 C. L. R. 493.—AUS.

**342 iii. ————.]—Testatrix bequeathed the residue of her property to the children of my brothers who**

reach the age of twenty-five years in the case of boys, & twenty-one years in the case of girls:—*Held*: this was a gift to a class, in which the word "children" included all the children born or to be born of testatrix's brothers, & was wholly void as offending against the rule against perpetuities.—*Re* BREHENY, [1915] V. L. R. 242.—AUS.

**342 iv. ————.]—Re TAYLOR'S**

TRUSTS, [1912] 1 I. R. 1.—IR.

**342 v. ————.]—GORMANSTON v. GORMANSTON**, [1923] 1 I. R. 137.—IR.

**k. Postponement of possession—After vesting of gift—Whether rule applies.]—DENNIS v. FRENCH** (1863), 14 I. Ch. R. 271.—IR.

**1. Class ascertained at death of testator.]—Re CHINNEY'S ESTATE** (1877), 1 L. R. Ir. 296.—IR.

**343.** ———.]—Testator bequeathed personal property to his trustees & exors. on trust, to pay the dividends to his daughter, during her life, to her separate use & after her decease to pay the principal unto all & every her children who should live to attain the age of twenty-three years share & share alike with benefit of survivorship in case any of them died under that age; with limitation over in case there should be no such child or children or being such, all of them should die under twenty-three, without lawful issue. The daughter had a child who died under age in the daughter's lifetime. Bequests to the children & the subsequent limitations too remote.—*BULL v. PRITCHARD* (1826), 1 Russ. 213; 38 E. R. 83; *subsequent proceedings* (1828), 7 L. J. O. S. Ch. 41.

*Annotations*.—*Dttd.* Bland v. Williams (1834), 3 My. & K. 411. *Distd.* Doe d. Dolley v. Ward (1839), 9 Ad. & El. 582; Davies v. Fisher (1842), 5 Beav. 201. *Expld.* Taylor v. Frobisher (1852), 5 De G. & Sm. 191. *Distd.* Bell v. Cade (1861), 2 John. & H. 122. *Consd.* Re Finch. Abbliss v. Burney (1881), 17 Ch. D. 211. *Refd.* Challis v. Doe d. Evers (1850), 18 Q. B. 231.

**344.** ———.] — DUNGANNON (LORD) v. SMITH, No. 9, *ante*.

**345.** ———.]—Testator bequeathed £3,000 to trustees, in trust, after certain life interests: "for all the children of T., except Thomas the younger, William, Rebecca, Elizabeth, Sarah & Frances, equally to be divided between them, share & share alike; the share or respective shares of such children to become vested interests in & to be paid, assigned & transferred to them respectively, as & when they should attain their respective ages of twenty-five years"; provided that, if any of them died, before their shares became vested & payable, leaving issue, their shares should go to their issue; & the trustees were directed, in the meantime & until the shares of the children should become payable, assignable & transferable to them, to apply the income for their maintenance. Testator also bequeathed £8,000 to the same trustees, in trust, after certain life interests; "for all & every the children of T. born or hereafter to be born equally to be divided between them, share & share alike, & to be paid, assigned & transferred to them at their respective ages of twenty-five years, & to be subject to the like descent to the lawful issue of such of them as shall die under the said age of twenty-five years, & under the like conditions & restrictions, & with the like power to apply the interest thereof for their respective maintenance, & in all other points & respects, under & subject to the same rules, regulations, conditions & restrictions as are hereinbefore contained in relation to the several legacies, hereinbefore given to or in trust for the said children respectively"; provided that in case any person to or in trust for whom any bequest, to take effect in remainder or reversion or upon any contingency, was made, should sell or incur his interest under such bequest before the same should take effect in possession, all the bequests in favour of that person should become void. By a codicil testator revoked a power which he had given, by his will, to the trustees, to apply, for the advancement of the legatees, the whole or part of the capital of their legacies, before they attained twenty-five, & directed that the legacies should vest in & be payable, assignable & transferable to them as if no such power were contained in his will:—*Held*: the trusts declared of both sums, were void for remoteness.

If their shares were to vest in them at twenty-five, & the members of the class who were to take, would not, of necessity & at all events, come into *esse* during a life in being, the vesting is made to

depend upon an event which would not necessarily happen within a life in being & twenty-one years afterwards. It is impossible to separate children who might afterwards come into *esse*, from those who were already in existence. I think, therefore, that the legacy of £8,000 as well as the legacy of £3,000 is void for remoteness (SHADWELL, V.-C.).—*COMPORT v. AUSTEN* (1841), 12 Sim. 218; 59 E. R. 1115.

*Annotations*.—*Consd.* Re Edmondson's Estate (1868), L. R. 5 Eq. 389. *Refd.* Wilkinson v. Duncan (1861), 30 L. J. Ch. 938.

**346.** ———.]—(1) If testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment of it, to secure certain objects for the benefit of the legatee; upon failure of such objects, the absolute gift prevails; but, if there be no such absolute gift as between the legatee & the estate, & particular modes of enjoyment are prescribed, & those modes of enjoyment fail, the legacy forms part of testator's estate, as not having in such event been given away from it.

(2) Here the direction is to divide among the children in manner following, that is to say, sons when they shall attain twenty-three. . . . It is a gift to a class of persons, some of whom may be born after testator's own death, & who are not to have the gift till they are twenty-three; & then, & not till then, & amongst such children, & not other children, the property is to be divided. A gift to divide property among unborn children at twenty-three is a gift void for remoteness; & consequently . . . the moiety given to the sons falls within this rule. It is the same as if none of the sons had attained twenty-three; it is therefore undisposed of, & goes with the residue of the property (LORD COTTENHAM, C.).—*LASSENCÉ v. TIERNEY* (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L. T. O. S. 557; 14 Jur. 182; 41 E. R. 1379, L. C.

*Annotations*.—*As to* (1) *Consd.* Salmon v. Salmon (1860), 29 Beav. 27; Re Walter, Turner v. Walter (1912), 56 Sol. Jo. 632; Re Harrison, Hunter v. Bush, [1918] 2 Ch. 59. *Refd.* Kellett v. Kellett (1868), L. R. 5 H. L. 160; Re Richards, Williams v. Gorvin (1883), 50 L. T. 22; Re Houghton, Houghton v. Brown (1884), 53 L. J. Ch. 1018; Hancock v. Watson, [1902] A. O. 14; Re Currie's Settlement, Re Rooper, Rooper v. Williams, [1910] 1 Ch. 329; Re Connell's Settlement, Re Benett's Trusts, Fair v. Connell, [1915] 1 Ch. 867. *As to* (2) *Appld.* Re Boyd, Nield v. Boyd (1890), 63 L. T. 92. *Refd.* Re Witty, Wright v. Robinson, [1913] 2 Ch. 666. *Generally, Refd.* Savage v. Tyers (1872), 7 Ch. App. 356; Cooke v. Cooke (1887), 38 Ch. D. 202. *Mentd.* Surcome v. Pinniger (1853), 3 De G. M. & G. 571; Field v. Moore, Field v. Brown (1855), 7 De G. M. & G. 691; Warden v. Jones (1857), 23 Beav. 487; Barrow v. Barrow (1858), 4 K. & J. 409; Goldie v. Townsend (1860), 28 Beav. 445; Re Skinner's Trusts (1860), 1 John & H. 102; Whiteway v. Fisher (1861), 9 W. R. 433; Caton v. Caton (1866), 1 Ch. App. 137; Churchill v. Churchill (1867), L. R. 5 Eq. 44; McDonald v. McDonald (1875), L. R. 2 Sc. & Div. 482; Cahill v. Cahill (1883), 8 App. Cas. 420; Maddison v. Alderson (1883), 8 App. Cas. 467; McManus v. Cooke (1887), 35 Ch. D. 681; Re Crawshaw, Crawshaw v. Crawshaw (1890), 43 Ch. D. 615; Johnstone v. Mappin (1891), 60 L. J. Ch. 241; Sharman v. Sharman (1892), 67 L. T. 834; Re Pinhorn, Moreton v. Hughes (1894), 42 W. R. 438; Re Whitehead, Peacock v. Lucas, [1894] 1 Ch. 678; Re Wilcock, Kay v. Dewhurst, [1898] 1 Ch. 95; Re Holland, Gregg v. Holland, [1902] 2 Ch. 380; Sponcer v. Registrar of Titles, [1906] A. C. 503; Re Jones, Last v. Dobson, [1915] 1 Ch. 246; Morryoseph v. Morryoseph, [1920] 2 Ch. 33; Re A Bankruptcy Notice, [1924] 2 Ch. 76.

**347.** ———.]—Testator gave an annuity of £200 a year to T. for life, & after his death, to his children then living for life, in equal shares; & at the decease of any of them, his share of the capital producing the annuity was to be divided amongst his children:—*Held*: notwithstanding there were children of T. living in testator's lifetime, & the gift to the children was as tenants in common, the bequest to all of the grandchildren of T. was void, for remoteness.

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Where there is a gift to a class of persons, some of whom are incapable of taking, by the rule against perpetuities, the consequence is that the gift fails altogether (ROMILLY, M.R.).—GREENWOOD v. ROBERTS (1851), 15 Beav. 92; 21 L. J. Ch. 262; 19 L. T. O. S. 100; 51 E. R. 471.

**Annotations.**—*Consd.* Cattlin v. Brown (1853), 11 Hare, 372. *Apld.* Webster v. Boddington (1858), 26 Beav. 128. *Consd.* Knapping v. Tomlinson (1864), 34 L. J. Ch. 3. *Distd.* Re Russell, Dorrell v. Dorrell (1895), 12 R. 499. *Reid.* Maynard v. Wright (1858), 26 Beav. 285; Wilkinson v. Duncan (1861), 30 L. J. Ch. 938.

**348.** ———.]—*Semble*: a gift by will to an individual named & known to testator does not fail because there are words superadded which include a class to take with him, as to which class the gift must wholly fail, because as to some of them it might be too remote; *secus*: where an individual is named as one of a class.—JAMES v. WYNFORD (LORD) (1852), 1 Sm. & G. 40; 22 L. J. Ch. 450; 20 L. T. O. S. 273; 17 Jur. 17; 1 W. R. 61; 65 E. R. 18.

**Annotation.**—*Consd.* Re Radford, Jones v. Radford (1918), 62 Sol. Jo. 604.

**349.** ———.]—Devise in trust for A. for life, & after her decease, to apply the rents for the benefit of her children, until the youngest attained twenty-five; & as soon as the youngest should have attained twenty-five, to sell, & “pay & divide” the produce equally “among such of the children of A. as should be then living, & issue of such, if any, of her children as might be then dead,” such issue to take their parents’ share only.—*Held*: the gift of the income was valid, but the gift of the corpus was void for remoteness.—READ v. GOODING (1856), 21 Beav. 478; 52 E. R. 944.

**350.** ———.]—Where there is a gift to a class, some of the objects of which are too remote, & some not, effect cannot be given to the latter separated from the former, but the whole gift is void.

The produce of real & personal estate was bequeathed upon trust for A. for life, & after his death upon trust “to pay or transfer” it unto such children of A. as should attain the age of twenty-one years, & also such children of any son of A. who should die under twenty-one, as should attain that age, equally, but the children of any deceased son, collectively, to take their parent’s share equally, with certain gifts over.—*Held*: the whole of the limitations subsequent to the life estate were void for remoteness.—SEAMAN v. WOOD (1856), 22 Beav. 591; 52 E. R. 1236.

**Annotations.**—*Expld.* Wilkinson v. Duncan (1861), 30 Beav. 111. *Consd.* Knapping v. Tomlinson (1864), 34 L. J. Ch. 3; Re Moseley’s Trusts (1871), L. R. 11 Eq. 499. *Foll’d.* Hale v. Hale (1876), 3 Ch. D. 643; Bentinck v. Portland (1877), 7 Ch. D. 693.

**351.** ———.]—Testator gave his residuary estate to his daughter for life, & afterwards to her two sons H. & C., & all other her children thereafter to be born, & the issue of his grandchildren, who, being a son, should attain twenty-one, or being a daughter, should attain that age or marry with consent equally to be divided, such issue to take a parent’s share.—*Held*: void for remoteness.—WEBSTER v. BODDINGTON (1858), 26 Beav. 128; 53 E. R. 845.

**Annotations.**—*Distd.* Wilkinson v. Duncan (1861), 30 Beav. 111. *Consd.* Knapping v. Tomlinson (1864), 34 L. J. Ch. 3. *Distd.* Re Moseley’s Trusts (1871), L. R. 11 Eq. 499. *Reid.* Salmon v. Salmon (1860), 29 Beav. 27; Bentinck v. Portland (1877), 38 L. T. 58; Re Russell, Dorrell v. Dorrell (1895), 12 R. 499.

**352.** ———.]—Testator devised his estates to trustees, after C.’s decease, “in case she should

have only one child which should survive her,” to pay £200 a year for his maintenance until he should attain twenty-five; & from & after such only child should attain that age, to raise £10,000 & pay the same to him at that age. Or in case C. should, “at her decease, have two or more children,” then to raise an annuity for their maintenance “until they should respectively attain twenty-five, & when they respectively attained that age, to pay each an equal share of the £10,000.” *Ptfd.* was *en ventre sa mère* at testator’s death, & was the only child of C. who survived her.—*Held*: the bequest of the £10,000 was too remote.—MERLIN v. BLGRAVE (1858), 25 Beav. 125; 53 E. R. 584.

**353.** ———.]—(1) When there is a gift to a class, some of whom are within the rule against perpetuities, & some not, but the class itself, & the shares of each, cannot be ascertained within the legal limits as to time, the whole gift is void.

(2) Where the individual shares of the members of the class can be ascertained within the proper periods, the gift is valid as to those within the rule against perpetuities, though invalid as to the rest.

Property was bequeathed by an uncle in trust for his nephew A. for life, with power to him to appoint it amongst his children. A. directed the trustees “to pay £2,000 to each of his daughters, as & when they should respectively attain twenty-four years of age” & to pay the residue “between his sons equally, as & when they should respectively attain twenty-four years of age.”—*Held*: the bequests were valid as to such of A.’s daughters as were three years of age at his death, but void for remoteness as to the rest.—WILKINSON v. DUNCAN (1861), 30 Beav. 111; 30 L. J. Ch. 938; 5 L. T. 171; 7 Jur. N. S. 1182; 9 W. R. 915; 54 E. R. 831.

**Annotations.**—*As to (2)* *Apld.* Von Brockdorff v. Malcolm (1885), 30 Ch. D. 172; *Re* Paul, Public Trustee v. Pearce, [1921] 2 Ch. 1. *Generally, Reid.* Knapping v. Tomlinson (1864), 34 L. J. Ch. 3.

**354.** ———.]—Testator gave property to his wife for her life & on her death to be divided in the manner expressed by the following words, “among all such child or children of mine then living & such issue then living of any child or children then deceased as shall either before or after the death of my said wife attain the age of twenty-three years as tenants in common.”—*Held*: the whole gift in remainder was void for remoteness.—SMITH v. SMITH (1870), 5 Ch. App. 342; 18 W. R. 742, L. C. & L. J.

**Annotations.**—*Apld.* Hale v. Hale (1876), 3 Ch. D. 643. *Foll’d.* Bentinck v. Portland (1877), 7 Ch. D. 693. *Apprvd. & Foll’d.* Pearks v. Moseley (1880), 5 App. Cas. 714. *Reid.* Picken v. Matthews (1878), 10 Ch. D. 264.

**355.** ———.]—By deed poll S. declared that his trustees should hold the money to be received on certain policies on his life upon trust after the decease or second marriage of his wife, to pay the fund between “all & every the child or children of S. by his wife equally to be divided if more than one . . . the share or shares of such of them as shall be a son or sons to belong to & be an interest vested & payable to him or them at his or their respective ages of twenty-five years & the share or shares of . . . daughter or daughters to become vested but not payable upon her or their attaining twenty-one years or day of marriage.” The income of shares not vested was to be applied in maintenance of the children presumptively entitled thereto.—*Held*: the gift was to a class, & the invalidity of the gift to the sons made the whole gift void.

The fund must therefore be paid out to the personal representatives of the settlor (LORD



ROMILLY, M.R.).—*Re SLARK'S TRUSTS* (1872), 21 W. R. 165.

356. ———.]—Testator gave the residue of his real & personal estate in trust, after the death or second marriage of his widow, for his children who might be then living & the issue of any who should have previously died, such issue to take the share of their deceased parent in equal shares, the shares of such of testator's children or grand-children as should be sons to become vested & payable when they should respectively attain twenty-four, & as to the shares of his daughters or the female issue of any deceased child upon trust for their separate use for life, & after the decease of his said daughters or granddaughters upon trust for their issue as they should appoint, & in default of appointment for their children who should be living at their respective deaths & should attain twenty-four, & in case either of his said daughters or granddaughters should die under twenty-four without leaving issue or leaving issue all such issue should die under twenty-four then the shares of such daughters or granddaughters should be divided equally among all testator's children who should be then living & be payable upon the same terms as their original shares; & the will contained a power after the death of the widow to apply the income of the contingent shares of the respective children & issue aforesaid for their maintenance:—*Held*: (1) the gift to children & issue was a gift to a class; (2) "vested" was to be read in its proper sense; (3) the whole of the persons to take as members of the class not being necessarily ascertainable within the period of perpetuity, the entire gift was bad for remoteness.—*HALE v. HALE* (1876), 3 Ch. D. 643; 35 L. T. 933; 24 W. R. 1065.

*Annotations*:—*As to* (3) *Appld.* *Bentinck v. Portland* (1877), 7 Ch. D. 693. *Apprvd.* *Pearks v. Moseley* (1880), 5 App. Cas. 714. *Generally, Reftd.* *Re Finch, Abbiss v. Burney* (1881), 17 Ch. D. 211.

357. ———.]—*PEARKS v. MOSELEY, Re MOSELEY'S TRUSTS*, No. 98, *ante*.

358. ———.]—*Re SEELY, LANGTON v. LANGTON* (1920), 149 L. T. Jo. 462.

#### *B. Gift to Members of a Class.*

*See, generally, WILLS.*

359. Valid as to members capable of taking.]—*BLANDFORD v. THACKERELL*, No. 77, *ante*.

360. ———.]—*DUNGANNON (LORD) v. SMITH*, No. 9, *ante*.

361. ———.]—Gift to individual with class super-added.]—*JAMES v. WYNFORD (LORD)*, No. 348, *ante*.

362. ———.]—Testator directed his exors. to pay "the sum of £500 apiece to each child that may be born to either of the children of either of my brothers lawfully begotten":—*Held*: the child of a niece born within eight months after testator's death was entitled to the legacy & the gift was not as to such child void for remoteness.—*STORRS v. BENBOW* (1853), 3 De G. M. & G. 390; 22 L. J. Ch. 823; 21 L. T. O. S. 189; 17 Jur. 821; 1 W. R. 420; 43 E. R. 153, L. C.

*Annotations*:—*Consd.* *Knapping v. Tomlinson* (1864), 34 L. J. Ch. 3; *Re Moseley's Trusts* (1871), L. R. 11 Eq. 499. *Reftd.* *Villar v. Gilbey*, [1907] A. C. 139.

363. ———.]—*CATTLIN v. BROWN*, No. 95, *ante*.

364. ———.]—In a gift by will to the present & future children of J. who should be living at the decease of testator's wife, a direction that the shares of daughters should be settled upon themselves for life, with remainders to their children, is not void for remoteness as regards the share of a daughter born in testator's life time, the gift not being to a class, but a separate gift in favour of

each child.—*WILSON v. WILSON* (1858), 28 L. J. Ch. 95; 32 L. T. O. S. 122; 4 Jur. N. S. 1076; 7 W. R. 26.

*Annotations*:—*Consd.* *Re Moseley's Trusts* (1871), L. R. 11 Eq. 499. *Appld.* *Herbert v. Webster* (1880), 15 Ch. D. 610; *Re Russell, Dorrell v. Dorrell*, [1895] 2 Ch. 698; *Re Millward, Steedman v. Hobday* (1902), 87 L. T. 476. *Consd.* *Re Game, Game v. Tennent*, [1907] 1 Ch. 276. *Reftd.* *Knapping v. Tomlinson* (1864), 34 L. J. Ch. 3.

365. ———.]—*WILKINSON v. DUNCAN*, No. 353, *ante*.

366. ———.]—*KNAPPING v. TOMLINSON*, No. 68, *ante*.

367. ———.]—Gift on trust for A. for life, & after her death for all her children who should attain twenty-one, & the issue of such of them as should die under that age leaving issue, "which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue at his, her, or their decease or respective deceases, as tenants in common if more than one, but such issue to take only the shares which his, her, or their parent or parents respectively would have taken if living." None of the children of A. died under twenty-one leaving issue:—*Held*: the whole gift was not void as infringing the rule against perpetuities, but it might be severed, & the shares only would be void as to which the specified event happened.—*Re MOSELEY'S TRUSTS* (1871), L. R. 11 Eq. 499; 40 L. J. Ch. 275; 24 L. T. 260; 19 W. R. 431.

*Annotations*:—*Dbtd.* *Hale v. Hale* (1876), 3 Ch. D. 643; *Pearks v. Moseley* (1880), 5 App. Cas. 714.

368. ———.]—Where there is a time fixed at which a fund is to be divided into separate shares, each share stands separate & the gift of any share will take effect if the disposition of that particular share does not violate the rule against perpetuities, & will not be made void by the invalid gift of a portion of another share to the donee of the first mentioned share. But where there is a gift to a class & the total amount to be taken by any member of the class cannot be ascertained within the period fixed by law, the whole gift is void. Testatrix made a bequest in trust for such of her four nephews & nieces as should be living at the expiration of twelve months after the death of their mother, & the issue then living who should attain the age of twenty-one years, of any of the nephews & nieces who should have died before the expiration of the twelve months:—*Held*: on the construction of the will, there was no period of distribution fixed except by the gift to the class; & as the members of the class might not be ascertained until the expiration of more than twenty-one years from the death of the mother the whole bequest failed.

Where there is a time fixed at which a fund is to be divided into separate shares, & that time is not obnoxious to the rule against perpetuities, there, as I conceive, each share stands separate from the others, & will take effect or not according as the dispositions of that share do or do not violate the rule against perpetuities; & I conceive it to follow that the valid gift of one share will not be made void by the invalid gift of another share or of a portion of another share, to the donee of that first share . . . I conceive that it is a class gift where the total & ultimate amount of the share to be taken by any one donee cannot be ascertained until all the persons who are to take, & the ultimate proportions in which they are to take, are finally ascertained (*FRY, J.*).—*BENTINCK v. PORTLAND (DUKE)* (1877), 7 Ch. D. 693; 47 L. J. Ch. 235; 38 L. T. 58; 26 W. R. 278.

*Annotation*:—*Reftd.* *Pearks v. Moseley* (1880), 5 App. Cas. 714.

**Sect. 3.—Application of rule in general: Sub-sect. 5, B.; sub-sect. 6.]**

**369.** —[.]—Testator directed his trustees, after the death of the longest liver of his son, his daughter, & any widow whom the son might leave, to sell his real estate & to stand possessed of the proceeds & of the rents & profits until sale, upon trust to pay & apply them "unto & equally amongst all & every the child & children of my son W. & daughter M. share & share alike, & the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." He directed that if his daughter's son then living should die without leaving issue, or leaving issue, all of them should die under age & unmarried, the trustees should pay the share which would have been payable to him under the above trusts to the children of J.; & that if testator's son died without leaving issue, or all of them died under age & unmarried, the trustees should pay the share which would have been payable to them under the trusts aforesaid to the children of J. & M. The heir-at-law claimed the *corpus* as undisposed of, on the ground that the disposition of the proceeds of sale was void for remoteness as being a gift to a class not ascertainable till at or after the death of the son's widow, who might be a person unborn at testator's death:—*Held*: the gift was not a gift to such children of the son & daughter as should be living at the period of distribution & the issue of such of them as should be then dead, but a gift to all the children of the son & daughter, with a gift over by way of substitution of the shares of such of them as might die before the period of distribution leaving issue; when the gift over of any share was void for remoteness the original gift remained unaffected; & the heir-at-law had no title.

The result is that there is a gift to a class who must be ascertainable within the prescribed period subject to gifts over of the shares in certain events & if any of those gifts over are invalid, the original gift of those shares remains unaffected (JESSEL, M.R.).—*GOODIER v. JOHNSON* (1881), 18 Ch. D. 441; 51 L. J. Ch. 389; *sub nom. Re GOODIER, GOODIER v. JOHNSON*, 45 L. T. 515; 30 W. R. 449, C. A.

*Annotations*.—*Apld.* *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Re Appleby, Walker v. Lever, Walker v. Nisbet*, 1893] 1 Ch. 565.

**370.** —[.]—Testator gave his residuary estate in trust, after the death of M. & her husband, for all the daughters of M. who should attain twenty-one or marry under that age; with a proviso that the share of any daughter should be held upon trust for her life, & after her death upon similar trusts for her children as were thereinbefore declared for the children of M. M. had one daughter only, *pltf.*, who attained twenty-one, & she was born in the lifetime of testator:—*Held*: the proviso for resettlement of the shares must be construed as applicable to each share separately; & although it would have been void for remoteness in the case of daughters, born after the death of testator, it was valid in the case of *pltf.* & therefore she was only entitled to a life interest in the fund.—*Re RUSSELL, DORRELL v. DORRELL*, [1895] 2 Ch. 698; 64 L. J. Ch. 891; 73 L. T. 195; 44 W. R. 100; 12 R. 499, C. A.

*Annotations*.—*Apld.* *Re Game, Game v. Tennent*, [1907] 1 Ch. 276. *Re Bates v. Kesterton*, [1896] 1 Ch. 159.

**371.** —[.]—*Re SHEELY, LANGTON v. LANGTON* (1920), 149 L. T. Jo. 462.

**372. Separation of forfeiture clause.**—Testa-

trix, by will, dated in 1845, limited to a daughter an exclusive power of appointment by will amongst her children. The daughter, by her will, dated in 1874, in exercise of the power, appointed the fund amongst the objects of the power in certain shares, giving to two of her daughters life interests only, & declared that if either during her life or after her death any son or daughter of hers should marry a person who did not profess the Jewish religion, or was not born a Jew though converted to Judaism, or should forsake the Jewish & adopt the Christian, or any other religion, then such son or daughter should forfeit all share in the fund, & in case of forfeiture the forfeited share was to accrue & go over to the other or others of the children living at the time of the forfeiture. J., a son of the appointor, married a Christian in his mother's lifetime, but without her consent. *Pltf.*, one of the two daughters of the appointor, to whom a life interest only was appointed, became a Christian after the mother's death. Both J. & *pltf.* were born after the death of the creator of the power:—*Held*: (1) the forfeiture clause was not void as against public policy; (2) it was effectual as to the shares of children marrying Christians or becoming Christians during the lifetime of the appointor, & therefore the share of J. was forfeited; (3) the forfeiture clause must be read in conjunction with the gift over, & therefore, so far as it affected, after the death of the appointor, the share of a child born after the death of the creator of the power, it was void for remoteness, whether such share was appointed for life only or absolutely, & consequently *pltf.* had not forfeited her share.—*HODGSON v. HALFORD* (1879), 11 Ch. D. 959; 48 L. J. Ch. 548; *sub nom. Re LYON, Re JACOBS, Hodgson v. Halford*, 27 W. R. 545.

*Annotation*.—*As to* (3) *Apld.* *Wainwright v. Miller*, [1897] 2 Ch. 255.

**373. Necessity for ascertainment within period of limitation**—Though whole class ascertainable.—*BLIGHT v. HARTNOLL*, No. 421, *post*.

**SUB-SECT. 6.—ALTERNATIVE INDEPENDENT LIMITATIONS.**

**374. Void alternative disregarded.**—Personal estate devised to one for life, & after to her children; & if they have no issue, the remainder over, is a void devise as to the remainder.—*BOUCHER v. ANTRAM* (1871), 2 Rep. Ch. 65; 21 E. R. 617.

*Annotation*.—*Distd.* *Smith v. Clever* (1888), 2 Vern. 59.

**375.** —[.]—*BROWN v. PITTMAN* (1710), *Gilb.* Ch. 75; 25 E. R. 52.

**376.** —[.]—Trust of a term, to arise on the contingency that, (a) A. & B. shall die without leaving issue male, or (b) that such issue male shall die without issue, is good in case A. & B. have a son who dies *sans* issue in the lifetime of the survivor.—*LONGHEAD v. PHELPS* (1770), 2 Wm. Bl. 704; 96 E. R. 414.

*Annotations*.—*Apld.* *Goring v. Howard* (1848), 16 Sim. 395. *Reid, Proctor v. Bath & Wells (Bp.)* (1794), 2 Hy. Bl. 358; *Minter v. Wrath* (1842), 13 Sim. 52; *Scarisbrick v. Skelmersdale* (1850), 14 Jur. 562; *Monypenny v. Dering* (1852), 2 De G. M. & G. 145; *Re Thatcher's Trusts* (1859), 26 Beav. 385; *Hancock v. Watson*, [1902] A. C. 14; *Re Bowles, Page v. Page*, [1905] 1 Ch. 371; *Re Davies & Kent's Contract*, [1910] 2 Ch. 35; *Re Hewett's Settlement*, *Hewett v. Eldridge*, [1915] 1 Ch. 810.

**377.** — **Application to personalty.**—Devise to trustees to invest in stock & pay dividends to testator's son for life, & after his decease to his eldest son & his heirs for ever, & in case of their death without issue, to his testator's nearest relation, & the nearest relations of such nearest



relation for ever:—*Held*: this was a double contingency, &, in the event of the son dying without issue, was good.—*MARSH v. MARSH* (1783), 1 Bro. C. C. 293; 28 E. R. 1140.

*Annotations*.—*Mentd.* Doe d. Pilkington v. Spratt (1833), 5 B. & Ad. 731; *Start v. Platel* (1839), 8 L. J. C. P. 249; *Withy v. Mangles* (1843), 10 Cl. & Fin. 215; *Bird v. Luckie* (1850), 8 Hare, 301.

378. ———.]—*WILKINSON v. SOUTH*, No. 141, *ante*.

379. ———.]—If lands be devised to A. his heirs & assigns for ever, & if he die leaving no issue behind him, then over, the limitation over is good by way of executory devise.

If we were to consider this as a limitation of real property, instead of land, to be converted into money, this may be supported as a contingency with a double aspect, & I should have no difficulty in saying that, in the event of A. dying without leaving issue at his death, the widow, if she were alive, might take; if not, the second son, or the daughters of the deviser (LORD KENYON, C.J.).—*PORTER v. BRADLEY* (1789), 3 Term Rep. 143; 100 E. R. 500.

*Annotations*.—*Refd.* *Roe v. Jeffery* (1798), 7 Term Rep. 589; *Wood v. Baron* (1801), 1 East, 259; *Crooke v. De Vandes* (1803), 9 Ves. 197; *Tonny (Jesse of Agar) v. Agar* (1810), 12 East, 253; *Doe v. Webber* (1818), 1 B. & Ad. 713; *Doe d. Jones v. Owens* (1830), 1 B. & Ad. 318; *Campbell v. Harding* (1831), 2 Russ. & M. 390; *Doe d. Cadogan v. Ewart* (1838), 7 Ad. & El. 636; *Doe d. Todd v. Duesbury* (1841), 8 M. & W. 514; *Doe d. Blesard v. Simpson* (1842), 3 Man. & G. 929; *Cole v. Goble* (1853), 22 L. J. C. P. 148; *Edwards v. Tuck* (1853), 22 L. J. Ch. 523; *Bamford v. Lord* (1854), 14 C. B. 708; *Feakins v. Standley* (1857), 24 Beav. 485.

380. ———.]—An appointment exceeding the power by a limitation to objects not within the power, is void as to the excess; as where the power is to appoint to children, & the appointment is to a child for life, & after his decease to his wife & children; but that void limitation shall not defeat a limitation over to an object of the power, in case such child dies without leaving a wife or child surviving.

There are two alternatives: if B. leaves no wife or children at his death, then the limitations over being to a good object shall take effect; if he does leave a wife or children, then it cannot take effect (*per Cur.*).—*CROMPE v. BARROW* (1799), 4 Ves. 681; 31 E. R. 351.

*Annotations*.—*Refd.* *Williamson v. Farwell* (1887), 35 Ch. D. 128. *Mentd.* *Thornton v. Bright* (1836), 2 My. & Cr. 230.

381. ———.]—If a limitation is made dependent on the happening of either of two events, one of which is too remote, but the other is not; it will take effect if the latter event happens.—*MINTER v. WRAITH* (1842), 13 Sim. 52; 60 E. R. 21.

*Annotation*.—*Mentd.* *Wharton v. Barker* (1858), 4 K. & J. 483.

382. ———.]—Testator gave the residue of [his personal estate to trustees, in trust to pay the income for the maintenance & education of his grandson A., & such other grandchildren, the children of his son, B., during their lives or life; & after the decease of any or either of his grandchildren, to pay the share of the income of any or either of them so dying, unto their, his or her issue, if any, until he, she or they respectively attained the age of twenty-five years, & then to pay, transfer & equally divide their parent's share of the residue between them, if more than one, & if but one, then the whole to such one child absolutely. & in case either of his grandchildren by his son B. should die without leaving lawful issue at the time of his or her decease, & without having obtained a vested interest, he directed that the share or shares of him, her or them so dying should go to the survivors or survivor of them,

upon the same trusts as were thereinbefore declared, & to be payable & transferable as thereinbefore mentioned. A., the grandson, died a bachelor, leaving three brothers & a sister surviving him:—*Held*: they were entitled to their deceased brother's share of the income for their lives: because, though the first gift was too remote, the subsequent one was intended to take effect, not by way of remainder, but by way of substitution.—*GORING v. HOWARD* (1848), 16 Sim. 395; 18 L. J. Ch. 105; 60 E. R. 926.

*Annotation*.—*Refd.* *Evers v. Challis* (1859), 7 H. L. Cas. 531.

383. ———.]—Bequest to trustees for A. for life, & after her decease to divide between her children when they should attain twenty-seven, & in the event of A. not leaving any child at her death, then over. A. has no issue:—*Held*: the gift over took effect.—*CAMBRIDGE v. ROUS* (1858), 25 Beav. 409; 53 E. R. 693.

*Annotations*.—*Mentd.* *Willmot v. Flowitt* (1865), 11 Jur. N. S. 820; *Marriott v. Abell* (1869), L. R. 7 Eq. 478.

384. ———.]—Though a gift over may as to one alternative operate as an executory devise, it will not necessarily do so as to another; & if the second is that which in fact occurs, the gift may be treated as a good contingent remainder.

The invalidity of one alternative will not necessarily defeat the other.

Devise to E. for life, " & from & after her decease to such child or children as she may have, if a son or sons who shall live to attain the age of twenty-three &, if a daughter or daughters, who shall live to attain the age of twenty-one, as tenants in common, etc. "; & in case of the death of any son under twenty-three, or daughter under twenty-one, the share to go to the survivors attaining those ages. & in case E. has only one son to attain twenty-three, or a daughter to attain twenty-one, to such son or daughter. " & also, in case E.'s children shall die under " the ages mentioned, " or if she has none, " then to J., A. & S. for life, & afterwards to their sons & daughters on attaining the above ages respectively. There were similar devises to J., A. & S., but in the devises to J. & S. nothing was said as to total absence of issue; in that to A. the words used were " & farther, in case A. shall die without issue. " E. first & A. afterwards died without ever having had a child:—*Held*: on the death of A. the gift over in favour of a daughter of J., who had attained twenty-one, took effect as a contingent remainder, because no prior estate was divested or displaced, & when the particular estate, the life estate of A., determined the contingency on which the remainder was to take effect, had occurred.—*EVERS v. CHALLIS* (1859), 7 H. L. Cas. 531; 11 E. R. 212; *sub nom.* *DOE d. EVERS v. CHALLIS*, 29 L. J. Q. B. 121; 33 L. T. O. S. 373; 5 Jur. N. S. 825; 7 W. R. 622, H. L.

*Annotations*.—*Foll.* *Watson v. Young* (1885), 28 Ch. D. 436. *Consd.* *Re Bence, Smith v. Bence*, [1891] 3 Ch. 242. *Dist.* *Hancock v. Watson*, [1902] A. C. 14. *Refd.* *Brookman v. Smith* (1871), L. R. 6 Exch. 291; *Re Farmcombe's Trusts* (1878), 9 Ch. D. 652; *Hodgson v. Halford* (1879), 11 Ch. D. 959; *Re Roberts, Repington v. Roberts-Gawen* (1881), 19 Ch. D. 520; *Re Harvey, Peek v. Savory* (1888), 39 Ch. D. 289; *White v. Summers*, [1908] 2 Ch. 256.

385. ———.]—Bequest to A. for life, & afterwards to her children equally, " to be vested " on such as should attain twenty-five, & " to be payable " as soon as might be after that age should be attained, with powers of maintenance & advancement out of their " vested or expectant portions, " with a gift over to B. if no child should attain twenty-five:—*Held*: the gift to the children was too remote, & on A.'s death, without having been married, the gift to B. could not take effect,

**Sect. 3.—Application of rule in general: Sub-sect. 6.]** as an alternative limitation to a person in *esse* at the date of the will.

It is clearly settled that if there be two alternative limitations, one branch of which is too remote, & the other of which is capable of taking effect, the ct. will disregard the invalid limitation & give effect to that which is legal (ROMILLY, M.R.).

—*Re THATCHER'S TRUSTS* (1859), 26 Beav. 365; 53 E. R. 939.

**Annotation.**—*Fidd. Re Hewett's Settltmt.*, Hewett v. Eldridge, [1916] 1 Ch. 810.

**386.** —.]—*WILLSON v. COBLEY*, [1870] W. N. 46.

**387.** —.]—Testator devised his freehold estates in W. to his third son & his issue male, with remainder to his fourth son & his issue male, in strict settlement; & he devised his real estates in C. to his fourth son & his issue male, with remainder to his fifth son & his issue male, in strict settlement. By a shifting clause it was provided that if his fourth son, or any issue male of his fourth son, should become actually entitled to the possession of his W. estates, & if his fifth son or any of his issue male should be then living, the limitations of his C. estates in favour of his fourth son, or his issue male, should absolutely cease. He bequeathed his leasehold estates in C. to trustees upon such trusts as, regard being had to the difference in the tenure of the premises respectively, would best or most nearly correspond with the uses declared of the C. freeholds. The third son died a bachelor in the lifetime of the fourth son, who thereupon entered into possession of the W. estates:—*Held*: (1) the fifth son was entitled to the rents & profits of the C. leaseholds, because they were given upon an executory trust; & assuming the shifting clause, if applied verbatim to the leaseholds, to be bad for remoteness, it ought to be so modified as to render it free from that objection; (2) the shifting clause was divisible, & in the events which happened was not bad for remoteness.—*MILES v. HARFORD* (1879), 12 Ch. D. 691; 41 L. T. 378.

**Annotations.**—*As to* (1) *Reid. Re Norton*, Norton v. Norton, [1911] 2 Ch. 27; *Re Beresford-Hope*, Aldenham v. Beresford-Hope, [1917] 1 Ch. 287. *As to* (2) *Reid. Re Bence*, Smith v. Bence, [1891] 3 Ch. 242; *Portman v. Portman*, [1922] 2 A. C. 473. *Generally, Mend. Pole v. Pole*, Mundy Pole v. Pole, Martin v. Pole, [1924] 1 Ch. 156.

**388.** —.]—Devise of real estate to trustees in fee, upon trust for J. for life, & after his death upon trust for his children who should attain twenty-one, & the issue of any child who should die under twenty-one leaving issue who should attain that age; but, in case there should be no child, nor the issue of any child of J. who should attain twenty-one, the property was to be held on trust for the child or children of R. who should respectively attain twenty-one, if more than one in equal shares. Provided always, that the rents of the trust premises should, during the term of twenty-one years from the day next before the day of testator's death, be accumulated by way of compound interest, & the accumulated fund should be held in trust for the child, if only one, or all the children equally, if more than one, of R. who should attain twenty-one. J. died without ever having had a child. R. had six children who attained twenty-one. The youngest of them was born after the eldest had attained twenty-one, but before the end of the period of accumulation:—*Held*: the gift over to the children of R. was divisible into two distinct alternative gifts, viz., (a) a gift over in the event of there never being any child of J.; (b) a gift over in the event of no child or issue of any child of J. attaining twenty-

one; & consequently the first alternative was not too remote, & the gift over was in the events which had happened good.—*WATSON v. YOUNG* (1885), 28 Ch. D. 436; 54 L. J. Ch. 502; 33 W. R. 637.

**Annotations.**—*Dbdd. Re Bence*, Smith v. Bence, [1891] 3 Ch. 242. *Condd. Re Stephens*, Kilby v. Betts, [1904] 1 Ch. 32. *Reid. Re Harvey*, Peck v. Savory (1858), 39 Ch. D. 289; *Re Hancock*, Watson v. Watson (1900), 70 L. J. Ch. 114. *Mend. Re Knapp's Settltmt.*, Knapp v. Vassall, [1895] 1 Ch. 91; *Re Canney's Trusts*, Mayers v. Strover (1910), 101 L. T. 905.

**389.** —.]—Testatrix, after settling a sum of money upon trusts for M., a married niece, for life with power to appoint the income to any husband who might survive her for his life, with remainder to her children, if any, at twenty-one, settled three other sums of money upon such trusts & with such powers in favour of E., B., & J., three unmarried nieces, & their respective husbands & children, if any, as should correspond with the preceding trusts & powers in favour of M. & her husband & children, if any. Testatrix directed that, in case none of her nieces should have any child who should become entitled to the principal sums under the trusts aforesaid, then all the principal sums should, subject to the preceding trusts, be held in trust for a class of persons, ascertained within due limits, in such shares, etc., as the last survivor of the four nieces should by will appoint. M. died without having had a child, & E., B., & J. all died unmarried; & B., the last survivor of them, by her will executed the power in favour of the class mentioned in the ultimate trust. On the death of B., the question arose whether the ultimate trust or gift was not void for remoteness on the ground that, if the power to appoint to husbands had been exercised, the period for ascertaining the class in the ultimate gift might have infringed the rule against perpetuities, because the husbands need not necessarily have been born in the lifetime of the settlor:—*Held*: it was a case of alternative independent gifts within the principle of *Monypenny v. Dering*, No. 548, *post*, & *Longhead v. Phelps*, No. 376, *ante*; & inasmuch as the power in favour of husbands was never exercised, the ultimate gift in the events which had happened was valid, & therefore the appointment made by B. was good.

There is in the first instance a limitation . . . to a married niece & her children . . . & then there are limitations to three unmarried nieces & their children, with a power for the nieces to appoint to any husband whom they may marry, who may survive them for a life interest or any less interest. Those husbands, of course, would not necessarily be born in testatrix's lifetime. If, therefore, there had been, not a power to appoint to such husbands, but in each case an actual life interest given to such husbands, & the class of children, to take was not to be ascertained until the death of the survivor of such niece & her husband, the gift to the class would be void for perpetuity, because the class would not be reasonably ascertainable within a life or lives in being & twenty-one years afterwards (*FARWELL, J.*).—*Re BOWLES*, PAGE v. PAGE, [1905] 1 Ch. 371; 74 L. J. Ch. 338; 92 L. T. 556.

**Annotation.**—*Appld. Re Davies & Kent's Contract*, [1910] 2 Ch. 35.

**390.** —.]—Testator devised his real estate to trustees upon trust to pay the income to his three children, & in the events which happened, to the survivors & survivor of them for their lives, with power for any child to appoint by will a life interest to his or her wife or husband, & directed that upon the death of the last survivor

of all his children & any husband or wife to whom an appointment had been made, his trustees should sell his real estate & divide the proceeds equally between all his grandchildren then living. No appointment had been made to any husband or wife not born in testator's lifetime. One child died without issue, & the other two had become trustees of the will as well as tenants for life; they had sold part of testator's estate in 1898 as tenants for life, exercising the statutory power, & had also received the purchase-money as trustees:—*Held*: (1) the trust for sale was not bad for perpetuity, there being alternative independent gifts, on the principle stated in *Re Boules, Page v. Page*, No. 389, *ante*, & inasmuch as the power in favour of a husband or wife had not been exercised so as to raise any question of perpetuity, the ultimate gift to the grandchildren was, in the events which had happened, valid.

It seems to me that this case falls within the principle laid down by FARWELL, J., in *Re Boules, Page v. Page*, No. 389, *ante*. It is a case in which we have not to deal with limitations made by testator himself in this form, but we are dealing with what will be the effect of the creation under the power of a fresh interest in some unborn person. That brings the case into the class of alternative gifts, one of which may be perfectly good & the other may be distinctly bad, having regard to the rule against perpetuities (COZENS-HARDY, M.R.).

(2) It has not been contended & it could not be contended that it would be sufficient to find in the will a trust for sale or a future event, if that future event was itself necessarily void on the ground of perpetuity. The only question for us on this part of the case is to say whether at the date this sale took place, there was a trust for sale on a future event, which might or might not be a good trust for sale (COZENS-HARDY, M.R.).—*Re DAVIES & KENT'S CONTRACT*, [1910] 2 Ch. 35; 79 L. J. Ch. 689; 102 L. T. 622; 26 T. L. R. 457, C. A.

*Annotation*.—*Generally, Mentd. Re Johnson's S. E.* (1913), 37 Sol. Jo. 717.

391. —.]—*Re BULLOCK'S WILL TRUSTS, BULLOCK v. BULLOCK*, No. 554, *post*.

392. —.]—Testator made certain provision out of part of the residuary estate for his nephew R. during his life, & as to all the residue gave the same upon trust for the first son born of the body of R. as should live to attain twenty-one, provided such son should be christened John or should assume the name of John Davey, the whole of the capital to be paid to him on attaining twenty-one, & in default of any such son upon trust for the first son born of the body of either of the daughters of R. who should attain twenty-one, provided as aforesaid, & in default of any such son of a daughter then in trust as to one half of the capital for the first daughter of R. who should have attained twenty-one, her exors. & administrators, & as to the other half for charities, " & in case of the death of R. without leaving lawful issue as before mentioned then as to the whole thereof " upon trust for certain charities. R. died without ever having had a child, & his next of kin & heir-at-law claimed his residuary estate on the ground that the ultimate gift to charities was void for remoteness:—*Held*: the ultimate trust for the charities was an alternative & independent gift upon an event ascertainable at the death of R. & was good.—*Re DAVEY, FRISK v. MITCHELL*, [1915] 1 Ch. 837; 84 L. J. Ch. 505; 113 L. T. 60, C. A.

393. Necessity for expression of alternatives in

instrument.]—A. devises an advowson to the first or other son of B. that should be bred a clergyman, & be in Holy Orders, in fee, but in case B. should have no such son, then to C. in fee. Both devises are void, as depending on too remote a contingency; though B. dies without having had a son, the heir-at-law of the devisor, & not C. is entitled.

The devise over to C., as it depended on the same event was also void, for the words of the will would not admit of the contingency being divided (*per Cur.*).—*PROCTOR v. BATH & WELLS* (Bp.) (1794), 2 Hy. Bl. 358; 126 E. R. 594.

*Annotations*.—*Consd. Monypenny v. Dering* (1852), 2 De G. M. & G. 145; *Hancock v. Watson*, [1902] A. C. 14. *Reid. Tollemache v. Coventry* (1834), 8 Bl. N. S. 547; *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Cattlin v. Brown* (1853), 11 Hare, 372; *Eserton v. Brownlow* (1853), 4 H. L. Cas. 1; *Evers v. Challa* (1859), 7 H. L. Cas. 532; *Re Bence, Smith v. Bence*, [1891] 3 Ch. 242.

394. —.]—*MONYPENNY v. DERING*, No. 548, *post*.

395. —.]—The will of a testatrix contained an ultimate limitation of her real estate to her right heirs in case both her daughters, for whom & their husbands & issue provision had already been made by the will, should die without leaving any child or the issue of any child living at the death of the survivor of their respective then present or any future husbands. Her personal estate was bequeathed by reference to the trusts of the real estate. Both the daughters died leaving their respective first husbands surviving them, but no issue:—*Held*: the gift over was void for remoteness, as it was not in the alternative on the happening of either of two distinct events, but a gift of one event involving two things, & as testatrix had not severed the gift the ct. could not do so.—*Re HARVEY, PEEK v. SAVORY* (1888), 39 Ch. D. 289; 60 L. T. 79, C. A.

*Annotation*.—*Apld. Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482.

396. —.]—Testator gave one-fifth share of his residuary estate upon trust for his son A. for life, & after his death upon trust for such child or children of A. as being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, & also such child or children of any son or daughter of A. who might die under the age of twenty-one years as should live to attain twenty-one, or being a daughter, to be married, in equal shares & proportions *per stirpes*. The four other fifth shares were given by reference on similar trusts for testators daughters B. C. D. & E. respectively, & their respective issue, & testator declared that if any or either of A. C. B. D. & E. should die without leaving any lawful issue who should live to attain a vested interest in their respective shares of the estate, the share or shares to which such failure should happen should go over on the trusts therein mentioned. B. died without ever having had a child:—*Held*: the gift over in the event of B.'s dying without leaving lawful issue who should live to attain a vested interest could not be split so as to make the gift over take effect in the event which had happened of her dying without ever having had a child.—*Re BENCE, SMITH v. BENCE*, [1891] 3 Ch. 242; 60 L. J. Ch. 636; 65 L. T. 530; 7 T. L. R. 593, C. A.

*Annotation*.—*Reid. Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482.

397. —.]—A will made in 1850 gave residuary personal estate to trustees in trust for testator's wife for life & after her death, which happened, to be divided into five portions which testator allotted thus: " To S., a married woman, I give two of such portions " & directed that the two-fifths allotted to S. should remain in trust

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for her life for her separate use & from & after her decease in trust for her children upon attaining twenty-five if sons or upon attaining twenty-one or marriage if daughters: "but in default of any such issue" the two-fifths to be divided among the children of C., payable to sons at twenty-five or to daughters at twenty-one or marriage. S. died without having had a child. At her death there were children of C., daughters who had all attained twenty-one or married:—*Held*: (a) that the whole gift over on the death of S. was void for remoteness & could not be split up into separate contingencies, so as to be construed as a gift over on one contingency, that of S. having no child; & (b) upon the death of S. there was no intestacy as to the two-fifths but that by reason of the invalidity of the gift over on her death the original absolute gift remained & upon her death passed to her representatives.

Where there is an absolute gift to a legatee in the first instance, & trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next of kin as the case may be.

If a devise can take effect as a remainder it shall do so (LORD DAVEY).—HANCOCK v. WATSON, [1902] A. C. 14; 71 L. J. Ch. 149; 85 L. T. 729; 50 W. R. 321, H. L.

*Annotations*:—*Reid*, *Re Davies & Kent's Contract* (1910), 102 L. T. 622; *Re Norton, Norton v. Norton*, [1911] 2 Ch. 27; *Re Hewett's Settlt.*, *Hewett v. Eldridge*, [1915] 1 Ch. 810; *Re Jones, Last v. Dobson*, [1915] 1 Ch. 246. *Mentl*, *Re Wood, Wood v. Wood*, [1901] 2 Ch. 578; *Re Currie's Settlt.*, *Re Rooper, Rooper v. Williams*, [1910] 1 Ch. 329; *Re Harrison, Hunter v. Bush*, [1918] 2 Ch. 59; *Moryoseph v. Moryoseph*, [1920] 2 Ch. 33; *Re Atkinson, Atkinson v. Weightman*, [1925] W. N. 30.

**398. Gift over simple in expression—Construction as contingent remainder.**—*EVERS v. CHALLIS*, No. 384, *ante*.

**SUB-SECT. 7.—DURATION OF LIMITATIONS AND POSTPONEMENT OF ENJOYMENT.**

See SETTLEMENTS; WILLS.

**SUB-SECT. 8.—LIMITATIONS TO A SERIES OF PERSONS.**

**399. General rule—Effect of remoteness as to one person.**—*DUNGANNON (LORD) v. SMITH*, No. 9, *ante*.

**400. ———.**—*CATTILIN v. BROWN*, No. 95, *ante*.

**Chattels settled as realty.**—See SETTLEMENTS; WILLS.

**Construction of limitations.**—See SETTLEMENTS; WILLS.

**SUB-SECT. 9.—OTHER CASES.**

**401. First heir male attaining twenty-one—Tenant in tail.**—Testator bequeathed chattels to trustees, upon trust to permit them to be used by the person & persons who, for the time being, should be entitled to the possession of his mansion house under his marriage settlement or his will, until a tenant in tail of the age of twenty-one years should be in possession of his mansion house;

& then the chattels were to belong to such tenant in tail. Testator was, under his marriage settlement, tenant in fee, subject to some prior limitations, which all failed at his death; & under his will, his brother became tenant for life with remainder to his, the brother's, eldest son in tail, & died, leaving such eldest son then of the age of twenty-one years:—*Held*: the gift of the chattels to the first tenant in tail who should attain twenty-one was too remote, & the will gave the brother's eldest son no title to them.—*IBBERTSON v. IBBERTSON* (1840), 5 My. & Cr. 26; 10 L. J. Ch. 49; 41 E. R. 281, L. C.; *subsequent proceedings* (1843), 13 Sim. 544.

*Annotations*:—*Apld*, *Ferrand v. Wilson* (1845), 4 Hare, 344. *Foll*, *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Re Atkinson, Atkinson v. Atkinson*, [1916] 1 Ch. 91. *Reid*, *Crosse v. Glennie* (1843), 2 Y. & C. Ch. Cas. 237; *Wainman v. Field* (1854), Kay, 507.

**402. ———.**—*DUNGANNON (LORD) v. SMITH*, No. 9, *ante*.

**403. Tenant in tail becoming seised in fee.**—Testator bequeathed to his exors. & trustees all his personal estate, except such goods as were by his will especially bequeathed, & also except his leasehold estates, which he declared it to be his intention to exonerate from the payment of his debts & legacies, upon trust, in the first place, to pay his debts, funeral & testamentary expenses, & legacies; & in case there should be any residue of his personal estate, except as aforesaid, he gave the same to his son R. After giving certain specific legacies, testator devised all his freehold hereditaments to the same trustees, upon trust for his said son R., for life, with remainder to his grandson W. for life, with divers remainders over in tail. Testator gave all his leasehold estates to the same trustees, in trust, to permit the clear rents thereof to be received, taken, & enjoyed by the person for the time being entitled to the freeholds, until such person should by good assurance become seised of the freeholds in fee simple in possession; & then in trust to convey & assign the leaseholds to him:—*Held*: (1) the limitations of the leaseholds beyond the life estates of R. & W. were void for remoteness; (2) the interest thus improperly attempted to be given did not belong absolutely to W. as the last tenant for life, nor did it pass by the residuary bequest to R., because the exception of the leaseholds out of the residuary gift was not simply for the purpose of making a separate bequest of them, but also to exonerate them from the payment of the debts & legacies; & therefore, beyond W.'s life estate, the leaseholds were undisposed of by the will, & belonged to the next of kin of testator.—*WAINMAN v. FIELD* (1854), Kay, 507; 69 E. R. 215.

*Annotations*:—*As to* (2) *Distd*, *Blight v. Hartnoll* (1883), 23 Ch. D. 218. *Reid*, *Torrens v. Millington* (1878), 26 W. R. 753.

**404. Future working of minerals—Until pits exhausted.**—*Re WOOD, TULLETT v. COLVILLE*, No. 297, *ante*.

**405. ——— If minerals worked.**—*THOMAS v. THOMAS*, No. 31, *ante*.

**406. ———.**—*EDWARDS v. EDWARDS*, No. 174, *ante*.

**407. On appointment of next colonel—Gift to volunteer corps.**—Testator bequeathed a sum of £100 to be provided to the Central London Rangers, a volunteer corps, on the appointment of the next Lieutenant Colonel:—*Held*: the gift was void because it infringed the rule against perpetuities.—*Re STRATHEDEN & CAMPBELL (LORD), ALT v. STRATHEDEN & CAMPBELL (LORD)*, [1894] 3 Ch. 205; 63 L. J. Ch. 872; 71 L. T.

225; 42 W. R. 647; 10 T. L. R. 574; 38 Sol. Jo. 602; 8 R. 515.

*Annotations*.—*Ald. Worthing Corpn. v. Heather*, [1908] 2 Ch. 532. *Ment. Re Nottage, Jones v. Palmer*, [1895] 2 Ch. 649; *Re Good, Harrington v. Watts*, [1905] 2 Ch. 60; *Re Gray, Todd v. Taylor*, [1925] Ch. 382.

**408. On marriage or death of unmarried daughter.—Appointment under power in marriage settlement.**—By a marriage settlement in 1793 a fund was settled in trust for the husband & wife successively for life with remainder for children of the marriage as the husband & wife should jointly appoint. In 1835, there being then seven children of the marriage, including three unmarried daughters, the husband & wife appointed out of the fund £1,500 to be paid to each of the three unmarried daughters "who should thereafter marry"; & so long as those three daughters, or any or either of them, should be living & unmarried, directed that the income of the residue of the fund should be paid to them, or such of them as should from time to time be living & unmarried, equally; & "in case one or two only of them should marry," which happened, then that after the death or marriage of such one as should be last living & unmarried the capital of the residue should be paid to the four other children & such of the three unmarried daughters "as should marry as aforesaid," equally:—*Held*: (1) the ultimate gift over of the residue of the fund was void for remoteness, as the class was not necessarily ascertainable within twenty-one years after the death of the survivor of the appointors; (2) the appointment of the three sums of £1,500 was also void for remoteness, as it could not be ascertained whether a daughter would marry within twenty-one years after the death of the survivor of the appointors; (3) the appointment of the income of the residue of the fund to the three unmarried daughters was a valid appointment of one-third to each daughter so long as she was living & unmarried; but, so far as it purported to be a gift over of such one-third on her marriage, was void for remoteness.

The question is whether this is good, seeing that the daughters may marry more than twenty-one years after the death of the survivor of the husband & wife, & that until a daughter marries, it is necessarily left uncertain what will be taken by the other children, & what is to be taken by them under the appointment or under the provisions of the settlement if there be no appointment. That seems to be obnoxious to the rule against perpetuities (*KEKEWICH, J.*).—*Re GAGE, HILL v. GAGE*, [1898] 1 Ch. 498; 67 L. J. Ch. 200; 78 L. T. 347; 46 W. R. 569.

**409. When all charges on land cleared.**—*Re BEWICK, RYLE v. RYLE*, No. 299, *ante*.

**Construction of limitations.**—*See SETTLEMENTS; WILLS.*

#### SECT. 4.—APPLICATION OF RULE TO POWERS.

##### SUB-SECT. 1.—REMTENESS IN DONEE OF POWER.

###### A. In General.

*See, generally, POWERS.*

**410. Donee must be ascertainable within perpetuity period.**—*Re HARGREAVES, MIDGLEY v. TATLEY*, No. 27, *ante*.

**411. Donee may be survivor of several living persons.**—*ROBINSON v. HARDCASTLE*, No. 58, *ante*.

**412. —.**—*THELLUSSON v. WOODFORD*, No. 67, *ante*.

###### B. Severable Powers.

**413. Exercisable by person within limits of rule —Named person & others.**—A gift of all the residue, real & personal, to A., upon trust to divide it into two moieties, the income of one moiety to go to A. for life; & testator empowered his trustees to set apart out of this moiety £5,000, & to advance, by way of loan or absolute gift, the whole or any part of such sum to B. or all or any of his children, in such manner as to A. or other testator's trustees should seem meet; & when B. & his children were all dead, then the said sum to be subject to the trusts of the other moiety of the residue; & he appointed A. sole exor., & inserted in the will a power of appointing new trustees:—*Held*: (1) the power was divisible, & was to be considered as two powers, one to be exercised by A. & the other by the succeeding trustees in default of A.'s exercising his power, & the former power was valid, whatever might be said of the latter; (2) such power was not bad, because it contemplated an appointment to objects, some of whom were too remote, but a valid appointment thereunder might be made to such of its objects as were within the proper limits.—*ATTENBOROUGH v. ATTENBOROUGH* (1855), 1 K. & J. 296; 25 L. T. O. S. 155; 69 E. R. 470.

*Annotation*:—*As to* (1) *Reid. Re De Sommers, Coelenbier v. De Sommers*, [1912] 2 Ch. 622.

**414. —.**—(1) A special power which, according to the true construction of the instrument creating it, is capable of being exercised beyond lives in being & twenty-one years afterwards is, by reason of the rule against perpetuities, absolutely void, but if it can only be exercised within the period allowed by the rule, it is a good power, even although some particular exercise of it might be void because of the rule. If a power be given to a person alive at the date of the instrument creating it, it must of course, if exercised at all, be exercised during his life, & is therefore valid. If a power can be exercised only in favour of a person living at the date of the instrument creating it, it must, if exercised at all, be exercised during the life of such person, & is therefore unobjectionable. (2) The instrument itself may expressly limit a period, not exceeding the legal limits, for the exercise of the power; & where the settlor has used language from which the ct. may fairly infer that he contemplated the creation, not of a single power, but of two distinct powers, one of which only is open to objection because of the rule against perpetuities, the ct. will avoid the latter only & will give effect to the power which is not open to this objection. Thus, although a power vested in the trustees for the time being of a settlement has apparently been uniformly looked on as a single & indivisible power, it may be otherwise if the power be limited to A. & B. or other of the trustees of the settlement for the time being. In this case the ct. may treat the settlor as having created one power vested in A. & B. while trustees, & a distinct power vested in their successors, in which case the power vested in A. & B. would be open to no objection on the ground of remoteness.

Testatrix, who was domiciled & died in England, by her will appointed C. & D. exors., & gave all her real & residuary personal estate, except her shares in a certain French co., to "C. & D., hereinafter called 'my trustees,'" upon trust for sale, & to hold the net proceeds, after payment of her debts & funeral & testamentary expenses, upon trust to pay a certain charitable legacy, & to divide the residue into thirteen parts, as to eleven of them upon certain trusts, " & as to two other of

**Sect. 4.—Application of rule to powers: Sub-sect. 1, B.; sub-sects. 2 & 3.]**

such parts upon trust to pay the capital or income thereof, or neither, to my nephew E., or to apply the capital or income thereof, or any part of either, for his benefit, or for the benefit of his wife or any child or children of his as my trustees may in their absolute & uncontrolled discretion consider desirable"; & she gave all her twenty one shares in the French co. "to my trustees" upon trust to sell or retain the same & to hold the same upon trust for certain persons. Seven of the shares were charged with the payment of certain legacies:—*Held*: (3) if one power only was vested in these trustees, it might, according to the true construction of the will, be exercised during the life of any child of E. whether alive at testatrix's death or born afterwards, & was therefore avoided by the rule against perpetuities; (4) there were two powers vested in the trustees for the time being of the will (a) to pay either capital or income to E., which was only capable of being exercised during his life, & (b) a power to apply either capital or income for the benefit of E., his wife or children, which was capable of being exercised beyond the period allowed by law, & the former power must be upheld & the latter rejected.—*Re DE SOMMIERY, COLENBIER v. DE SOMMIERY*, [1912] 2 Ch. 622; 82 L. J. Ch. 17; 107 L. T. 253, 823; 57 Sol. Jo. 78.

*Annotations*:—As to (1) *Apld. Re Allott, Hanmer v. Allott*, [1924] 2 Ch. 498. As to (3) *Reid. Re Cassel, Public Trustee v. Mountbatten*, [1926] Ch. 358. *Generally, Reid. Kennedy v. Kennedy*, [1914] A. C. 215. *Mentd. Re Scott, Scott v. Scott*, [1915] 1 Ch. 592. *Re Grosvenor, Grosvenor v. Grosvenor*, [1916] 2 Ch. 375. *Re Scott, Scott v. Scott*, [1916] 2 Ch. 288; *Re Hewett, Eldridge v. Hewett* (1920), 90 L. J. Ch. 126.

415. —]—Limitations depending on or expectant upon a prior limitation, which is void for remoteness are themselves invalid; but limitations in default of appointment under a power which is void for remoteness are not necessarily invalid unless they are themselves obnoxious to the rule against perpetuities.

The powers of appointment conferred on Mrs. F. jointly with her husband, & on her if she survives him, appear to me to be valid; but the power purported to be conferred on a husband of hers who may survive her, may be, & I will assume is, open to objection (*STIRLING, J.*).—*Re ABBOTT, PEACOCK v. FRIGOUT*, [1893] 1 Ch. 54; 62 L. J. Ch. 46; 67 L. T. 794; 41 W. R. 154; 3 R. 72.

*Annotations*:—*Conad. Re Hewett's Settlement, Hewett v. Eldridge*, [1915] 1 Ch. 810. *Reid. Re Davies & Kent's Contract*, [1910] 2 Ch. 35.

**SUB-SECT. 2.—REMOTENESS IN CONTINGENCY ON WHICH POWER EXERCISABLE.**

416. Contingency must be within perpetuity period—Power exercisable by will only—Donee alive at creation of power.]—Testator bequeathed a sum of stock in trust for all or such one or more exclusive of the others of the children of his niece, as she should, by her will, appoint; &, in default of appointment, in trust for all her children living at his decease. The niece, by her will, appointed £6,000, part of the stock, to her daughter, for her separate use for life; & after her death, to such persons, etc., as the daughter should, by will, appoint, &, in default of appointment, to the niece's two sons. The two sons & the daughter

were the niece's only children, & they were all living at testator's death. After the death of the niece, her two sons & daughter & the husband of the daughter executed a deed by which, after reciting that it was conceived that the testamentary power of appointment given to the daughter, was invalid, as being an excessive execution of the power given to her mother, & that it was also conceived that, if that power should be valid & should not be exercised, than & in either event the reversion of the £6,000 expectant on the daughter's death, belonged to her two brothers & to herself & her husband; the parties, in order to obviate any doubts respecting the same & to carry their mother's intention into effect, assigned the fund to two trustees, in trust for the daughter, for her separate use for life, &, after her death, for the husband for life, & after his death, for the children of the daughter & her husband, & if they should all die under twenty one, in trust for the daughter's next of kin; & the daughter alone was empowered to appoint new trustees of the deed. A few months afterwards, the daughter made a will, in exercise of the power given to her by her mother, & appointed the fund to her husband absolutely. Some time afterwards she executed a deed, by which she appointed a new trustee of the prior deed. Shortly afterwards she died, leaving her husband & four children surviving:—*Held*: the testamentary power of appointment given to the daughter was valid: the first deed was not intended to operate, unless that power should be either void or not exercised: the daughter's will was a good execution of the power, & was not revoked by the second deed.—*PHIPSON v. TURNER* (1838), 9 Sim. 227; 2 Jur. 414; 59 E. R. 345.

*Annotations*:—*Distd. Jebb v. Tugwell* (1855), 20 Beav. 84. *Apld. Morse v. Martin* (1865), 34 Beav. 500. *Fold. Stark v. Dakyns* (1874), 10 Ch. App. 35. *Reid. Ewart v. Ewart* (1853), 1 Eq. Rep. 536; *Re Hughes, Hughes v. Footner*, [1921] 2 Ch. 208.

417. —]—A father, under a power to appoint to his children, appointed a share to a daughter for life, for her separate use, with remainder as she should by will appoint:—*Held*: this was a good execution of the power.—*MORSE v. MARTIN* (1865), 34 Beav. 500; 55 E. R. 728.

*Annotation*:—*Mentd. Re Walker, MacColl v. Bruce*, [1908] 1 Ch. 560.

418. —]—Testator gave certain property upon trust for his granddaughter A. for life, & after her death for her children or some of them, as she should by deed or will appoint. A. by her will, appointed one-fifth of the fund to each of five children, all of whom were living at the death of the original testator, for life, & directed that, after the death of each child, the share in which the child had a life interest should be held in such manner as the child might by will appoint, with limitations over in default of appointment in favour of the survivors in different events:—*Held*: a good exercise of the power of appointment.

As to the question of perpetuity, the arguments adduced have no bearing whatever. There is no doubt that, under the power which original testator by his will gave to his granddaughter, she might have given a power to appoint to children born after his death, & might, therefore, have contrived to give interests which would be void under the rules against perpetuities. But it does not follow that because the original power

**PART I. SECT. 4, SUB-SECT. 2.**  
m. Contingency must be within perpetuity period—Power exercisable by will only.]—The exercise, by the will of the donee of the power, of a

special power of appointment by will, is valid within the rule against perpetuities, no matter what conditions are imposed by the will exercising the power, if, at the date of the death

of appointor, it is clear that the person or class intended to be benefited must be ascertained, & the property vest, within the period of twenty-one years from that date.—*WHITE v.*



might have been badly exercised, yet, if it is so exercised as not to infringe the rule, the possibility of its being exercised in another way would make the power void (LORD CAIRNS, C.).—*SLARK v. DAKYNS* (1874), 10 Ch. App. 35; 44 L. J. Ch. 205; 31 L. T. 712; 23 W. R. 118, L. C. & L. JJ. *Annotation*:—*Held*. *Re Abbott, Peacock v. Frigout* (1892), 41 W. R. 154.

419. — Donee unborn at creation of power.]—Testatrix had, under her marriage settlement, a power of appointment of a certain fund to & among the children of the marriage. By her will, purporting to be in execution of the power, she appointed a portion of this fund to a son for life, with remainder to such persons as he should by his will appoint. By her will there was also a general residuary appointment, subject to all other appointments to her three daughters. She also gave other bequests to these daughters out of her own property:—*Held*: the execution of the power in favour of the appointees after the son's life interest, was void for remoteness.—*WOLLASTON v. KING* (1869), L. R. 8 Eq. 165; 38 L. J. Ch. 61; 20 L. T. 1003; 17 W. R. 641.

*Annotations*:—*Follad. Morgan v. Gronow* (1873), L. R. 18 Eq. 1. *Consd.* *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54. *Mentd.* *Bate v. Willats* (1877), 37 L. T. 221; *Champion v. Davy* (1879), 11 Ch. D. 949; *White v. White* (1882), 22 Ch. D. 555; *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1885), 55 L. J. Ch. 46; *Re Brookbank, Beauchamp v. James* (1886), 34 Ch. D. 160; *Re Chesham, Cavendish v. Dacre* (1886), 31 Ch. D. 468; *Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436; *Re Beales' Settmt.*, *Barrett v. Beales*, [1905] 1 Ch. 256; *Re Oliver's Settmt.*, *Gyver v. Leigh*, [1905] 1 Ch. 191; *Re Naah, Cook v. Frederick*, [1910] 1 Ch. 1. *Re Macartney, Macfarlane v. Macartney*, [1918] 1 Ch. 300.

420. — — — — —.]—*COOKE v. COOKE*, No. 458, *post*.

421. — Power exercisable after sale of property—Sale directed after perpetuity period.]—

(1) The rule against perpetuities requires that not only the extreme limit of the class of persons who may take, but the actual persons who are to take, should be ascertained within the prescribed period.

The rule against perpetuities requires, in my view, the ascertainment within the period not only of the extreme limits of the class of persons who may take, but of the very persons who are to take, & that because the rule is aimed at the practical object of telling who can deal with the property, & if you cannot tell who are entitled to the property, but only who may become entitled to the property, the property is practically tied up (FRY, J.).

Testatrix directed property to be sold at a period beyond the limit prescribed by the rule against perpetuities, & the proceeds to be divided between such of her grandchildren living at the time of the sale in such proportions as testatrix's sister should by will appoint:—*Held*: an appointment made by a will of the sister before the sale was a bad exercise of the power; as the class of grandchildren living at the time of the sale could not be ascertained within the prescribed limit, the gift was void for remoteness, notwithstanding that the entire class of grandchildren must be ascertained within the prescribed limit.

(2) *Semle*: a power of appointment among such members of a class as shall survive a contingency cannot be exercised until the contingency takes place.

(3) The second objection, which I think is equally fatal, is this, that C. H. exercised a power of appointment amongst a class of persons who were not ascertained at the time she exercised it. . . . I think that where a power of appointment amongst a class of people is given, the appointor must know the class—must be able to ascertain the class amongst whom he or she is so to divide the property (FRY, J.).—*BLIGHT v. HARTNOLL* (1881), 19 Ch. D. 294; 51 L. J. Ch. 162; *sub nom.* *Re BLIGHT, BLIGHT v. HARTNOLL*, 45 L. T. 524; 30 W. R. 513.

*Annotations*:—*Mentd.* *Re Morgan, Morgan v. Morgan*, [1893] 3 Ch. 222; *Re Evans, Thomas v. Thomas* (1908), 77 L. J. Ch. 583; *Townsend v. Ascroft*, [1917] 2 Ch. 14.

#### SUB-SECT. 3.—RE MOTENESS IN CONTINGENCY ON WHICH POWER TAKES EFFECT.

422. Contingency must be within perpetuity period.]—No personal property can be limited on so remote a contingency as the death of a person dying without issue generally. E. R. by will appointed a sum of £3,000 to several persons in different proportions, upon the death of her son without issue, or without making any disposition by will or deed. The son survived his mother, but died without issue, & without making any disposition by will or deed. On a bill filed by the several parties to recover their shares of this legacy:—*Held*: the gift over depending on the son's dying without issue generally, was, by the known rules of law & equity, too remote to take place, & therefore void.—*GREY v. MONTAGU* (1770), 3 Bro. Parl. Cas. 314; 1 E. R. 1341, L. C.

423. —.]—A. by will devised to trustees to the use of B. for life, remainder to trustees, etc., remainder to the first & other sons of B. remainder to the daughters of B. remainder to the use of such person as he should appoint by deed; & afterwards by a deed, in which he recited the will, he appointed the same premises "after the death of B. & failure of her issue, to the use of the first & other sons of C., etc." B. afterwards died without issue:—*Held*: the limitations created by the will & the deed could not be united; & the limitation in the latter, to the first & other sons of C., etc., was too remote to take effect, being after a general failure of issue of B.—*HABERGHAM v. VINCENT* (1792), 5 Term Rep. 92; 101 E. R. 53; *subsequent proceedings* (1793), 2 Ves. 204, L. C.

*Annotation*:—*Mentd.* *Venables v. Morris* (1797), 7 Term Rep. 342.

424. —.]—Settlement on husband & wife for their lives, remainder to the sons in tail male, remainder to the daughters in tail, remainder to the survivor of the husband & wife in fee, with power to the wife, if the husband survived, & all the children of the marriage died without issue, to charge the estate with £5,000:—*Held*: the power is void for remoteness.—*BRISTOW v. BOOTHBY* (1826), 2 Sim. & St. 465; 4 L. J. O. S. Ch. 88; 57 E. R. 424.

*Annotations*:—*Held.* *Ellicombe v. Gompertz* (1837), 3 My. & Cr. 127; *Eno v. Eno* (1847), 6 Hare, 171.

425. —.]—Real estate was devised in 1778 to the son-in-law of testator for his life, remainder to his daughter, the wife of such son-in-law, for her

STAMPS COMR. (1908), 8 S. R. N. S. W. 287; 25 N. S. W. W. N. 104.—*AUS.*  
n. —.]—*BANDON (EARL) v. MORELAND*, [1910] 1 L. R. 220.—*IR.*

#### PART I. SECT. 4, SUB-SECT. 3.

422 i. Contingency must be within

perpetuity period.]—A money fund was settled in trust for the issue of the marriage of M. & his wife; after their deaths in such shares, etc., & at such times as M. should appoint. M. by his will, appointed the fund to his three sons in equal shares, their respective portions to be paid to them as & when

they should attain their respective ages of twenty-five years & not before:—*Held*: the appointment was void for remoteness.—*MASSEY v. BARTON* (1844), 7 I. Eq. R. 95.—*IR.*

423 ii. —.]—*Re HALLINAN'S TRUSTS*, [1904] 1 I. R. 452.—*IR.*

**Sect. 4.—Application of rule to powers: Sub-sects. 3 & 4, A. & B. (a).]**

life, remainder to her first & other sons successively in tail, remainder to her daughters as tenants in common in tail, with cross remainders between them; &, in default of such issue of his daughters, to such person or persons as she should by deed or will appoint. In 1841, the daughter, the donee of the power, executed a deed poll of appointment, which, reciting the limitations of the estate by the will that she had not any issue of her body, & that she was desirous of exercising the power subject to the life interest of her husband & herself as thereafter mentioned, appointed that, from & after the decease of the survivor of her husband & herself, " & there being a failure of issue of her " said donee of the power, the estate should go, remain & be unto & to the use of plff., his heirs & assigns for ever:—*Held*: this was a good appointment of the estate under the power; the words " & there being a failure of issue of," etc., must be read either parenthetically, or as applying to the time of the death of the survivor of the donee of the power & her husband.—*ENO v. ENO* (1847), 6 Hare, 171; 16 L. J. Ch. 358; 11 Jur. 746; 67 E. R. 1127.

428. — **Power to unborn person to appoint so as to take effect on marriage.**—(1) Where an appointment is made to take effect out of a trust fund generally, & afterwards an appointment is made of a specific portion of the trust fund, the portion of the fund not specifically appointed must be first applied in satisfaction of the first appointment; & the specifically appointed portion is only to be resorted to in the event of a deficiency. G. having, under his marriage settlement, a power to appoint amongst his children, appointed a portion of the trust fund to his daughter L. for life, & after her death as she should by will appoint:—*Held*: the power of appointment by will conferred on the daughter was void for remoteness.

(2) G. also appointed another portion of the trust fund upon such trusts to take effect after the marriage of his daughter E., then unmarried, as she should by deed or will appoint, & in the meantime upon trust for her for life, & after her death as she should by will appoint. E., upon her marriage, purported to appoint the fund to the trustees of her marriage settlement. G. afterwards executed a deed poll by which, after reciting the appointments in favour of L. & E. & also other appointment, he in exercise of the power given to him by his marriage settlement, confirmed the several appointments appearing by the recitals to have been previously made, & directed & appointed that the trustees of the settlement should hold the trust funds upon the trusts therein-after mentioned; & he reserved to himself a power to revoke the direction & appointment thereby made, which power of revocation G. afterwards exercised. E. also afterwards made a second appointment to the trustees of her marriage settlement of the fund:—*Held*: the original appointment in favour of E. was void for remoteness, & could not be supported, as an appointment to E. & a re-settlement by her.—*MORGAN v. GROW* (1873), L. R. 18 Eq. i; 42 L. J. Ch. 410; 28 L. T. 434, L. C.

*Annotation*.—As to (2) *Reid*. *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54.

427. — **J.**—(1) Testatrix gave her residuary estate to trustees upon trust to pay one-fifth of

the income thereof to each of her two sons & three daughters for life, & after the death of each daughter leaving a husband to pay the income of her share to her husband, during his life, & after the death of each of her sons & the survivor of each of her daughters & any husband with whom she might intermarry, leaving children or more remote issue living at the time or such death, in trust for the children or more remote issue of such son or daughter as he or she might appoint & in default of appointment for the children then living & the issue of such as might be then dead, & in case of the death of any son or daughter without leaving issue, then, after the death & failure of issue of each son, & after the death of the survivor of each daughter so dying & whose issue should so fail & any husband with whom she might have intermarried, then the trustees were to stand possessed of the share to the income of which such son or daughter was entitled, to pay the income thereof equally amongst the survivors of testatrix's sons & daughters during their lives; & on the death of the last survivor of the sons or daughters & the husbands of daughters there was an ultimate trust of the *corpus* for the children of sons & daughters who had died leaving children then living & the issue then living of children who should be then dead. Testatrix died in 1881, leaving her two sons & three daughters her surviving. E., one of the daughters, who at the date of the will was married, died intestate in 1903 without having had any children, & leaving a husband who died in 1909:—*Held*: the gift over of the income of her share to the survivors of testatrix's sons & daughters was not void for remoteness, but there was no valid gift over of the *corpus* of her share.

(2) Another daughter, F., was also married at the date of the will. Her husband died in 1895, & she had not married again. She had nine children, all of whom were living & had attained twenty-one. By a deed poll in 1907 in exercise of her power she irrevocably appointed her share to her nine children in equal shares, subject to her life interest:—*Held*: the limitations, by the joint operation of the will & deed of appointment created, of the share to the income of which F. was entitled for her life were not such as must necessarily take effect, if at all, within the limits of the rule against perpetuities; & consequently the power had not been validly exercised.

(3) *Semble*: if F. had appointed merely life interests to her children or even remote issue in existence at her death or had appointed interests to her children or issue which by the very terms of their creation must vest & take effect if at all within the limits allowed by the rule against perpetuities such appointments would have been a valid exercise of the power.—*Re NORTON, NORTON v. NORTON*, [1911] 2 Ch. 27; 80 L. J. Ch. 119; 103 L. T. 821; 55 Sol. Jo. 169.

*Annotation*.—*Generally*, *Expld. Re Hewett's Settlement*, *Hewett v. Eldridge*, [1915] 1 Ch. 810.

**SUB-SECT. 4.—REMTENESS OF OBJECTS OR APPOINTEES.**

**A. General Powers.**

428. **Objects cannot be too remote**—General power equivalent to ownership.]—The general rule of law, that the interest of an appointee under a

**PART I. SECT. 4, SUB-SECT. 4.—A.**  
o. *Limitations in default of appointment—Whether within rule.*—*Limitations in default of appointment*

under a power which is void for remoteness are not invalid unless they themselves contravene the rule against perpetuities.—*Re*

*HOBSON v. SHARP*, [1907] V. L. R. 794.—*AUS.*  
p. —.]—*D'ABRADDIE v. BIZOIN* (1871), 5 I. R. Eq. 205.—*IR.*



power must be considered as arising under the deed creating the power, is subject to exception where the limitations created by the exercise of the power would, if inserted in the deed creating the power, be void for remoteness.

A general power being equivalent to the fee, the same estates might be created by either" (AMPHLETT, B.).—*A.-G. v. CHARLTON* (1876), 1 Ex. D. 204; 45 L. J. Q. B. 354; 34 L. T. 503; 24 W. R. 788; *on appeal* (1877), 2 Ex. D. 398, C. A.; *sub nom. CHARLTON v. A.-G.* (1879), 4 App. Cas. 427, H. L.

*Annotations*.—*Reid. A.-G. v. Mitchell* (1881), 6 Q. B. D. 548; *A.-G. v. Chapman*, [1891] 2 Q. B. 526; *A.-G. v. Selborne*, [1902] 1 K. B. 388. *Mentl. Wolverton v. A.-G.*, [1898] A. C. 535.

429. Period runs from time to exercise.—Power exercisable by will.]—*TAYLOR v. FROBISHER*, No. 92, *ante*.

430. ———.]—A power to appoint by will is a general power within the scope of Wills Act, 1837 (c. 26), s. 27, so that where a person having a power to appoint real or personal estate by will makes a residuary disposition of his property without reference to the power, the will will be construed as an execution of the power. But such a general power does not constitute ownership; so that, for the purpose of considering the question whether the exercise of the power be or be not void for remoteness, the real or personal estate subject to the power will be deemed to be the property of the donor, & not of the donee of the power.

J. bequeathed sums amounting to £5,000 after the deaths of certain persons mentioned, upon trust for H. for life, & after her death upon trust for such person or persons as H. should, by her last will & testament, appoint. H. made a will not referring in any way to the power, but leaving the residue of her property in trust for her daughter S. for life, for her separate use, without power of anticipation, & after her death in trust for the children of S., who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters should attain that age or marry. S. was born after the death of J. P.:—*Held*: (1) the will of H. must be construed as an execution of the power created by the will of J. according to Wills Act, 1837 (c. 26), s. 27; (2) the exercise of the power was void for remoteness.—*Re POWELL'S TRUSTS* (1869), 39 L. J. Ch. 188; 18 W. R. 228.

*Annotations*.—*As to* (1) *N.F. Re Flower, Edmonds v. Edmonds* (1885), 55 L. J. Ch. 200; *Rous v. Jackson* (1885), 29 Ch. D. 521. *Reid. Phillips v. Cayley* (1889), 38 W. R. 241.

431. ———.]—Testator devised freeholds to his daughter H., a married woman, for her life; & as to certain land at K., which formed a portion of those freeholds, he directed that she or her husband, should she marry, should not have power to mortgage, sell, or give away during her life, but at her decease she might give it to whom she pleased:—*Held*: the power of appointment conferred upon H. as to the land at K. was exercisable by will only; & inasmuch as the power was general limitations created by her will must be calculated from the date of her death in order to ascertain whether they offended against the rule against perpetuities.—*Re FLOWER, EDMONDS v. EDMONDS* (1885), 55 L. J. Ch. 200; 53 L. T. 717; 34 W. R. 149.

432. ———.]—A married woman exercised a general testamentary power:—*Held*: time under the rule against perpetuities ran from her death, & not from the date of the instrument creating the power.—*ROUS v. JACKSON* (1885), 29 Ch. D. 521; 54 L. J. Ch. 732; 52 L. T. 733; 33 W. R. 773.

*Annotations*.—*Foll. Re Flower, Edmonds v. Edmonds* (1885), 55 L. J. Ch. 200. *Reid. Re Devon's S. E., White v. Devon, Re Steer, Steer v. Dobell*, [1896] 2 Ch. 562.

### B. Special Powers.

#### (a) Objects a Class.

433. Objects must be ascertainable within period reckoned from date of creation.]—Testator, who had under a settlement a power of appointment over leasehold & other personal estate among his children or grandchildren or other issue, by his will gave a moiety of the property on trust for his daughters who should survive him, & attain twenty-four, in equal shares. Testator's youngest daughter was more than three years old at the time of his death:—*Held*: the appointment was not void for remoteness.—*VON BROCKDOREFF v. MALCOLM* (1885), 30 Ch. D. 172; 55 L. J. Ch. 121; 53 L. T. 263; 33 W. R. 934.

*Annotations*.—*Conrad. Re Thompson, Thompson v. Thompson*, [1906] 2 Ch. 199. *Foll. Re Paul, Public Trustee v. Pearce*, [1921] 2 Ch. 1. *Reid. Re Clarke's Settlement, Trust, Wanklyn v. Streetfield*, [1916] 1 Ch. 467. *Mentl. Re Cotton, Wood v. Cotton* (1888), 40 Ch. D. 41; *Re Paget, Re Mellor, Mellor v. Mellor* (1898), 78 L. T. 72; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563; *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518; *Re Weston's Settlement, Neeves v. Weston*, [1906] 2 Ch. 620; *Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125; *Re Slack's Settlement, Re Slack, Butt v. Slack*, [1923] 2 Ch. 359.

434. ———.]—*Re BOWLES, PAGE v. PAGE*, No. 389, *ante*.

435. ———.]—*Re NORTON, NORTON v. NORTON*, No. 427, *ante*.

436. ———.]—Testator, who died in 1895, gave a share in his residuary estate to trustees in trust to pay the income thereof to his daughter, Mrs. A., during her life, & to hold the share after her death, but only if she should so direct by will or codicil, in trust for such child or children of hers & in such manner as she should by will or codicil appoint. He also by his will declared that, subject as aforesaid, he left all his residuary estate, "not hereby or hereunder" effectually disposed of in trust for his two other daughters. In 1917 Mrs. A. by her will appointed that the share bequeathed to her by her father's will should be held in trust for her son J. contingently on his attaining the age of twenty-five years. She was married for the second time in Apr. 1919, & died in July, 1919. J. was then eighteen or nineteen years old:—*Held*: the appointment to J. was valid, although the vesting was postponed until he was twenty-five years old.—*Re PAUL, PUBLIC TRUSTEE v. PEARCE*, [1921] 2 Ch. 1; 90 L. J. Ch. 446; 125 L. T. 566.

437. ———.]—*As individuals & as class*.]—*BLIGHT v. HARTNOLL*, No. 421, *ante*.

438. ———.]—*Re SAMUDA'S SETTLEMENT TRUSTS, HORNE v. COURTENAY*, No. 324, *ante*.

439. ———.]—*Class comprising valid & invalid objects*.]—One having a power of appointing a fund amongst "her children, or remoter issue," appointed a sum to one of her children absolutely, & then attempted to limit it over to the unborn children of such child. The appointment to the

### PART I. SECT. 4, SUB-SECT. 4.—B. (a).

433 I. Objects must be ascertainable within period reckoned from date of creation.]—The exercise, by the will of the donee of the power, of a special

power of appointment by will, is valid within the rule against perpetuities, no matter what conditions are imposed by the will exercising the power, if, at the date of the death of the appointor, it is clear that the person

or class intended to be benefited must be ascertainable, & the property vest, within the period of the twenty-one years from that date.—*WHITE v. STAMPS COMB*, [1908], 8 S. R. N. S. W. 287; 25 N. S. W. N. 104.—*AUS.*

**Sect. 4.—Application of rule to powers: Sub-sect. 4, B. (a), (b) & (c) 1.]**

grandchildren being too remote:—*Held*: the prior absolute gift to the child was effectual.—*KAMPE v. JONES* (1837), 2 Keen, 756; Coop. Pr. Cas. 13; 7 L. J. Ch. 63; 1 Jur. 814; 48 E. R. 821.

*Annotations*.—*Consd.* Lasseuse v. Tierney (1849), 2 H. & Tw. 115. *Apld.* Harvey v. Stracey (1852), 1 Drew. 73. *Refd.* Churchill v. Churchill (1887), L. R. 5 Eq. 44; Cooke v. Cooke (1887), 38 Ch. D. 202.

**440.** ———.]—A. had power to appoint a fund amongst all the children of B., begotten & to be begotten, & their issue, & in default of appointment, the fund was given to the children equally. B. had only six children, all of whom were living when the power was created. A. directed by his will that the share which every child of B., begotten or to be begotten, was entitled to in default of appointment, should be held in trust for that child for life &, after its death, for its children:—*Held*: the appointment was not void for remoteness.—*GRIFFITH v. POWNALL* (1843), 13 Sim. 393; 60 E. R. 152.

*Annotations*.—*Distd.* Webster v. Boddington (1858), 28 Beav. 128. *Apld.* Knapping v. Tomlinson (1864), 34 L. J. Ch. 3. *Distd.* Bentinck v. Portland (1877), 7 Ch. D. 693. *Refd.* Wilkinson v. Duncan (1861), 30 Beav. 111; Re Russell, Dorrell v. Dorrell, [1895] 2 Ch. 698.

**441.** ———.]—By a marriage settlement, the trustees were directed, after the decease of the survivor of the husband & wife, to convey, assign & deliver the settled property to such children or child of the marriage, or the lawful issue of such who should or might be living at the decease of the survivor, & who should attain twenty-one, to whom the husband & wife should jointly appoint, or to whom the survivor of them should appoint; & in default of appointment, to permit the property to be held & enjoyed by & equally between all the children of the marriage & the survivors of them, & the lawful issue of such children or child so surviving the husband & wife & attaining twenty-one, such issue representing & taking the share that the parent would have taken if living:—*Held*: the words in the clause creating the power, "who shall or may be living at the decease of the survivor," referred to the children of the marriage & not to their issue; & that clause exceeded the limits prescribed by law; & consequently, an appointment made to the son of a daughter of the marriage was void.—*THOMAS v. THOMAS* (1844), 14 Sim. 234; 8 Jur. 1019; 60 E. R. 348.

**442.** ———.]—*SLARK v. DAKYNS*, No. 418, *ante*.

**443.** ———.]—Upon the actual words of the will you have no right to limit the power; but you have a right to limit it to a class to whom a valid appointment can be made under the law against perpetuity (*JESSEL, M.R.*).—*Re VEALE'S TRUSTS* (1876), as reported in 4 Ch. D. 61; *on appeal* (1877), 5 Ch. D. 622.

*Annotation*.—*Mentd.* Chamberlain v. Napier (1880), 15 Ch. D. 614.

**444.** ———.]—(1) A marriage settlement contained a power for the wife to appoint by will among the issue of the marriage, &, in default of appointment, the trust fund was to be in trust for the issue of the marriage, if more than one in equal shares, the son or sons at twenty-one, & the daughter or daughters at twenty-one or marriage; &, in case there should be but one child issue of the marriage, or, if more than one, all but one should die without having become entitled, then in trust

for such only or surviving child; & in case there should not be any issue of the marriage, or all such issue should die without having become entitled, then upon other trusts:—*Held*: the word "issue" in the power of appointment must be construed in its strict technical sense, & an appointment by the wife to the children of a deceased son was valid.

(2) The wife appointed another part of the fund on trust for another living son for his life, with remainder to his child or children who should attain twenty-one, if more than one in equal shares. Testatrix also bequeathed property of her own to the persons who were entitled in default of appointment. It was admitted that the appointment to the children of the living son was void for remoteness:—*Held*: the appointment being *ex facie* void, the will must be read as if the appointment had not been contained in it, & the persons entitled in default of appointment were not bound to elect between the interest which they took in that way, & the benefits given to them by testatrix out of her own property.—*Re WARREN'S TRUSTS* (1884), 28 Ch. D. 208; 53 L. J. Ch. 787; 50 L. T. 454; 32 W. R. 641.

*Annotations*.—*As to* (1) *Apld.* *Re Birks, Kenyon v. Birks*, [1899] 1 Ch. 703. *As to* (2) *Consd.* *Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436; *Re Beales' Settmt.*, Barrett v. Beales, [1905] 1 Ch. 256. *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1. *Refd.* *Wheatley, Smith v. Spence* (1884), 27 Ch. D. 606; *Re Brooksbank, Beauchamp v. James* (1880), 34 Ch. D. 160; *Re Oliver's Settmt.*, Evered v. Leigh, [1905] 1 Ch. 191.

**445.** ———.]—Where the donee of a special power of appointment has exercised it in favour of non-objects as well as objects of the power, the latter are only entitled to the shares of the property appointed that they would have taken if the whole exercise of the power had been valid, while the residue of the property is distributable as in default of appointment.

The principle seems to be that you must wait & see in a case of appointment. You take the appointment as being exercised at the moment of distribution arriving, & you will then know whether the appointment is wholly to persons within the class capable of taking (*COZENS-HARDY, M.R.*).—*Re WITTY, WRIGHT v. ROBINSON*, [1913] 2 Ch. 666; 83 L. J. Ch. 73; 109 L. T. 590; 58 Sol. Jo. 30, C. A.

**(b) Time from Which Period Runs.**

**446.** From time of instrument creating power.]—*Re THOMPSON, THOMPSON v. THOMPSON*, No. 12, *ante*.

**(c) Exercise of Power.**

**i. Validity of.**

**447.** Test of validity—Words executing power read into instrument creating it.]—Appointee takes under the power, as if inserted therein; but not so as to take by relation from creation of the power, as in assignment on commission of bkpcy. or in bargain & sale, enrolled.

The meaning that the persons must take under the power, or as if their names had been inserted in the power, is, that they shall take in the same manner as if the power & the instrument executing the power had been incorporated in one instrument; then they shall take as if all that was in the instrument executing, had been expressed in that giving the power (*LORD HARDWICKE, C.*).—*MARLBOROUGH (DUKE) v. GODOLPHIN (LORD)* (1750), 2 Ves. Sen. 61; 28 E. R. 41, L. C.

*Annotations*.—*Consd.* Robinson v. Hardcastle (1788), 2 Term Rep. 241; Brown v. Higgs (1803), 8 Ves. 561; A.-G. v. Pickard (1838), 3 M. & W. 552; Burrough v.

**PART I. SECT. 4, SUB-SECT. 4.—B. (b).**

**448.** From time of instrument creating power.]—*Re McLEAN, BULLEN v. PATON*, [1926] V. L. R. 21; 47 A. L. T. 107.—*AUS.*

*Philcox, Lacey v. Philcox* (1840), 5 My. & Cr. 73. *Apld.* *Re Bowles, Page v. Page*, [1905] 1 Ch. 371. *Reid. Jenkins v. Quinchant* (circa 1745), 5 Ves. 596, n.; *Teynham v. Webb* (1751), 2 Ves. Sen. 198; *Southby v. Stonehouse* (1755), 2 Ves. Sen. 610; *Hurst v. Winchelsea* (1759), 1 Wm. Bl. 187; *Foley v. Parry* (1833), *Coop. temp. Brough.* 219; *Salisbury v. Denton* (1857), 3 K. & J. 529; *Re Caplin's Will* (1865), 2 Drow & Sm. 527; *Re Vizard's Trusts* (1866), 1 Ch. App. 588; *De Serre v. Clarke* (1874), 43 L. J. Ch. 821; *Wilson v. Duguid* (1883), 24 Ch. D. 244; *Re Dowsett, Dowsett v. Meakin*, [1901] 1 Ch. 398; *Re Moses, Beddington v. Beddington*, [1902] 1 Ch. 100. *Mosca. Hawkins v. Kemp* (1803), 3 East, 410; *Pocock v. A.-G.* (1876), 3 Ch. D. 342.

448. ———.]—By a marriage settlement, four different portions of property were limited in the following manner: first, the wife was given a general power of appointment over £3,000 to take effect upon her own death; secondly, the wife had a special power of appointment over the residue of the stocks & funds, to be exercised in favour of a particular class of relations, & to take effect, not upon her own death, but upon the death of her husband; thirdly, the wife had a general power of appointment over the plate, furniture, etc., but not to take effect until her husband's death; fourthly, the wife had a general power to dispose of her jewels, trinkets, etc., to take effect upon her own death. The wife's will, which was dated before the Wills Act, 1837 (c. 26), & was properly executed in the form prescribed for the execution of the powers in the settlement, commenced, I, S. M., do, by virtue of the power & authority reserved to me by my marriage settlement, hereby make, publish, & declare this to be my last will & testament. Testatrix then referred specially to her power of appointing the £3,000, & disposed of it. The third & fourth portions of the property she disposed of without referring to her power. Lastly, she gave & bequeathed, directed & appointed all the rest, residue & remainder of her moneys, & other her personal estate, of whatsoever description, amongst the class of relations pointed out by the settlement, but did not refer to the power. As to the first, third, & fourth portions, no question was raised; but as to the second portion, being the residue, it was held, that the will was a good execution of the power. By the settlement, the trustees were, after the death of the husband, in case of his surviving his wife, to stand possessed of the residue, above referred to as the second portion of the property, in trust for all & every or such one or more of the wife's relations in blood, at the time of her decease, within the eighth degree of consanguinity to her, in such shares & proportions, & with such future or executory or other trusts, being for the benefit of the said relations in blood of the wife within the degree aforesaid, as the wife should by will direct or appoint:—*Held*: the appointment which was made by the wife was valid, notwithstanding that the persons who were to take as appointees, & the shares & interests which they were to take under the appointment, were made contingent upon a future event; & although the fund was appointed not entirely to objects of the power, but partly to objects of the power & partly to strangers, the appointment was nevertheless valid *pro tanto*, that is, it was valid *quoad* those who were objects of the power, & invalid as to those persons who were not properly objects of the power.

An appointment under a power will be void for

remoteness, whenever the same limitation, if contained in the instrument creating the power, would be too remote (*KINDERSLEY, V.-C.*).—*HARVEY v. STRACEY* (1852), 1 Drew. 73; 22 L. J. Ch. 23; 20 L. T. O. S. 61; 16 Jur. 771; 61 E. R. 379.

*Annotations*:—*Consd. Pomfret v. Perring* (1854), 18 Beav. 618; *Re Farncombe's Trusts* (1878), 9 Ch. D. 652. *Apld.* *Re Thompson, Thompson v. Thompson* (1906), 75 L. J. Ch. 599. *Reid. Whitehead v. Bennett* (1853), 1 Eq. Rep. 560; *Churchill v. Churchill* (1867), L. R. 5 Eq. 44; *Re Heales' Settlement, Barrett v. Heales*, [1905] 1 Ch. 256; *Re Witty, Wright v. Robinson*, [1913] 2 Ch. 606.

449. ———.]—By marriage settlement, dated in 1821, real estate was conveyed to trustees to the use of the settlor, W. M. for life, & after his death to the use of all or any exclusively, of the children, grandchildren, or other issue of W. M., to be born before the appointment was made, as he should by deed or will appoint, & in default to the uses therein declared. By will dated in 1867, W. M. appointed the estate to his son, W. E. M. in fee, but in case he should have no child who should attain twenty one, then to the settlor's grandson W. M. B. in fee:—*Held*: that the executory gift over to W. M. B. was void for remoteness.

The law is settled, that where a person takes property by virtue of the execution of a special or limited power of appointment, he takes directly under the instrument creating the power (*MALINS, V.-C.*).—*Re BROWN & SIBLY'S CONTRACT* (1876), 3 Ch. D. 156; 35 L. T. 305; 24 W. R. 782.

*Annotations*:—*Reid. Re Smith's Estate* (1876), 4 Ch. D. 70; *Re Bellis's Trusts* (1877), 5 Ch. D. 504.

450. ———.]—*Re BIRLEY, CLARKE v. CROUZET* (1895), 39 Sol. Jo. 263.

451. ———.]—With reference to circumstances at time of taking effect.]—*Re THOMPSON, THOMPSON v. THOMPSON*, No. 12, *ante*.

452. ———.]—(1) Testator devised his D. estate to trustees upon trust for his wife for life, & subject thereto & to the raising of two sums of £4,000 each, upon trust to assure the same "to such uses for such estates & with & subject to such powers & provisos as under & by virtue of" two deeds dated July 5, 1854, & Feb. 26, 1859, " & all mesne assurances, acts, & operations of law" should at the death of his wife be subsisting & capable of taking effect of & concerning the W. estate. Shortly after testator's death in 1875 there was a re-settlement of the W. estate, but at the death of testator's widow in 1912 there was nothing in the then subsisting uses, powers, & provisos of the W. estate which, if originally inserted in testator's will, would have infringed the rule against perpetuities:—*Held*: the referential devise of the D. estate was not void for remoteness.

(2) The rule against perpetuities is that an executory trust or limitation not only may but necessarily must take effect, if it takes effect at all within a life or lives in being & twenty-one years after, & if at the time of its creation the limitation is so framed, as that an event can be named in which, if it should happen, the rule would be infringed, the limitation is bad (*BUCKLEY, L.J.*).

(3) *Dungannon v. Smith*, No. 9, *ante*, is not an authority for the proposition that the rule against perpetuities is infringed by uncertainty

PART I. SECT. 4, SUB-SECT. 4.—B.  
(c) 1.

451 i. Test of validity.—Words executing power read into instrument creating it.—With reference to circum-

stances at time of taking effect.]—In order to ascertain whether a power of appointment & the exercise thereof infringes the rule against perpetuities you must wait & see how in fact the power has been executed, & in order

to test the validity of the appointment you must treat the appointment as if written in the original instrument creating the power.—*Re ELIOT* (1913), 21 O. W. R. 494; 4 O. W. N. 1198; 11 D. L. L. 34.—*CAN.*

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at testator's death whether the limitations introduced by reference will or will not exceed the rule (BUCKLEY, L.J.).—*Re FANE, FANE v. FANE*, [1913] 1 Ch. 404; 82 L. J. Ch. 225; 108 L. T. 288; 29 T. L. R. 306; 57 Sol. Jo. 321, C. A.

**ii. Gift Over after Life Interest to Appointee.**

**453. Life interest followed by estate tail.]—**A power being given to appoint an estate among children. *Qu.*: whether it is well executed by giving to a son for life with remainder to his sons in tail?—*ROBINSON v. HARDCASTLE* (1786), 2 Bro. C. C. 22; 29 E. R. 11, L. C.; *subsequent proceedings* (1788), 2 Term Rep. 241; 2 Bro. C. C. 344, L. C.

*Annotation*:—*Reid. Thellusson v. Woodford* (1805), 1 Bos. & P. N. R. 357.

**454. Life interest followed by general power of appointment by will—Object alive at creation of power.]—***PHIPSON v. TURNER*, No. 416, *ante*.

**455. ———.]—***MORSE v. MARTIN*, No. 417, *ante*.

**456. ———.]—***SLARK v. DAKYNS*, No. 418, *ante*.

**457. ——— Object unborn at creation of power.]—***WOLLASTON v. KING*, No. 419, *ante*.

**458. ———.]—**(1) Marriage settlements gave the intended husband & wife power by deed, or the survivor by deed or will to appoint among children. The husband survived, & by will appointed the settled property among his three daughters equally, with a proviso that if at the time of his death, any of them should be unmarried, her share would be held on trust for her for life, & after her decease, in case she should die leaving issue, as she should appoint & in default of appointment or in case she should not leave issue, on corresponding trusts in favour of his other children:—*Held*: the trusts of the proviso were inseparable, & totally void for remoteness, & the absolute gift in favour of a daughter unmarried at the death of the testator prevailed.

(2) By an ante-nuptial settlement, dated 1834, to which the wife, an infant, was party, her parents agreed & the husband covenanted, that the husband & wife would, on her attaining twenty-one, convey her real estate, to the uses of the settlement. In 1836, the wife, having attained twenty-one, by deed duly acknowledged in which the husband concurred, granted the real estate to the uses of the settlement:—*Held*: for the purpose of testing the validity of the exercise of a power, with reference to the rule against perpetuity, the real estate was settled in 1834.—*COOKE v. COOKE* (1887), 38 Ch. D. 202; 59 L. T. 693; 36 W. R. 756.

*Annotation*:—*As to* (1) *Apld. Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482.

**459. Life interest followed by gift to executor.]—**Husband & wife, having, under their marriage settlement, a joint power of appointment over personalty in favour of the children of the marriage, of whom there were three survivors, appointed one third of the fund to trustees upon such trusts as H., one of the sons, by deed, executed with the consent of the father during his life, & after his death with the consent of the trustees of his will, or by will, should appoint; & in default of such appointment, upon trust for H. for life, or until bkpcy. or assignment, such bkpcy. or assignment being limited to twenty one years after the death of his surviving parent; &

after H.'s death, upon trust for his exors. or administrators, as part of his personal estate; but if such interest should be previously determined, then upon the trusts therein mentioned:—*Held*: the appointment to such uses as H. should appoint with consent of the trustees, was void, but the limitation over in default of appointment by H. was valid, & gave H. an absolute interest in the share, subject to the contingency of his committing a forfeiture within the prescribed period.—*WEBB v. SADLER* (1873), 8 Ch. App. 419; 42 L. J. Ch. 498; 28 L. T. 388; 21 W. R. 394, L. C. & L. J.J.

*Annotations*:—*Consd. Williamson v. Farwell* (1887), 35 Ch. D. 128; *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54. *Mentd. Re Clay, Clay v. Clay* (1885), 54 L. J. Ch. 648; *Scottney v. Lomer* (1885), 29 Ch. D. 535; *Re Thompson, Machell v. Newman* (1886), 55 L. T. 85.

**460. Life interest followed by gift to next of kin—Next of kin objects of power.]—**An appointment to an object of a power for life with remainder to his next of kin will take effect if at the death of the tenant for life his next of kin are objects of the power.

This power may be properly exercised by appointing to next of kin, if next of kin happen to be within the power. With respect to the appointment to the next of kin of the youngest child of R. it is admitted that it offends the rule against perpetuities, & accordingly it must fail (*PEARSON, J.*).—*Re COULMAN, MUNBY v. ROSS* (1885), 30 Ch. D. 186; 55 L. J. Ch. 34; 53 L. T. 560.

*Annotation*:—*Reid. Re Witty, Wright v. Robinson*, [1913] 2 Ch. 666.

**iii. Invalid Exercise of Power.**

**461. Appointment made with concurrence of object—Treated as appointment to object—& settlement by him.]—***ROUTLEDGE v. DORRIL*, No. 567, *post*.

**462. ———.]—**(1) The donees of a power of appointment appointed to their son, an object of the power, for life & then to any wife of such son, the wife not being an object of the power, for her life. The son was a party to the deed of appointment:—*Held*: the appointment to the wife was good, as the deed operated as a settlement by the son of the appointed fund.

(2) A settlement upon any children attaining twenty-three years of age of the settlor by any wife:—*Held*: void as infringing the rules against perpetuities & double possibilities.

(3) A power of appointment to the issue of the settlor by any wife, subject to the life interests of the settlor & his wife, such issue to be born in his lifetime, is not validly exercised by an appointment by the settlor's will to the settlor's daughter.—*WHITTING v. WHITTING* (1908), 53 Sol. Jo. 100.

*Annotations*:—*As to* (2) *Apld. Re Nash, Cook v. Frederick*, [1909] 2 Ch. 450; *Re Park's Settltmt., Foran v. Bruce*, [1914] 1 Ch. 595. *Consd. Re Bullock's Will Trusts, Bullock v. Bullock*, [1915] 1 Ch. 493. *N.F. Re Garnham, Taylor v. Baker*, [1910] 2 Ch. 413.

**Effect of invalid exercise generally.]—***See POWERS*, pp. 490 *et seq.*

**Whether question of election raised.]—***See EQUITY*, Vol. XX., pp. 431–433, Nos. 1602–1608.

**SUB-SECT. 5.—COLLATERAL POWERS.**

**A. Power arising on a Contingency.**

**463. Event must necessarily happen within perpetuity period.]—***HALE v. PEW*, No. 188, *ante*.

*B. Duration of Power.*

**464. Duration depends on construction of instrument creating power.**—A power given to the trustees of a settlement or will to sell land comprised in it can be exercised by them after the property has, under the trusts, become absolutely vested in persons who are *sui juris*, if on the construction of the instrument it appears to be the intention of the settlor or testator that it should be then exercised, provided that the power in its creation was not obnoxious to the rule against perpetuities, & that the *cestuis que trust* have not put an end to the trusts by electing to take the property as it stands.

I must observe that there is the greatest possible distinction between the determination of a power under the instrument which created it, & its extinction by the concurrence of the persons who are entitled to take the property which is the subject of the power (FRY, J.).—*Re COTTON'S TRUSTEES & LONDON SCHOOL BOARD* (1882), 19 Ch. D. 624; 51 L. J. Ch. 514; 46 L. T. 813; 30 W. R. 610.

*Annotations*.—*Consd.* *Re Sudeley & Baines*, [1891] 1 Ch. 334; *Re Jump, Galloway v. Hope*, [1903] 1 Ch. 129. *Reff.* *Re Dyson & Powke*, [1896] 2 Ch. 720; *Re Horsnall, Womersley v. Horsnall*, [1909] 1 Ch. 631.

**465.** —.]—The question of the duration of a power in a settlement is, if the rule against perpetuities is not infringed, one of intention. A power of sale given by a will to trustees to enable them to perform a trust for the maintenance, out of capital as well as income, of a lunatic during his life is not determined by the lunatic's becoming absolutely entitled to the property so long as he is unable to call for a conveyance.—*Re JUMP, GALLOWAY v. HOPE*, [1903] 1 Ch. 129; 72 L. J. Ch. 16; 87 L. T. 502; 51 W. R. 260.

**466. Power changing nature of interests—Outside limit of rule.**—Leasehold estates bequeathed, in trust to pay the rents & profits to the persons for the time being entitled under the limitations of real estate, devised in strict settlement: with power to the trustees, at any time with consent of the persons so entitled, or, if minors, at their own discretion, to sell, and invest the produce in real estate to the same uses.

The leasehold estates vest absolutely in the tenant in tail upon his birth; & the power is void.

Upon further consideration as to the leasehold estate, I think, that power of sale is void; for it may travel through minorities for two centuries & if it is bad to the extent, in which it is given, you cannot model it to make it good. I think, the soundest ground is, that the power is bad (LORD ELDON, C.).—*WARE v. POLHILL* (1805), 11 Ves. 257; 32 E. R. 1087, L. C.

*Annotations*.—*Consd.* *Southampton v. Hertford* (1813), 2 Ves. & B. 54; *Ibbetson v. Ibbetson* (1840), 10 Sim. 495. *Expld.* *Ferrand v. Wilson* (1845), 4 Haro. 344. *Distd.* *Briggs v. Oxford* (1852), 1 De G. M. & G. 363. *Consd.* *Doncaster v. Doncaster* (1856), 3 K. & J. 26; *Lantsbery v. Collier* (1856), 2 K. & J. 709. *Expld.* *Wolley v. Jenkins* (1857), 23 Beav. 53. *Consd.* *Tait v. Swinstead* (1859), 20 Beav. 525. *Reff.* *Dungannon v. Smith* (1846), 12 Cl. & Fin. 546; *Ware v. Egmout* (1854), 4 De G. M. & G. 460; *Bulkeley v. Hope* (1855), 1 K. & J. 482; *Re Allott, Hammer v. Allott*, [1924] 2 Ch. 498. *Mentd.* *Burgos v. Mawbey* (1823), Turn. & R. 167; *Ware v. Polhill* (1852), 19 L. T. O. S. 198; *Horton v. Smith* (1858), 4 K. & J. 624; *A-G v. Allesbury* (1887), 12 App. Cas. 672.

**467.** —.]—No doubt you cannot have a power of sale to change the nature of the interests limited by the instrument so as to exceed the limit of time prescribed by the rule against remoteness or perpetuity (JESSEL, M.R.).—*PETERS v. LEWES & EAST GRINSTEAD RY. CO.* (1881), 18

Ch. D. 429; 50 L. J. Ch. 839; 45 L. T. 234; 29 W. R. 874, C. A.

*Annotations*.—*Consd.* *Goodier v. Edmunds*, [1893] 3 Ch. 455; *Re Allott, Hammer v. Allott*, [1924] 2 Ch. 498. *Reff.* *Re Cotton's Trustees & School Board for London* (1882), 19 Ch. D. 624; *Re Henzell, Holgate v. Humphris*, [1887] W. N. 240; *Re Sudeley & Baines*, [1894] 1 Ch. 334; *Re Dyson & Powke*, [1896] 2 Ch. 720; *Re Kaye & Hoyle's Contract* (1900), 53 Sol. Jo. 520. *Mentd.* *Biggs v. Peacock* (1882), 31 W. R. 148; *Re Wilton's S. M.*, [1907] 1 Ch. 50.

**468.** —.]—Testator by his will directed his trustees to stand possessed of all the mines & minerals beneath the surface of his residuary real estate, & of the rents & profits thereof on trusts to pay perpetual annuities to his daughters. The daughters were parties to a deed of family arrangement under which power was given to trustees to manage or lease the mines & minerals in order to provide the moneys necessary to pay the annuities. Under the will, the trusts of which were to be treated as incorporated in the deed, the surviving husband of any daughter was entitled for his life to the annuity given to his wife by the will, & the deed contemplated the exercise of the power of leasing during the life of the surviving husband, who was not necessarily a person who was alive at the date of the execution of the deed.—*Held*: as the trustees might have exercised their power of leasing so as to create for the first time a new interest in land after the perpetuity period had expired, the power of leasing was void.—*Re ALLOTT, HAMMER v. ALLOTT*, [1924] 2 Ch. 498; 94 L. J. Ch. 91; 132 L. T. 141, C. A.

**469. Need not be expressly confined to exercise within limit of rule.**—A power of sale is not void, although the exercise of it is not expressly confined within the line of perpetuity.—*BIDDLE v. PERKINS* (1829), 4 Sim. 135; 58 E. R. 52.

*Annotation*.—*Reff.* *Lantsbery v. Collier* (1856), 2 K. & J. 709.

**470.** —.]—*POWIS v. CAPRON* (1830), 4 Sim. 138, n.; 58 E. R. 53.

*Annotations*.—*Reff.* *Waring v. Coventry* (1833), 1 My. & K. 249; *Lantsbery v. Collier* (1856), 2 K. & J. 709.

**471.** —.]—By a marriage settlement certain premises were conveyed to trustees to the use of the husband & his assigns for life, remainder to trustees to preserve contingent remainders during his life, & after his death that the wife, if surviving, should receive the yearly charge of £25 for her life, with power of appointment by them or the survivor to the use of one or more of the children or remoter issue of the tenant for life by his wife. In default of such appointment estates in fee were given to all the children of the marriage, but overridden by a power of sale by the trustees for the time being, with the consent in writing of the tenant for life & his wife or of the survivor of them, & after the decease of such survivor, at the discretion of the trustees or trustee for the time being. A subsequent clause provided for appointment of new trustees. The tenant for life & his wife joined with the trustees in a contract of sale & conveyance under the above power.—*Held*: they could make a good title to the purchaser, notwithstanding the rule against perpetuities.—*BOYCE v. HANNING* (1832), 2 Cr. & J. 334; 2 Tyr. 327; 1 L. J. Ex. 123; 140 E. R. 143.

*Annotations*.—*Appl.* *Lantsbery v. Collier* (1856), 2 K. & J. 709. *Reff.* *Ferrand v. Wilson* (1845), 4 Haro. 344.

**472.** —.]—*WARING v. COVENTRY*, No. 249, ante.

**473.** —.]—*Semle*: whatever objections may exist to an indefinite power of sale, on the ground of its tending to a perpetuity, such objections, if any, will not prevent the valid exercise of the power during the continuance of limitations which are within the prescribed legal limits.

Testator, by his will, after disposing of three

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one-fifths of his residuary real & personal estate, gave another one-fifth in trust for his son W. & his children; & the remaining one-fifth in trust for his daughter till twenty-five or marriage; with a direction, that if she married under that age, her fifth should be conveyed & settled upon the trusts therein mentioned; & he gave the trustees a general power of sale during the continuance of the trusts thereby reposed in them. W. survived testator, & died, leaving infant children; & upon the daughter's marriage under twenty-five, a settlement was executed, which, reciting that no part of the real estate had been sold, though it was intended that the same should be sold under the power contained in the will, assigned to trustees, their exors., etc., all the daughter's share of the moneys to be produced by the sale of the real estate, upon certain trusts in favour of her intended husband, herself, & her issue.

I must not pass over an objection raised as to the whole of the power under the will, namely, that it was too remote & tended to a perpetuity. Being of opinion that the trust as to W.'s share would determine upon his children attaining twenty-one, & that the trusts as to E.'s share would determine upon her attaining twenty-five, or marrying, this objection may be considered as disposed of; but if it were otherwise, the sale in question is within the permitted period & there would not, I think, be much doubt of its validity until the expiration of that period (LORD COTTENHAM, C.).—WOOD v. WHITE (1839), 4 My. & Cr. 460; 8 L. J. Ch. 209; 3 Jur. 117; 41 E. R. 178, L. C.

*Annotation:—Reid, Ferrand v. Wilson (1845), 15 L. J. Ch. 41.*

474. —.]—Testator devised his estates to trustees, in trust for his brother's first & other sons, successively in fee; but so that the estate & interest of each of them should cease in favour of his next brother, on his dying under twenty-one & without leaving issue living at his death; & if all of them should die under that age & without leaving issue living at their deaths, in trust for the person who should then be his heir, absolutely; & he empowered the trustees of his will for the time being to sell the estates at any time after his decease & at their sole discretion:—*Held*: the power of sale was valid.—NELSON v. CALLOW (1848), 15 Sim. 353; 60 E. R. 655.

475. —.]—LANTSBERY v. COLLIER, No. 250, *ante*.

476. —.]—The limitation of the power, to the period of time of twenty-one years after the death of the husband, was probably introduced, in consequence of an apprehension that prevailed, that powers of sale & exchange, unlimited in point of time, were void, on the ground that they offended against the rule relating to perpetuity, inasmuch as it was, at one time, supposed that this had been decided by LORD ELDON in *Ware v. Polhill*, No. 466, *ante*, although, I apprehend, that was not intended by LORD ELDON (ROMILLY, M.L.).—WOLLEY v. JENKINS (1856), 23 Beav. 53; 26 L. J. Ch. 379; 3 Jur. N. S. 321; 5 W. R. 281; 53 E. R. 21; *affd.* (1857), 28 L. T. O. S. 362, L. C.

*Annotations:—Conrad, Talte v. Swinstead (1859), 26 Beav. 525. Reid, Vine v. Raleigh (1883), 24 Ch. D. 238; Re Kaye & Hoylo's Contract (1909), 53 Sol. Jo. 520. Mentid, Wise v. Piper (1880), 41 L. T. 794.*

477. —.]—An estate was devised to trustees for different persons in fifth shares, some of which shares were given to living persons absolutely, &

the others to living persons for life, with remainder to their children in fee. An unlimited power of sale over the whole estate was given to the trustees:—*Held*: this power of sale was valid & could be exercised over the whole estate, so long as any of the trusts of any of the shares remained to be performed.

If an estate be given to trustees, in trust for certain persons, as tenants in common in fee, with a power of sale given to the trustees without any limit, the power of sale would be invalid, because, if it were exercisable at all, it would be exercisable *in perpetuum* & as long as the estates given to the *cestuis que trust* lasted. But if the estate was given to trustees in trust for certain persons for life, in succession, with an ultimate remainder to persons in fee, & a power of sale was entrusted to those trustees, the power of sale would, in my opinion, subsist until the trust was exhausted; in other words, until the persons entitled to the remainder in fee had a right to call upon the trustees to convey them the absolute interest in the shares (ROMILLY, M.R.).—TAITE v. SWINSTEAD (1850), 26 Beav. 525; 33 L. T. O. S. 312; 5 Jur. N. S. 1019; 7 W. R. 373; 53 E. R. 1001.

*Annotation:—Reid, Re Horsnall, Womersley v. Horsnall (1909) 11 Ch. 631.*

478. —.]—(1) By a settlement dated May 13, 1892, the settlor conveyed real estate unto & to the use of two trustees in fee simple upon the trusts thereafter declared, & it was thereby declared that the two trustees or the survivor of them or other the trustees or trustee for the time being thereof (thereinafter called said trustees or trustee), should stand possessed of said premises during the term of twenty-one years from the date thereof upon trust to apply the rents & profits as therein mentioned, including the payment of an annual sum of £320 on May 13 & Nov. 13 in each year; & it was thereby further declared that said trustees or trustee should "at the expiration of said term of twenty-one years" sell the premises as therein mentioned. On June 20, 1913, the two trustees named in the settlement, pursuant to the foregoing trust for sale, contracted to sell the real estate to deft., who took the objection that the trust for sale was void for remoteness:—*Held*: the determination of the term & the commencement of the trust for sale arising at one & the same moment, the trust was not void for remoteness on the ground that it was limited to take effect "at the expiration" of the term; according to the true construction of the settlement the term commenced from midnight on May 12, & therefore the trust for sale was not void for remoteness on the ground of exceeding a term of twenty-one years from its creation.

(2) *Semle*: if the trust for sale had otherwise been void for remoteness it would not have been saved by the fact that it was being exercised by the two trustees originally named in the settlement.—ENGLISH v. CLIFF, [1914] 2 Ch. 376; 83 L. J. Ch. 850; 111 L. T. 751; 30 T. L. R. 599; 58 Sol. Jo. 687.

*Annotation:—Mentid, Brakspear v. Barton, [1921] 2 K. B. 88.*

479. — Exercise within reasonable time.]—Where in a deed or will there is a limitation of real & personal estate to one for life, & upon the death of the tenant for life upon trust to divide amongst certain persons, with power or authority to the trustees to sell, at such times as they shall think fit, all or any portion of such real & personal estate, such power of sale is not void as infringing the law against perpetuities, but may be exercised within a reasonable time after the death of the



tenant for life, & after the property has become absolutely vested in possession, if on the construction of the particular instrument it appears to be the intention of the settlor or testator that it should then be exercised.—*Re SUDELEY (LORD) & BAINES & Co.*, [1894] 1 Ch. 334; 63 L. J. Ch. 194; 70 L. T. 549; 8 R. 79; *sub nom. Re SUDELEY & BAINES & Co.'s CONTRACT, Re SAME & ILLUSTRATED LONDON NEWS CONTRACT*, 42 W. R. 231; 38 Sol. Jo. 128.

*Annotations*:—*Reid. Re Dyson & Fowke*, [1896] 2 Ch. 720; *Re Jump, Galloway v. Hope*, [1903] 1 Ch. 129; *Re Horsnail, Womersley v. Horsnail*, [1909] 1 Ch. 631.

**480. Imperative direction to sell at period outside limit of rule.**—Testator gave a life interest in real estate to his son, then a bachelor, & any woman his son might marry, with remainders over to his son's children, or in the event of his son being childless, to his own other children & their descendants who should be living at the son's death. He directed the trustees to sell the property at the death of the survivor of the son & his wife, & gave them a discretionary power to sell during the lifetime of either of them. The son died in 1872, his widow in 1895, but the trustees were unable to sell the property until 1915:—*Held*: (1) the gift over was to a class at the death of the son & was not void for remoteness, but the class must be ascertained as at the son's death; (2) the power to sell was only optional, & the imperative direction to sell, as being after the death of an unascertained person, was void for remoteness.—*Re GARNHAM, TAYLOR v. BAKER*, [1916] 2 Ch. 413; 85 L. J. Ch. 646; 115 L. T. 148.

## SECT. 5.—APPLICATION OF RULE TO SECURITIES.

*See, now*, Law of Property Act, 1925 (c. 20), s. 102.

**Mortgage.**—*See* MORTGAGE, Vol. XXXV., pp. 352, 353, Nos. 946-958.

**Welsh mortgage.**—*See* MORTGAGE, Vol. XXXV., p. 271, Nos. 277-282.

**Rent charges.**—*See* RENTCHARGES & ANNUITIES. **Debiture of company—Proviso for repayment by ballot.**—*See* COMPANIES, Vol. X., p. 781, No. 4906.

## SECT. 6.—FAILURE OF LIMITATION UNDER RULE.

### SUB-SECT. 1.—EFFECT ON SUBSEQUENT LIMITATIONS.

**481. Subsequent limitation void.**—If a subsequent limitation depends upon a prior estate which is void the subsequent one must fall together with it (BULLER, J.).—*ROBINSON v. HARDCASTLE* (1788) 2 Term Rep. 241; 100 E. R. 131; *subsequent proceedings*, 2 Bro. C. C. 344, L. C.

*Annotations*:—*Apld. Routledge v. Dorril* (1794), 2 Ves. 357; *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54. *Reid. Brudenell v. Elwes* (1801), 1 East, 442; *Williamson v. Farwell* (1887), 35 Ch. D. 128; *Re Hewett's Settlement*, [1915] 1 Ch. 810. *Mentd. Crompo v. Barrow* (1799), 4 Ves. 681; *Bray v. Bree* (1834), 8 Bl. N. S. 508.

**482.** —.]—*ROUTLEDGE v. DORRIL*, No. 567, *post*.

**483.** —.]—Settlement in pursuance of arts., previous to marriage, to convey to the use of the husband for life; remainder to wife for life; remainder upon trust to convey unto & amongst all & every or any of the children in such parts & proportions, etc., as the husband & wife or the survivor should by deed or writing, with or without power of revocation, or by will appoint: in default of appointment, to the first & other sons in tail male; remainder, subject to trusts that failed, to the heirs of the husband. A joint appointment by deed, subject to a proviso for revocation & re-appointment by the husband & wife & the survivor, well revoked by the wife surviving, & by the same deed a re-appointment to the daughter & two sons successively for life, with remainders in tail to the grandchildren, & the ultimate remainder to the daughter in fee:—*Held*: (1) void for the excess beyond the power, viz. the estates to the grandchildren, & the ultimate limitation upon them to the daughter; (2) the principle of *cy pres* not applicable.—*BRUDENELL v. ELWES* (1802), 7 Ves. 382; 32 E. R. 155, L. C.

*Annotations*:—*As to* (2) *Reid. Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502. *Generally. Mentd. Holmesdale v. West* (1866), L. R. 3 Eq. 474; *Eastwood v. Avison* (1869), L. R. 4 Exch. 141.

**484.** —.]—*PALMER v. HOLFORD*, No. 85, *ante*.

**485.** —.]—*Re ABBOTT, PEACOCK v. FRIGOUT*, No. 415, *ante*.

**486.** —.]—*Re STEVENS, CLARK v. STEVENS* (1890), 40 Sol. Jo. 296.

**487.** —.]—*Re BACKHOUSE, FINDLAY v. BACKHOUSE*, No. 511, *post*.

**488.** —] **Though given to person in esse.**—Devise to A. for ninety-nine years, if he should so long live; remainder to his first son, then unborn, for ninety-nine years, if he should so long live, & so on in tail male to such first son lawfully issuing for ever, & for want & in default of such issue of such first son, to the second & other sons successively for ninety-nine years only, in case he should so long live; & that such elder son, or the issue of such elder son, should have no greater estate than for ninety-nine years, determinable at his decease; & if there should be no issue male of A. at the time of his, A.'s, death, or in case there should be such issue male at that time, & they should all die before twenty-one without issue male, then to B. for ninety-nine years, if he should so long live; remainder to the first son of B. for ninety-nine years, if he should so long live, etc.:—*Held*: the limitations to the second & other unborn sons of A. were void as tending to perpetuity; & the limitations over to B., etc., after those void limitations, were not accelerated, but were void also.—*BEARD v. WESTCOTT* (1822), 5 B. & Ald. 801; 106 E. R. 1383; *subsequent proceedings*, Turn. & R. 25, L. C.

*Annotations*:—*Apld. Monypenny v. Dering* (1852), 2 De G. M. & G. 145. *Follid. Re Stevens, Clark v. Stevens* (1890), 40 Sol. Jo. 296; *Re Hewett's Settlement*, *Hewett v. Eldridge*, [1915] 1 Ch. 810. *Reid. Boughton v. James* (1844), 1 Coll. 26; *Re Thatcher's Trusts* (1859), 26 Beauv. 365; *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54.

**489. S. P. BEARD v. WESTCOTT** (1822), Turn. & R. 25; 37 E. R. 1002, L. C.

*Annotations*:—*Apld. Monypenny v. Dering* (1852), 2 De G. M. & G. 145. *Follid. Re Hewett's Settlement*, *Hewett v. Eldridge*, [1915] 1 Ch. 810. *Reid. Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54.

## PART I. SECT. 6, SUB-SECT. 1.

**481 i. Subsequent limitation void.**—*Re O'BRIEN'S ESTATE* (1898), 24 V. L. R. 360.—*AUS*.

**481 ii.** —.]—*Re PHILLIPS* (1913),

28 O. L. R. 94; 4 O. W. N. 751; 11 D. L. R. 500.—*CAN*.

**481 iii.** —.]—*HUTCHINSON v. TOTENHAM*, [1898] 1 I. R. 403.—*IR*.

**481 iv.** —.]—*Re TYRRELL'S ESTATE*,

[1907] 1 I. R. 292.—*IR*.

**481 v.** —.]—*Re MANNING'S TRUSTS* (1915), 49 I. L. T. 143.—*IR*.

**481 vi.** —.]—*Re RAMADGE'S SETTLEMENT*, *HAMILTON v. RAMADGE*, [1919] 1 I. R. 205.—*IR*.

**Sect. 6.—Failure of limitation under rule: Sub-sects. 1 & 2, A. & B. (a) & (b). Sect. 7: Sub-sects. 1 & 2.]**

**490.** ———.]—*MONYPENNY v. DERING*, No. 548, *post*.

**491.** ———.]—*Re THATCHER'S TRUSTS*, No. 385, *ante*.

**492.** ———.]—The rule that a limitation ulterior to or expectant on a limitation which may infringe the rule against perpetuities is itself void applies although the subsequent limitation consists of life interests only, & although it is to persons in being at the date when the settlement came into operation.—*Re HEWETT'S SETTLEMENT*, *HEWETT v. ELDRIDGE*, [1915] 1 Ch. 810; 84 L. J. Ch. 715; 113 L. T. 315; 59 Sol. Jo. 476.

**493.** ———.]—**Though subsequent limitation life interest.**—*Re HEWETT'S SETTLEMENT*, *HEWETT v. ELDRIDGE*, No. 492, *ante*.

**Alternative independent limitations.**—*See Sect. 3, sub-sect. 6, ante*.

#### SUB-SECT. 2.—EFFECT ON PRIOR LIMITATIONS.

##### A. In General.

**494. Prior estate infeasible — If interest vested.**—A gift, in terms which import a present vested interest, is not made contingent by a direction to accumulate till the time of payment arrives; nor can a gift over, which is too remote & void, defeat a vested interest previously given.—*BLISS v. BURGESS* (1840), 2 Beav. 221; 9 L. J. Ch. 226; 48 E. R. 1104.

*Annotation:—Reid. Boughton v. James* (1844), 1 Coll. 26.

**495.** ———.]—*TAYLOR v. PROBISHER*, No. 92, *ante*.

**496.** ———.]—*COURTIER v. ORAM*, No. 327, *ante*.

**497.** ———.]—Testator directed that, at his sons attained twenty-five, his exors. should pay them a share of his estate & effects, it being his will that his sons & daughters should receive equal shares of his estate. As his daughters attained twenty-five, the exors. were to invest £1,000 each for them for life, & the difference between this & their share paid to them. In case any daughter should die without issue, the £1,000 was to be divided amongst such of his children as might be then living, & the issue of such as might be dead, share & share alike, the issue to take the like share as the parent would, if living, have been entitled to:—*Held*: the gift over was on an indefinite failure of issue; there was an absolute gift of the £1,000 in the first instance to the daughters, which had not effectually been cut down, & the daughters were absolutely entitled to the £1,000.

Then comes the gift over on an indefinite failure of issue, which is bad & must be disregarded. The result is, that the original gift remains unaffected, & the daughters take absolute interests in these sums of £1,000 (*ROMILLY, M.R.*).—*WEBSTER v. PARR* (1858), 26 Beav. 236; 53 E. R. 888.

*Annotations:—Reid. Dowling v. Dowling* (1865), 13 L. T. 553; *Locke v. Lamb* (1867), L. R. 4 Eq. 372.

**498.** ———.]—*HODGSON v. HALFORD*, No. 372, *ante*.

**499.** ———.]—*GOODIER v. JOHNSON*, No. 360, *ante*.

**Vesting of interests.**—*See WILLS.*

**500. Series of limitations—Good severable from bad.**—Testator devised lands upon trust to pay the rents & profits to a tenant for life & after her decease & until her youngest child should attain

twenty-five to pay the rents & profits [equally] for the maintenance of her children, &, on the youngest child attaining twenty-five, to sell & divide the proceeds among all the children of the tenant for life then living & the issue of such as should be dead:—*Held*: the trust for maintenance was separable from the rest & was not bad for remoteness, whether the trust for sale was so or not.—*GOODING v. READ* (1853), 4 De G. M. & G. 510; 43 E. R. 606, L. J.J.; *subsequent proceedings, sub nom. READ v. GOODING* (1856), 21 Beav. 478.

*Annotations:—Consd. Hampton v. Holman* (1877), 5 Ch. D. 183. *Follid. Re Watson, Cox v. Watson*, [1892] W. N. 192. *Consd. Re Blew, Blew v. Gunner*, [1906] 1 Ch. 624. *Reid. Re Wise, Jackson v. Parrott*, [1896] 1 Ch. 281; *Re Cassel, Public Trustee v. Mountbatten*, [1928] Ch. 358.

**501.** ———.]—*Re WATSON, COX v. WATSON* (1892), 27 L. J. N. C. 174.

*Annotations:—Appl. Re Wise, Jackson v. Parrott*, [1896] 1 Ch. 281. *N.F. Re Blew, Blew v. Gunner*, [1906] 1 Ch. 624.

#### B. Devolution of Void Limitations.

##### (a) In General.

**502. Limitation by will—Devolution on residuary legatee or devisee.**—*PROCTOR v. BATH & WELLS (B.P.)*, No. 393, *ante*.

**503.** ———.]—Devise & bequest, in trust to pay the income to A. for his use during his life, with remainder in default of issue to B. for his use during his life; remainder in default of issue to C. for life in the same manner; remainder over. The remainder after the limitation to A. for life void, as too remote, & A. being heir-at-law & residuary legatee, his title to the real & personal estate was established.—*BOEHM v. CLARKE* (1804), 9 Ves. 580; 32 E. R. 728.

*Annotations:—Dtd. Barlow v. Salter* (1810), 17 Ves. 479. *Consd. Lepine v. Forard* (1831), 2 Russ. & M. 378; *Greenwood v. Verdon* (1853), 1 K. & J. 74.

**504.** ———.]—*TREGONWELL v. SYDENHAM*, No. 306, *ante*.

**505.** ———.]—*LEAKE v. ROBINSON*, No. 290, *ante*.

**506.** ———.]—Testator directed the trustees of his will to sell his real estates & retain £5,000 out of the proceeds, & to stand possessed of that sum in trust for A., for life, remainder in trust for A.'s son for life, with divers remainders over, all of which were void for remoteness; & he gave his personal estate, after payment of the legacies thereinafter given, & the residue of the money to arise by the sale of his real estates after making good the £5,000, to B. A. died a bachelor. Testator's heir also died:—*Held*: the heir's personal representative was entitled to the £5,000.

When testator carves a chattel interest out of his real estate, & makes it the subject of limitations which fail, it results to his heir, but with the character which testator impressed upon it (*SHADWELL, V.-C.*).—*BURLEY v. EVELYN* (1848), 16 Sim. 290; 11 L. T. O. S. 410; 12 Jur. 712; 60 E. R. 885.

*Annotation:—Reid. Re Bence, Smith v. Bence*, [1891] 3 Ch. 242.

**507.** ———.]—Testator gave & devised to trustees all his freehold, leasehold & personal property, upon trust to sell, & the money arising from such sale was to be invested for the benefit of his three daughters; the interest thereof to be paid to each of them for their lives, & on the decease of each of them one half of the fund or share to be paid to the children of each daughter so dying, at the age of twenty-one, & the other half to such grandchildren for life only, & afterwards to their children at twenty-one:—*Held*: the gift to the children of grandchildren was void for remoteness; the daughters did not take an absolute interest, & the undisposed of portion of the real property



went to testator's heir.—**WHITEHEAD v. BENNETT** (1853), 1 Eq. Rep. 560; 22 L. J. Ch. 1020; 21 L. T. O. S. 178; 18 Jur. 140; 1 W. R. 406.

508. ———.]—**WAINMAN v. FIELD**, No. 403, *ante*.

509. ———.]—**JOY v. ASPINWALL**, No. 22, *ante*.

510. ———.]—**BENTINCK v. PORTLAND (DUKE)** (1877), 7 Ch. D. 603; 47 L. J. Ch. 235; 38 L. T. 58; 26 W. R. 278.

*Annotation* :—**Reid**, *Pearks v. Moseley* (1880), 5 App. Cas. 714.

511. ———.]—Testator bequeathed a picture to his eldest son J. for life, & then to his second son C. for life, & then to his daughter M. for life, & after her death to the first & every other son then living of J. successively, according to seniority, for their respective lives, & then to the first & every other son then living of C. successively according to seniority for their respective lives, & then to the first & every other son of his daughter M. successively according to seniority for their respective lives, & then to his own right heirs, it being his strong desire that the picture should not be sold but should always remain in the possession of some descendant of C. F. of T. Testator devised the residue of his real & personal estate upon trust for his two sons, J. & C., in equal shares, absolutely. On the death of testator on June 7, 1906, the exors. handed the picture to the eldest son, J., & on his death on July 27, 1918, they gave it to C., who now held it. By clause 6 of his will J. gave his daughter, F., all his pictures other than those made heirlooms, & by clause 23 he gave "my pictures" at it. to be enjoyed as heirlooms with settled real estate. By clause 36 of his will he left residuary estate to his three sons in certain proportions. A deed of family arrangement, dated Mar. 5, 1919, was entered into between the children of J. & the exors. & trustees of his will, wherein it was recited that the pictures at R. should be treated as having passed to F. under clause 6 of the will, & clause 23 was (*inter alia*) revoked in pursuance of a power contained in the will. Questions were raised as to the validity of the limitations in the settlmt. of the picture, & who was now entitled to it:—*Held*: the bequests of the picture were only good so far as they included the sons of J. living at the death of M., & all the subsequent limitations, including the ultimate gift to the right heirs of testator, were void for remoteness; (2) subject to the valid life interests the picture formed part of the residuary estate of testator & went to his two sons in equal shares; & the interest of J. in his undivided moiety of the picture passed under his will & the deed of family arrangement to F.—*Re BACKHOUSE, FINDLAY v. BACKHOUSE*, [1921] 2 Ch. 51; 90 L. J. Ch. 443; 125 L. T. 218; 65 Sol. Jo. 580.

———.]—*See, generally*, **WILLS**.

512. *Limitation in settlement*—*Devolution on settlor*.]—**Re SLARK'S TRUSTS**, No. 355, *ante*.

513. ———.]—A marriage settlement, to which the wife's father was a party, after reciting that he had agreed to give £3,000 as a marriage portion or fortune with his daughter, & that it had been agreed that £500 should be forthwith paid to the husband for his own use, & that the residue thereof should be invested on the trusts therein mentioned, & that the wife's father had accordingly paid £500 to the husband, & had invested £2,500 in the names of the trustees, declared trusts of that fund for the settlor until

the marriage, & then, after giving to the husband & wife life interests, & a power of appointment among the children, which was not exercised, for the children attaining twenty-five, & in default of such children, for the wife's representatives or next of kin in the usual manner. The trusts for the children, & subsequent thereto, being considered bad for remoteness:—*Held*: there was a resulting trust for the settlor.—*Re NASH'S SETTLEMENT* (1882), 51 L. J. Ch. 511; 46 L. T. 97; 30 W. R. 406.

*Annotation* :—*Consd. Re Connell's Settltmt., Re Benett's Trusts, Fair v. Connell*, [1915] 1 Ch. 867.

———.]—*See, generally*, **SETTLEMENTS**.

*Limitation in special power of appointment*.]—*See POWERS*, pp. 493–498, Nos. 868–908.

(b) *Limitation subject to Valid Directions*.

*See, now*, Administration of Estates Act, 1925 (c. 23), ss. 45–52.

514. *Valid trust for sale*—*Trusts of proceeds void for remoteness*—*Proceeds devolve as realty*.]—Testator devised estates to A. for life, with remainder to trustees, for sale, upon trust, for all the children of A. B. C. & D. who should attain the age of twenty-four years, & directed that the annual produce of the trust funds should be applied for the maintenance of the children entitled in expectancy or contingency, until they respectively attained the age at which their said shares should vest:—*Held*: the gift in remainder was void for remoteness, & the trustees were trustees of the legal estate for the heir-at-law.—**NEWMAN v. NEWMAN** (1839), 10 Sim. 51; 8 L. J. Ch. 354; 59 E. R. 531.

*Annotations* :—*Reid*, *Holmes v. Prescott* (1864), 3 New Rep. 559; *Patching v. Barnett* (1880), 49 L. J. Ch. 665.

515. ———.]—**WHITEHEAD v. BENNETT**, No. 507, *ante*.

516. ———.]—**HALE v. FEW**, No. 188, *ante*.

*Trust for sale void for remoteness*—*Trusts of proceeds valid*.]—*See EQUITY*, Vol. XX., pp. 341, 342, Nos. 830–833.

## SECT. 7.—VOID RESTRICTIONS ON VALID LIMITATIONS.

### SUB-SECT. 1.—IN GENERAL.

517. *Restriction void*.]—Testatrix, in pursuance of a power in her marriage settlement, appointed a fund to her son C. for life, with remainder to his eldest son, provided that, in the event of their refusal to comply with a request by her son A. to release their interests in certain other property, their interests in the fund were to go over to her son A. absolutely:—*Held*: the condition was void as being contrary to the rule against perpetuities.—*Re STAVELEY, DYKE v. STAVELEY* (1920), 90 L. J. Ch. 111; 124 L. T. 466; 65 Sol. Jo. 154.

### SUB-SECT. 2.—RESTRAINT ON ANTICIPATION.

518. *Imposed on unborn person*—*Restraint rejected*.]—Under a power of appointment of a trust fund among children, in the usual form, the share of a married daughter, who was unborn at the creation of the power, was limited to trustees, upon trust for her separate use, for life, without

## PART I. SECT. 7, SUB-SECT. 2.

g. *Whether within rule*—*Grand-nieces born in lifetime of widow of testator*.]—*Re URQUHART'S WILL, MCCracken v. RAMSAY*, [1921] V. L. R. 262.—**AUS**.

7.—*Void restrictions on valid limitations: Subsects. 2 & 3.]*

power of anticipation, & after her decease, to her general appointees by deed or will, & in default, to her exors. or administrators:—*Held*: such an appointment was not void as fettering the property beyond the legal limits, but the restraint upon anticipation might be rejected, & the rest of the appointment sustained.

If the restriction be not rejected, it is said that it will make the whole void. Rather than decide that, the ct. will reject the limitation & thus leave the rest of the appointment valid (PAGE-WOOD, V.-C.).—*FRY v. CAPPER* (1853), Kay, 163; 2 W. R. 130; 69 E. R. 70.

*Annotations*:—*Apld.* *Re Teague's Settlement* (1870), L. R. 10 Eq. 564. *Consd.* *Re Ridley, Buckton v. Hay* (1879), 11 Ch. D. 645. *Apld.* *Shute v. Hodge* (1888), 58 L. T. 546; *Re Tancered's Settlement*, *Somerville v. Tancered*, *Re Selby*, (*Shute v. Tancered* (1903), 88 L. T. 164. *Reid.* *Re Cunynghame's Settlement* (1871), L. R. 11 Eq. 324; *Re Errington, Bawtree v. Errington*, [1887] W. N. 23; *Whitby v. Mitchell* (1889), 42 Ch. D. 494.

519. ———.]—*Semble*: Where a bequest is made to persons *in esse* for life, with remainder to their unborn children, with a general direction that the female children shall take for their separate & inalienable use, such restriction against alienation is too remote & void.

Under several bequests to living persons for life, with remainder to their children born & unborn, with a general proviso that the shares of females shall be for their separate inalienable use:—*Held*: the restriction against anticipation applied only to the tenants for life, in consequence of a direction for payment to the children & a proviso that their receipts should be good discharges.

I do not express any opinion on the point, principally argued, as to remoteness; but my strong impression is, that it would be too remote, & that this ct. could never, after a life or lives in being & twenty-one years, permit any estate to be inalienable (ROMILLY, M.R.).—*ARMITAGE v. COATES* (1865), 35 Beav. 1; 55 E. R. 794.

*Annotations*:—*Apld.* *Re Michael's Trusts* (1877), 46 L. J. Ch. 651. *Reid.* *Re Ellis' Trusts* (1874), L. R. 17 Eq. 409; *Re Ridley, Buckton v. Hay* (1879), 11 Ch. D. 645; *Re Russell, Dorrell v. Dorrell* (1895), 12 R. 499.

520. ———.]—(1) A widow, having under her marriage settlement a power of appointment amongst the children of the marriage, executed the power by giving to one of her five daughters, who was married, a fifth share of the fund for her separate use, independently of her then or any future husband, but without power of anticipation; & after her decease as she should generally by deed or will appoint, & in default of appointment, for her exors. & administrators absolutely:—*Held*: the whole appointment was not void, & it was a valid execution of the power, except as to the restraint upon anticipation, but the attempted restraint upon anticipation was ineffectual & void. (2) A similar appointment was made to another daughter unmarried at the date of the appointment, who afterwards married:—*Held*: marriage did not operate as an adoption of the trusts of the fund so as to establish the validity of the restraint clause.—*Re TEAGUE'S SETTLEMENT* (1870), L. R. 10 Eq. 564; 22 L. T. 742; 18 W. R. 752.

*Annotations*:—*As to* (1) *Apld.* *Re Cunynghame's Settlement* (1871), L. R. 11 Eq. 324. *Obtd.* *Re Ridley, Buckton v. Hay* (1879), 11 Ch. D. 645.

521. ———.]—Under an ante-nuptial settlement, by which the husband had a power of appointing a sum of money among the children of the marriage, he appointed the fund to the separate use of a married daughter, with a restric-

tion against alienation:—*Held*: the appointment to the separate use of his daughter was valid, discharged of the restraint upon alienation, which was too remote & void.—*Re CUNYNGHAME'S SETTLEMENT* (1871), L. R. 11 Eq. 324; 40 L. J. Ch. 247; 24 L. T. 124; 19 W. R. 381.

*Annotations*:—*Consd.* *Re Ridley, Buckton v. Hay* (1879), 11 Ch. D. 645; *Cooper v. Laroche* (1881), 17 Ch. D. 368.

522. ———.]—*Re RIDLEY, BUCKTON v. HAY*, No. 11, *ante*.

523. ———.]—*Re ERRINGTON, BAWTREE v. ERRINGTON*, [1887] W. N. 23.

524. ———.]—On June 5, 1860, A. & B., in exercise of the power of appointment in favour of children contained in their marriage settlement, dated in 1830, appointed £3,500 to their daughter M., afterwards M. S.

By the marriage settlement of N. & M., dated June 6, 1860, M. assigned the £3,500 to the trustees, upon trusts under which N. had the first life interest, & in default of children, M. had a general testamentary power of appointment. There was also a covenant by N. & M. that if they, or either of them, should during the coverture become entitled to any real or personal property, except certain specified interests, the same should be forthwith assured to the trustees.

On June 20, 1860, A. & B. appointed that a moiety of the residue unappointed of the trust funds under the settlement of 1830 should, after the decease of the survivor of them, go to M., during her coverture, for her sole & separate use, without power of anticipation, her receipt to be a sufficient discharge for the payment thereof. There was a proviso that if M. should die in the lifetime of N., leaving no children, the same moiety should go to the brother of N. absolutely, & that if M. should survive her husband, the same moiety should go to M. absolutely.

M. died in 1887, leaving children, & having by her will appointed & bequeathed all her property to N., & appointed him sole exor. A. & B. had both pre-deceased M.:—*Held*: (1) the appointment by A. & B., of June 20, 1860, showed an intention to exclude N., & any interest which he would take if the fund was caught by his marriage settlement; though the restraint on anticipation must be rejected, yet, taken together with the gift over in default of children & the receipt clause, it showed an intention that the separate use should apply only to the income accruing during the particular coverture, & M. should have no power of disposition over the *corpus*.

(2) Such a limitation was clearly good; & therefore, the fund having accrued during the coverture, the *corpus* was caught by the after-acquired property clause.—*SHUTE v. HOGGE* (1888), 58 L. T. 546.

525. ———.]—*WHITBY v. MITCHELL*, No. 125, *ante*.

526. Imposed on class which may contain unborn persons—Whether restriction good as to members *in esse*.]—A clause restraining anticipation in a gift to a class which may contain unborn persons is invalid.—*Re MICHAEL'S TRUSTS* (1877), 46 L. J. Ch. 651.

*Annotations*:—*Obtd.* *Herbert v. Webster* (1880), 15 Ch. D. 610. *Reid.* *Re Ridley, Buckton v. Hay* (1879), 11 Ch. D. 645; *Re Russell, Dorrell v. Dorrell* (1895), 12 R. 499; *Re Game, Game v. Tennent*, [1907] 1 Ch. 276.

527. ———.]—Where a sum was settled in trust for present & future children in equal shares with a restraint on anticipation of daughters' shares, & some daughters were *in esse*; in order to carry out the intention with regard to these, & avoid the rule against perpetuities, the gift was read as of the shares separately.—*HERBERT v.*

WEBSTER (1880), 15 Ch. D. 610; 40 L. J. Ch. 620.

*Annotations* :—**Fold.** *Re Ferneley's Trusts*, [1902] 1 Ch. 543; *Re Millward, Steedman v. Hobday* (1902), 87 L. T. 476; *Re Game, Game v. Tennent*, [1907] 1 Ch. 276. **Reid.** *Re Russell, Dorrell v. Dorrell* (1895), 12 R. 499.

528. ———.] — **COOPER v. LAROCHE**, No. 301, *ante*.

529. ———.] — A restraint on anticipation imposed by a general clause in a will upon all the shares of daughters of testator's children, is good as to the shares of those members of the class who are born in testator's lifetime, though void as to the shares of those born afterwards.—*Re FERNELEY'S TRUSTS*, [1902] 1 Ch. 543; 71 L. J. Ch. 422; 86 L. T. 413; 50 W. R. 346; 46 Sol. Jo. 247.

*Annotation* :—**Reid.** *Re Game, Game v. Tennent*, [1907] 1 Ch. 276.

530. ———.] — Testator by his will gave his residuary estate to his wife, two daughters, & a son for life, the interests of the wife & daughters to be without power of anticipation, & after the death of the survivor he gave his estate to the then & future children of his son in equal proportions. By a codicil testator declared that the bequests to any female taking any beneficial interest under his will should be for her separate use, but so that she might not anticipate any part of the property to which she might become entitled, & he also declared the receipt of any female taking an interest under his will should be a good & sufficient discharge to his trustees for the money after the same should have actually accrued due. The survivor of the wife, daughters, & son died in Jan. 1902. The son left five children living at his death, of whom two were married women :—*Held* : the restraint on anticipation was valid, not being void for remoteness, but it only lasted during the existence of the prior life interests both as to income & corpus, & determined when the property fell into possession in Jan. 1902.—*Re MILLWARD, STEEDMAN v. HOBDAY* (1902), 87 L. T. 476.

531. ———.] — Testator directed his trustees to stand possessed of & invest a sum of £500 & pay the income arising from such investment to his daughter S. during her life & after her death upon trust for such child or children of S. or such child or children of a son or daughter of S., who should die before her as should if a son attain the age of twenty-one years or if a daughter attain that age or marry & as to the share or shares of any girl or girls for her or their separate use without power of disposing of the income or capital thereof otherwise than by will. S. survived testator & died leaving two married daughters who were born during testator's lifetime :—*Held* : the restraint upon anticipation was severable & was valid as to the shares of the two daughters born in testator's lifetime.—*Re GAME, GAME v. TENNENT*, [1907] 1 Ch. 276; 76 L. J. Ch. 168; 90 L. T. 145; 51 Sol. Jo. 210.

*Annotation* :—**Reid.** *Bagot v. Chapman* (1907), 23 T. L. R. 562.

532. ———.] — **BAGOT v. CHAPMAN** (1907), as reported in 23 T. L. R. 562.

*Annotation* :—**Mentd.** *Howatson v. Webb*, [1908] 1 Ch. 1.

### SUB-SECT. 3.—DIRECTION TO SETTLE.

533. *Direction to settle following absolute gift.*—Power to appoint amongst children, or some or one of them, with limitations over for benefit of one or more of such children, or his or their issue. The donee of the power appointed equal shares to

his daughters respectively for life, for their separate use; then to their issue, as they, the daughters respectively, should appoint; in default, amongst the issue equally :—*Held* : subject to the life interest of the wives for their separate use, the shares appointed to the daughters belonged to them & to their husbands in their right.

The trusts of the shares appointed to the daughters are void for remoteness, so far as those trusts relate to the issue of the daughters; but the same are good so far as they are made to the separate use of the daughters for their lives; & subject to such separate interest, the shares so appointed belong to the daughters, & to their husbands in right of the wives (**LEACH, M.R.**).—**CARVER v. BOWLES** (1831), 2 Russ. & M. 301; 9 L. J. O. S. Ch. 91; 39 E. R. 409.

*Annotations* :—**Consd.** *Kampf v. Jones* (1837), 2 Keon, 756. **Apld.** *Blacket v. Lamb* (1851), 14 Beav. 482; *Harvey v. Stracey* (1852), 1 Drew. 73. **Fold.** *Re Sondas' Will, Re Watson's Will* (1854), 2 Sm. & G. 416. **Apld.** *Gerrard v. Butler* (1855), 20 Beav. 541; *Stephens v. Gadsden* (1855), 20 Beav. 463; *Woolridge v. Woolridge* (1859), John. 63. **Distd.** *Tomkyns v. Blane* (1860), 28 Beav. 422. **Apld.** *Rucker v. Scholefield* (1862), 1 Hem. & M. 36. **Consd.** *Churchill v. Churchill* (1867), 1 L. R. 5 Eq. 44; *Wollaston v. Klug* (1869), L. R. 8 Eq. 165. **Apld.** *McDonald v. McDonald* (1875), L. R. 2 Sc. & Div. 482. **Consd.** *White v. White* (1882), 22 Ch. D. 555. **Reid.** *Kirk v. Kildowen* (1844), 3 Hare, 509; *Lassence v. Tierney* (1849), 2 H. & Tw. 115; *Re Cunyngname's Trusts* (1871), 40 L. J. Ch. 247; *Cooke v. Cooke* (1887), 38 Ch. D. 202; *Re Crawshaw, Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615; *Re Holland, Holland v. Clapton*, [1914] 2 Ch. 595. **Mentd.** *Powys v. Mansfield* (1836), 6 Sim. 528; *Tym v. Lockyer* (1841), 5 My. & Cr. 29; *Bate v. Williams* (1877), 37 L. T. 221.

534. ———.] — **KAMPF v. JONES**, No. 439, *ante*.

535. ———.] — Bequest to testator's wife for life, & after her death to make a division between testator's four children, A., B., C. & D.; his sons' shares to be paid immediately, & his daughters' shares to be invested for them for life, with remainder between all their children, to become vested at the age of twenty-five, with a gift over to the children of the others who should live to attain the age of twenty-five, in case either daughter should die without leaving any child who should live to attain twenty-five; with powers for the maintenance & advancement of such children :—*Held* : the gift over was too remote; & the gift to the daughters in the first instance being absolute, & the attempt to limit it having failed, the absolute interest remained unaffected, so that the representatives of a daughter who died without children were entitled to her one-fourth share.—**RING v. HARDWICK** (1840), 2 Beav. 352; 4 Jur. 242; 48 E. R. 1217.

*Annotations* :—**Apld.** *Gerrard v. Butler* (1855), 20 Beav. 541. **Reid.** *Re Hancock, Watson v. Watson*, [1901] 1 Ch. 482.

536. ———.] — **LASSENCE v. TIERNEY**, No. 340, *ante*.

537. ———.] — **HARVEY v. STRACEY**, No. 448, *ante*.

538. ———.] — Where there is an absolute appointment to A., an object of the power, followed by a qualification limiting the interest of A. to a life interest, with remainder to persons not objects of the power, the latter being void, A. takes absolutely, under the prior appointment.

Testatrix, having a power to appoint a fund to her children, appointed it in this form : Amongst my children, A., B., C. & D., the share of A. to be upon the trusts of her marriage settlement, & to be paid to the trustees thereof. A. was the only person in the marriage settlement within the power :—*Held* : she took her share absolutely.—**GERRARD v. BUTLER** (1855), 20 Beav. 541; 52 E. R. 712.

*Annotation* :—**Reid.** *Re Oliphant's Trusts, Re Dixon's Will*, *Phillips v. Phelps* (1917), 86 L. J. Ch. 452.

**Sect. 7.—Void restrictions on valid limitations: Subsect. 3. Sect. 8. Part II. Sect. 1.]**

**539.** —.]—Testator, by virtue of a power, appointed a fund to trustees for his four children, in four equal portions & subject to the trusts thereafter contained respecting his own residuary estate. Some of those trusts were to the children for life, with remainder to their children, &, as regarded the fund subject to the power, the appointment to grandchildren was void for remoteness:—*Held*: the children took absolutely in the first instance, & the subsequent attempt to limit the absolute gift being void, the children took the fund absolutely.—*STEPHENS v. GADSDEN* (1855), 20 Beav. 463; 52 E. R. 682.

**540.** —.]—(1) Testator directed his exors. to raise a legacy "to or in trust for his son." It was to be invested in the names of trustees, & life annuities were given to the son & his wife out of the income, & interests were given to the children of the son & to their issue, with gifts over:—*Held*: there was an absolute gift to the son cut down to the limited extent of the subsequent gifts.

(2) Testator bequeathed a legacy to his son, & after his decease & on the youngest of the son's sons attaining twenty-one, to divide it equally between the son's sons & the issue of deceased son's sons who should attain twenty-one, the issue to take the share which their father would have taken if living. (3) *Qu.*: whether the gift after the son's death is wholly void, or only as to the share of the issue.—*SALMON v. SALMON* (1860), 29 Beav. 27; 54 E. R. 535.

**541.** —.]—*COOKE v. COOKE*, No. 458, *ante*.

**542.** —.]—Testatrix under her marriage settlement had power to appoint the settled funds amongst the children & issue of the marriage. By her will testatrix gave all her residuary real & personal estate, "which by virtue of any power or authority, or of any separate right of property she was competent to dispose of," to trustees upon trust to sell & convert into money, & thereout pay her funeral & testamentary expenses, & to invest the residue & hold the same upon trust to pay the income to her husband during his life, & after his decease as to one-seventh part in trust for her son, & as to the remaining six-sevenths in trust for her daughters, with a direction that the trustees were to retain the daughters' shares upon trusts in favour of each daughter for life for her separate

use without power of anticipation, & after her death in favour of her children. There was evidence that testatrix & her husband had forgotten the existence of the settlement. The question was whether or not the will operated as an exercise of the power of appointment:—*Held*: (1) the evidence as to the settlement having been forgotten could not be acted upon; & if the will were not regarded as an exercise of the power, words would have to be struck out of the will, upon the face of which there was a clear intention to exercise any testamentary power the testatrix might have; (2) the daughters took their shares of the settled funds free from the fetters attempted to be imposed by the subsequent direction.—*Re BOYD, NEILD v. BOYD* (1890), 63 L. T. 92.

**543.** —.]—*HANCOCK v. WATSON*, No. 397, *ante*.

**544.** Direction to settle following gift not absolute.]—*LASSENCIE v. TIERNEY*, No. 346, *ante*.

**545.** —.]—Under an exclusive power to appoint a trust fund of stock to children & their issue born during the lives of the donees of the power, with a hotchpot clause, an appointment was made to five daughters out of nine children, whereby the trustees were directed, after the death of the parents, tenants for life, to stand possessed of the fund upon the trusts following: that is to say, upon trust thereout to appropriate one-fifth part to & for the benefit of each daughter, & to pay & apply the income of the share of each daughter for her separate use; & after the decease of each daughter, upon trusts for the benefit of her children:—*Held*: the limitations over being void, the daughters took life interests only, subject to account for the value under the hotchpot clause.—*RUCKER v. SCHOLEFIELD* (1862), 1 Hem. & M. 36; 1 New Rep. 48; 32 L. J. Ch. 46; 9 Jur. N. S. 17; 11 W. R. 137; 71 E. R. 16.

*Annotations*:—*Consd.* *McDonald v. McDonald* (1875), L. R. 2 Sc. & Div. 482; *Re Oliphant's Trusts, Re Dixon's Will, Phillips v. Phelps* (1917), 86 L. J. Ch. 452; *Re West, Denton v. West*, [1921] 1 Ch. 533. *Reid.* *Re Harrison, Hunter v. Bush* (1918), 87 L. J. Ch. 433.

**SECT. 8.—EFFECT OF LAW OF PROPERTY ACT, 1925.**

*See* Law of Property Act, 1925 (c. 20), ss. 102, 103.

## Part II.—The Rule Prohibiting Limitations to Issue of Unborn Persons.

**SECT. 1.—IN GENERAL.**

*See, now*, Law of Property Act, 1925 (c. 20), s. 101.

**546. Statement of the rule.**—Though by rules of law an estate may be limited by way of contingent remainder to a person not *in esse* for life or as an inheritance, yet a remainder to the issue of such contingent remainderman as a purchaser, is a limitation unheard of in law nor ever attempted (LORD NORTHINGTON, LORD KEEPER).—*MARLBOROUGH (DUKE) v. GODOLPHIN (EARL)* (1759), 1 Eden, 404; 28 E. R. 741; *affd. sub nom. SPENCER (LORD) v. MARLBOROUGH (DUKE)* (1763), 3 Bro. Parl. Cas. 232, II. L.

*Annotations*:—*Consd.* *Hay v. Coventry* (1789), 3 Term Rep.

83; *Mainwaring v. Baxter* (1800), 5 Ves. 458; *Re Oliver's Settlement, Kivord v. Leigh*, [1905] 1 Ch. 191. *Reid.* *Robinson v. Harcourt* (1786), 2 Bro. C. C. 22; *Routledge v. Dorril* (1794), 2 Ves. 357; *Monypenny v. Dering* (1852), 2 De G. M. & G. 145. *Mentd.* *Ferrand v. Wilson* (1845), 4 Hare, 344; *Scarsdale v. Curzon* (1860), 1 John. & H. 40; *Dawkins v. Penrhyn* (1877), 36 L. T. 680.

**547.** —.]—Where an estate was limited by will to A. for life, remainder to his first & other sons in tail male, remainder "to the use of all & every the daughters, etc., as tenants in common, & in default" of such issue to the use of the right heirs of the deviser." After the death of A. without any son, an only daughter took only an estate for life.

The law is now clearly settled that an estate for life may be limited to unborn issue, provided the

devisor does not go further & give an estate in succession to the children of such unborn issue (LORD KENYON, C.J.).—*HAY v. COVENTRY (EARL)* (1789), 3 Term Rep. 83; 100 E. R. 408.

**Annotations.**—*Consd.* Doe d. Liversage v. Vaughan (1822), 5 B. & Ald. 464; *Brigder v. Ramsey* (1853), 10 Harc. 320. *Apprvd.* Whitby v. Mitchell (1890), 44 Ch. D. 85. *Consd.* *Re Nash, Cook v. Frederick*, [1909] 2 Ch. 450. *Reid.* Doe d. Willis v. Martin (1790), 4 Term Rep. 39; Doe d. Dacre v. Dacre (1798), 1 Bos. & P. 250. *Mentd.* Goodright v. Jones (1815), 4 M. & S. 88.

548. —.]—J. M., by his will, devised the Maytham Hall estate, being of gavelkind tenure, to trustees upon trust to sell a competent part for the payment of debts, & subject thereto upon trust for P. M. for life, & after his decease for the first son of P. M. for life, & after his decease for the first son of such first son & the heirs male of his body, & in default of such issue, for every other son of P. M. successively for the like interests & limitations, & in default of issue of the body of P. M., or in case of his not leaving any at his decease, for T. M. for life, & after his decease for T. G. M. the eldest son of T. M. for life, & after his decease for the first son of T. G. M. & the heirs male of his body, & in default of issue of the body of T. G. M., for every other son of T. M. successively for the like estates & interests, & on failure of all such issue of the body of T. M., upon trust for him, his heirs & assigns for ever; P. M. never had any children:—*Held*: (1) P. M. took an estate for life with remainder to his first unborn son, if such son had been born, & all the remainders over were void; (2) effect was to be given to the gift over to T. M. & his sons in default of issue of the body of P. M., etc., as an independent clause, & it was consequently valid.

(3) Although by the doctrine of *cy-près* or by implication, as applied to the construction of a will, an estate may be carried otherwise than in the exact form & manner indicated by testator, yet it must always be in favour of a class or part of a class of persons intended to be provided for by testator.

(4) In construing wills effect may in certain cases be given to the general intent at the expense of a particular intent, but this is not to be done without an actual necessity.

(5) Where an estate is so limited to A. as would generally raise by implication an estate tail, but there are added limitations to the children of A. which are void for remoteness, it is not a general rule to reject these limitations as unimportant & to give to A. an estate tail, although cases may arise in which this would be done in favour of the clear intention of testator.

(6) Where there are gifts over which are void for perpetuity, & there is a subsequent & independent clause on a gift over which is within the line of perpetuity, effect cannot be given to such clause unless it will accord with previous valid limitations. A gift over made in words comprising only one event will not be construed as made on two events, although in point of fact it may consist very reasonably of two branches, unless it is so expressed by testator.

(7) The rule of law forbids the raising of successive estates by purchase to unborn children, that is, to an unborn child of an unborn child (LORD ST. LEONARDS, C.).

(8) The cts. have gone at least to this extent, that they will not hold a gift over made in words comprising only one event as made on two events, although in point of fact, it may consist very reasonably of two branches, unless testator has himself so expressed it (LORD ST. LEONARDS, C.).—*MONTPENNY v. DERING* (1852), 2 De G. M. & G.

145; 22 L. J. Ch. 313; 19 L. T. O. S. 320; 17 Jur. 407; 42 E. R. 820, L. C.

**Annotations.**—*As to* (1) *Apld.* *Re Stevens, Clark v. Stevens* (1806), 40 Sol. Jo. 296; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1. *Reid.* *Re Roberts, Hopington v. Roberts-Gawen* (1881), 19 Ch. D. 520. *As to* (2) *Consd.* *Re Clulow's Trust* (1859), 1 John. & H. 639; *Evers v. Challis* (1859), 7 H. L. Cas. 532. *Apld.* *Re Bowles, Page v. Page*, [1905] 1 Ch. 371; *Re Bullock's Will Trusts, Bullock v. Bullock*, [1915] 1 Ch. 493. *Reid.* *Re Davies & Kent's Contract*, [1910] 2 Ch. 35; *Re Norton, Norton v. Norton*, [1911] 2 Ch. 27. *As to* (3) *Apld.* *Re Rising, Rising v. Rising*, [1904] 1 Ch. 533; *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502. *Reid.* *Sonatun Bysack v. Sroomutty Juggut-soondree Dossee* (1859), 8 Moo. Ind. App. 66; *Whitting v. Whitting* (1908), 53 Sol. Jo. 100. *As to* (5) *Consd.* *Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332. *Reid.* *Re Wilmer's Trusts, Wingfield v. Moore*, [1910] 2 Ch. 111. *As to* (6) *Apld.* *Re Thatcher's Trusts* (1859), 26 Beav. 365. *Consd.* *Re Hewett's Settlement, Hewett v. Eldridge*, [1915] 1 Ch. 810. *Reid.* *Re Bence, Smith v. Bence*, [1891] 3 Ch. 242; *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 64. *As to* (7) *Apprvd.* *Whitby v. Mitchell* (1890), 44 Ch. D. 85. *Apld.* *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1. *As to* (8) *Consd.* *Re Davey, Prisk v. Mitchell & Bowden* (1915), 113 L. T. 60. *Generally, Reid.* *Re Farncombe's Trusts* (1878), 9 Ch. D. 652; *Hodgson v. Halford* (1879), 11 Ch. D. 959. *Mentd.* *Montpenny v. Dering* (1859), 33 L. T. O. S. 159.

549. —.]—*Re FROST, FROST v. FROST*, No. 130, ante.

550. —.]—*WHITBY v. MITCHELL*, No. 125, ante.

551. —.]—The old rule against “a possibility on a possibility,” namely, that although an estate may be limited to an unborn person for life, yet a remainder cannot be limited to the children of that unborn person as purchasers, has no application to personal estate.

By a marriage settlement personal estate was settled in trust, after life interests given to the husband & wife, for the children of the marriage, or any issue born in the lifetime of the survivor of the husband or wife, in such shares & manner, as they should jointly appoint. They appointed in equal shares to the three children of the marriage for life, & after their respective deaths to such of their children born in the lifetime of the husband & wife as should attain twenty one:—*Held*: a good appointment, & not void for remoteness.—*Re BOWLES, AMEDROZ v. BOWLES*, [1902] 2 Ch. 650; 71 L. J. Ch. 822; 51 W. R. 124.

**Annotation.**—*Distd.* *Re Nash, Cook v. Frederick*, [1909] 2 Ch. 450.

552. —.]—The rule against limiting land to an unborn child for life with remainder to his unborn child applies to equitable as well as to legal estates. We think that the rule should be so expressed, & that the phrase “possibility upon a possibility” should not be used (FARWELL, J.J.).—*Re NASH, COOK v. FREDERICK*, [1910] 1 Ch. 1; 79 L. J. Ch. 1; 101 L. T. 837; 26 T. L. R. 57; 54 Sol. Jo. 48, C. A.

**Annotations.**—*Apld.* *Re Park's Settlement, Foran v. Bruce*, [1914] 1 Ch. 595. *Consd.* *Re Bullock's Will Trusts, Bullock v. Bullock*, [1915] 1 Ch. 493. *Reid.* *Re Stamford & Warrington, Payne v. Grey*, [1912] 1 Ch. 343; *Re Clarke's Settlement, Trust, Wanklyn v. Stratsfeldt*, [1916] 1 Ch. 467; *Re Macartney, Macartney v. Macartney*, [1918] 1 Ch. 300. *Mentd.* *Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492.

553. —.]—Limitation of freehold to issue of bachelor in remainder after life estate to widow:—*Held*: void as infringing “the rule against limiting land to an unborn child for life with remainder to his unborn child.”—*Re PARK'S SETTLEMENT, FORAN v. BRUCE*, [1914] 1 Ch. 595; 83 L. J. Ch. 528; 110 L. T. 813; 58 Sol. Jo. 362.

**Annotations.**—*N.F.* *Re Bullock's Will Trusts, Bullock v. Bullock*, [1915] 1 Ch. 493; *Re Garnham, Taylor v. Baker*, [1916] 2 Ch. 413.

554. —.]—Testator directed the trustees of his will to pay a third of the rents & profits of his residuary real estate to his niece, B., who was then a spinster, for life, & after her death to pay the

**Sect. 1.—In general. Sect. 2: Sub-sect. 1.]**

same to any husband with whom she might intermarry, & who should survive her, during his life, & after the death of both to sell the estate, & hold the proceeds of one-third in trust for the children of B. attaining twenty-one, & if B. should die without leaving a child or there should be no child of B. who should attain a vested interest then in trust for the children of S. B. married but died without having had issue:—*Held*: (1) the original gift in favour of the children of B. was not void as infringing the rule against limiting land to an unborn person for life (a husband who might be unborn at the date of the creation of the limitations), with a remainder limited so as to confer an estate by purchase on that person's issue; (2) even if the original gift had been void, the gift to the children of S. was good as an alternative & severable gift.—*Re BULLOCK'S WILL TRUSTS, BULLOCK v. BULLOCK*, [1915] 1 Ch. 493; 84 L. J. Ch. 463; 112 L. T. 1119; 59 Sol. Jo. 441.

*Annotations*:—As to (1) *Fold*. *Re Garnham, Taylor v. Baker*, [1916] 2 Ch. 413. *Reid*. *Re Clarke's Settlement Trust, Wanklyn v. Streetfield*, [1916] 1 Ch. 467.

**555. Independent of & co-existent with rule against perpetuities.**—*WHITBY v. MITCHELL*, No. 125, *ante*.

**556. Application of rule — Contingent remainders.**—*Re FROST, FROST v. FROST*, No. 130, *ante*.

**557. — Personal estate.**—*Re BOWLES, AMEDROZ v. BOWLES*, No. 551, *ante*.

**558. — Legal & equitable estates.**—*MONYPENNY v. DERING*, No. 548, *ante*.

**559. — — — — —**—*Re NASH, COOK v. FREDERICK*, No. 552, *ante*.

**560. — — — — —**—The rule in *Whilby v. Mitchell*, No. 125, *ante*, that after an estate has been limited to an unborn person for life a remainder cannot be limited to any child of that unborn person, applies to any settlement of a fee simple estate, whether legal or equitable, & whether in possession, remainder, or expectancy. For the purposes of this rule there is no difference between freehold & copyhold estate.

Where a settlement of real estate contained a power to the trustees to convert the real estate & gave a special power of appointment over the property, in considering the application of the rule the nature & quality of the property must be regarded as at the time when the appointment became operative & not as at the date of the settlement by which the power was given.

By a settlement dated in 1861 freehold lands were conveyed by A. to a trustee in fee upon trust to pay the net income to A. for life, & after his death upon trust to pay out of the income an annuity, & subject thereto upon trust to convey the estate as A. should by will appoint. A., who died in 1887, by his will appointed the lands to trustees, upon certain trusts by way of settlement:—*Held*: in 1893, when the annuitant was still living & the lands were still vested in the original trustee, the beneficiaries under A.'s will had nevertheless equitable estates in the lands, & not merely equitable executory interests.—*Re CLARKE'S SETTLEMENT TRUST, WANKLYN v. STREETFIELD*, [1916] 1 Ch. 467; 85 L. J. Ch. 592; 114 L. T. 501.

**561. Validity of particular limitation—Devise of realty to bachelor or spinster for life—Remainder to any wife or husband respectively for life—Remainder to issue.**—*Re FROST, FROST v. FROST*, No. 130, *ante*.

**562. — — — — —**—*WHITTING v. WHITTING*, No. 462, *ante*.

**563. — — — — —**—*Re PARK'S SETTLEMENT, FORAN v. BRUCE*, No. 553, *ante*.

**564. — — — — —**—*Re BULLOCK'S WILL TRUSTS, BULLOCK v. BULLOCK*, No. 554, *ante*.

**565. — — — — —**—*Re GARNHAM, TAYLOR v. BAKER*, No. 480, *ante*.

**566. — Appointment under power — Power under post-nuptial settlement in pursuance of ante-nuptial settlement—Appointment antedated prior to marriage.**—*WHITBY v. MITCHELL*, No. 125, *ante*.

— Election by persons taking in default of valid appointment.—*See EQUITY*, Vol. XX., pp. 431-433, Nos. 1602-1608.

**SECT. 2.—THE CY-PRÈS DOCTRINE.****SUB-SECT. 1.—IN GENERAL.**

**567. Statement of rule.**—(1) Personalty settled on marriage for the husband for life, then for the wife for life, then to & among all & every the children & grandchildren, or issue, in such shares, under such restrictions, at such times, & in such manner, as they or the survivor should appoint by deed or deeds, or by will; for want of appointment to all & every the children, & grandchildren, or issue, living at the decease of the survivor, equally, payable at twenty one or marriage; if but one, to that one; provided, that in case of no appointment, the issue of any children dead should not have a greater share than their parents would have had; issue only are within the power; but in any degree: but an appointment to any issue not living must be restrained to twenty-one years, after lives in being at the creation of the power otherwise it is void, even as to such as come *in esse* within those limits; but on marriage of a daughter interests may be given to her children generally, & to the husband. What is ill appointed goes as in default of appointment; but children of a living parent cannot take under the proviso.

(2) The doctrine of *cy-près* does not apply to personal; therefore where under a power to appoint personal to children or issue, an appointment is made to a son for life; then among all his children; if none, to him, his exors., etc.; the limitation to his children being void, because not restrained within the legal bounds, cannot be made good *cy-près*.

(3) Preceding limitations under an appointment being void, subsequent limitations, though within the power, cannot be accelerated; & are void also; though the objects of the prior limitations never come *in esse*.

(4) An unborn child of a person *in esse* may be made tenant for life, if beyond that, the absolute interest is disposed of.

(5) Where real estate is under a power of appointment limited in strict settlement, if the children cannot take as purchasers, the intention shall be executed *cy-près* by construing it an estate tail.

(6) Wherever there is a power to appoint among persons capable of such appointment, & they come *in esse* at the particular times to make the appointment good, a sum appointed, as in this case, to the daughter, upon marriage, though modified with respect to the objects of the marriage, is a good appointment, not to the objects of the marriage, but to the daughter herself; & this appointment is a good appointment to her; though if it had been done by will & independent of any modification introduced by the daughter, it would not have

been good (ARDEN, M.R.).—*ROUTLEDGE v. DORRIL* (1794), 2 Ves. 357; 30 E. R. 671.

*Annotations*.—*As to* (1) *Consd.* *Crompe v. Barrow* (1799), 4 Ves. 681; *Leake v. Robinson* (1817), 2 Mer. 363; *Harvey v. Stracey* (1852), 1 Drew 73; *Re Bowles, Amedroz v. Bowles*, [1902] 2 Ch. 650. *Reid.* *James v. Wynford* (1852), 1 Sm. & G. 40; *Fitzroy v. Richmond* (No. 2) (1859), 27 Beav. 190; *Re Veale's Trusts* (1876), 4 Ch. D. 61; *Williamson v. Farwell* (1887), 35 Ch. D. 128; *Whitby v. Mitchell* (1890), 44 Ch. D. 85. *As to* (3) *Reid.* *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54; *Re Hewett's Settltmt.*, *Hewett v. Eldridge*, [1915] 1 Ch. 810. *As to* (5) *Consd.* *Monypenny v. Dering* (1852), 2 De G. M. & G. 145. *As to* (6) *Reid.* *White v. St. Barbe* (1813), 1 Ves. & B. 399; *Tucker v. Sanger* (1824), M'Cle. 424; *Re Bowles, Amedroz v. Bowles*, [1902] 2 Ch. 650. *Generally, Mentd.* *Legard v. Haworth* (1800), 1 East, 120; *Cutten v. Sanger* (1828), 2 Y. & J. 459; *Hughes v. Wells* (1852), 9 Hare, 749; *Re Gosset's Settltmt.* (1854), 19 Beav. 529; *Birley v. Birley* (1858), 25 Beav. 299; *Re Whitaker, Ainley v. Ainley* (1897), 41 Sol. Jo. 209.

**568. Nature—Rule of construction of wills.]—***BRUDENELL v. ELWES*, No. 573, *post*.

**569. ———.]—**Devise to A., the daughter of testator, for life, & after her decease to all & every the child or children of A., male or female, begotten or to be begotten, & their assigns, for their respective lives; & after the decease & respective deceases of such child or children of A., to all & every child or children of all & every such child or children of A., male or female, to be begotten, & the heirs of his, her, & their respective body & bodies, as tenants in common; & in case of the death of any of said children of such child or children of A., & failure of issue of his, her, or their body or bodies respectively, then as well the original as the accrued share of such of them so dying without issue to go to the survivors & survivor, others or other of them, as tenants in common, if more than one; & for default of such issue, over. A. had three children born in the lifetime of testator, & living at his decease, & one born after testator's death. One of the three born in his lifetime died during the life of A. without issue:—*Held*: inasmuch as the children of the afterborn child of A. could not take as purchasers, the devise would be supported according to the rule of *cy-près* or approximation, by giving an estate tail to the afterborn child of A.; the rule of *cy-près*, being an arbitrary principle of construction, introduced to effect the intention of testator in the exigency of a particular case, was not to be applied, except when the necessity of the case required it; & therefore, although the devise was to the children of A. as a class, the children of A. born in testator's lifetime would take estates for life, & the estates devised to the children of the afterborn child would alone be altered.

To determine the validity of a given set of limitations, the will must be applied to the facts of that particular case, as they stood at the death of testator, & not as they stood at the date of the will (*WIGRAM, V.-C.*).

It is clear that for the purpose of determining whether the whole of the class can take, I must look at the events as they existed at the death of testator. I cannot wait for subsequent events, so as to see whether a difficulty will be created by the birth of other children (*WIGRAM, V.-C.*).—*VANDERPLANK v. KING* (1843), 3 Hare, 1; 12 L. J. Ch. 497; 1 L. T. O. S. 143; 7 Jur. 548; 67 E. R. 273.

*Annotations*.—*Consd.* *Monypenny v. Dering* (1847), 16 M. & W. 418; *Williams v. Teale* (1847), 6 Hare, 239; *East v. Twyford* (1853), 4 H. L. Cas. 517; *Lyddon v. Ellison* (1854), 19 Beav. 565. *Appl.* *Parfitt v. Hember* (1867), L. R. 4 Eq. 443. *Reid.* *Gooch v. Gooch* (1851), 14 Beav. 565; *Bentlnok v. Portland* (1877), 38 L. T. 58; *Re Dawson, Johnston v. Hill* (1888), 39 Ch. D. 155; *Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 569. *Mentd.* *Wright v. Vanderplank* (1856), 8 De G. M. & G. 133; *Rabboth v. Squire* (1859), 4 De G. & J. 406; *Atkinson v.*

*Barton* (1861), 31 Beav. 272; *Re Clark's Trusts* (1863), 2 New Rep. 386; *Re Hudson, Hudson v. Hudson* (1882), 20 Ch. D. 406.

**570. ———.]—**(1) Where an estate for life is given by clear words, the mere imposition of a charge on the tenant for life will not have the effect of enlarging the estate.

(2) Testator, by a will written on the pages of a small notebook, divided his property into three classes, marked No. 1, No. 2, No. 3. He devised these classes of property to persons designated by letters. The order of "succession" was marked in one page (54) of his will. This page contained the words "The eldest & other sons to inherit before the next letter." The persons designated by the letters were all named in a card, which was referred to in the will, & which card was with the will admitted to probate. K. was testator's wife, to whom was given an estate for life in all the classes of the property. The will required implicit obedience to certain orders of testator on the part of "the individual first to inherit after K."; & if not, "the property aforesaid set down & particularised in No. 1 to go to M., if not to L., & afterwards to his eldest lawfully begotten son, etc." There were similar expressions with regard to N. & O. The card showed that these two letters were intended for the eldest sons of two nephews, but who were then unborn. The property No. 1 consisted of very large sums in stock, which the exors. of the will were to invest in the purchase of real estate; & in page 54 L. was named as the person to take No. 1 after the life estate of K. A grandson was "to inherit before the next-named in the entail or any one of his sons." Class No. 2 consisted of a small estate in land, & by page 54, O. was, as to that, to succeed to K. & the estate there given to O. was expressly a life estate, with remainder to his eldest & other sons in tail male; & it was there also said "a grandson legitimate shall inherit before a younger son." Class No. 3 consisted of certain estates in Suffolk; the "succession" there was (page 54) "first to K. then to M.," & the devise (page 47) was "first to K. & then to M., & afterwards to his eldest legitimate son, & then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, & so on to the other sons in like manner. After the decease of K., I repeat, I bequeath all the property aforesaid to M. & his heirs male, in the manner aforesaid, as in the case of L., etc., at page 2, & I mean & order that this mode shall prevail throughout the whole entail, under precisely the same injunctions":—*Held*: reading all the parts of the will together, L. only took a life estate in No. 1, with remainder to his eldest & other sons in tail male; this was not an executory trust.

The cts. have in recent times got over the difficulty of these void limitations to unborn issue of a person who is himself unborn, & is the supposed parent of unborn issue, by the application of the doctrine of *cy-près*, that is, if you attempt to give effect to the limitations as they stand, the law will declare them void to a certain extent, but will also carry the intention of testator into effect to a certain extent. An unborn son will no doubt take for life; but on that limitation you cannot superadd limitations to the issue of that unborn son as purchasers. The law therefore . . . does step in on the doctrine of *cy-près*, & says that the parent himself shall take an estate tail, which will comprise in it the issue which testator intended to provide for. The doctrine is not to be carried any further (*LORD ST. LEONARDS*).

(3) In coming to that conclusion you do not



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put on the same words different meanings, because you hold that testator in every case meant to make the parent tenant for life, with remainder to his first & other sons, born or unborn, as purchasers; but in the particular case of an unborn son, you do, in favour of the general intention, give a construction which you do not give to those limitations that require no such aid (LORD ST. LEONARDS).—*EAST v. TWYFORD* (1853), 4 H. L. Cas. 517; 22 L. T. O. S. 173; 10 E. R. 564, H. L. *Annotations*:—*Generally*, *Mentd.* *Re De Lanczy* (1869), L. R. 4 Exch. 345; *Hurton v. Newbery* (1875), 45 L. J. Ch. 202.

**571. ———.]—Devise in trust for A. for life, with remainder in trust for B., C., & D., & the survivor, for their lives & the life of the survivor, & for the issue of them respectively for their lives for ever, as tenants in common, with a gift over on their death without issue, or in case of the death of all their issue; & a direction that the before-stated entails to B., C., & D. & their respective issues, were to be equally divided amongst the daughters as well as the sons of them & their issue.**

The doctrine of *cy-près* established by *Humberston v. Humberston*, No. 570, *post*, is applicable to such a devise, & not merely to a will of an executory character.

This doctrine is a rule of construction, & when the ct. finds that the object expressed by testator is to give to A. an estate for life, to A.'s eldest son another estate for life, & to his eldest son a third estate for life, & so on, the ct. will carry that intention into effect as nearly as it can by giving to A. an estate for life, & to his eldest son, if unborn at the death of testator, an estate in tail male or, if he be alive at the death of testator, an estate for life, with a remainder to his eldest son in tail male (LORD ROMILLY, M.R.).—*PARFITT v. HEMBER* (1867), L. R. 4 Eq. 443.

*Annotations*:—*Consd.* *Hampton v. Holman* (1877), 5 Ch. D. 183. *Reid.* *Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332.

**572. ———.]—HAMPTON v. HOLMAN, No. 309, *ante*.**

**573. Not to be extended.]—A power of appointment under a marriage settlement unto & among all or any the child or children of the marriage for such estates as the husband & wife, or the survivor of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment reserving to them & the survivor a power of revocation & appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the first & other sons in tail, etc., remainder to the daughter in fee, all the limitations subsequent to that to the eldest son for life are void, as being an excess beyond the power; & the ultimate remainder dependent upon such intermediate limitations, though made in favour of one of the objects of the power, is also void; & shall not be accelerated by the event of such void intermediate limitations not having taken effect, for want of issue male of the eldest son, etc., to whom the appointment was made. For an appointment not good in its creation will not become so by subsequent circumstances, & such an appointment, being by deed, cannot be construed *cy-près*, so as to give the sons estates tail, as perhaps might have been the case if the appointment had been by will.**

It is equally clear that she did not intend that the subsequent limitation over to J. C. should be accelerated; but it was made to depend upon the intermediate limitations to the issue of her brothers, & she was not to take until their issue male was extinct (LORD KENYON, C.J.).

The doctrine of *cy-près* goes to the utmost verge of the law, even in the construction of wills; & we must take care that it does not run wild. But it has never been applied to the construction of deeds (LORD KENYON, C.J.).—*BRUDENELL v. ELWES* (1801), 1 East, 442; 102 E. R. 171; *subsequent proceedings*, (1802), 7 Ves. 382, L. C.

*Annotations*:—*Distd.* *Beard v. Westcott* (1814), 5 Taunt. 393. *Reid.* *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502; *Re Nash, Cook v. Frederick*, [1909] 2 Ch. 450. *Mentd.* *Holmesdale v. West* (1866), L. R. 3 Eq. 474; *Eastwood v. Avison* (1869), L. R. 4 Exch. 141; *Re Harding, Rogers v. Harding*, [1894] 3 Ch. 315.

**574. ———.]—EAST v. TWYFORD, No. 570, *ante*.**

**575. Applicable only where necessity requires.]—VANDERPLANK v. KING, No. 569, *ante*.**

**SUB-SECT. 2.—APPLICATION OF DOCTRINE.**

**A. In General.**

**576. To devise.]—Devise of lands to a corp'n. in trust to convey the premises to his godson A. for life, & so to his first son for life; & afterwards to convey the premises to the first son of that son for life; & in failure of such issue of A. to convey it to B. for life, etc., this is a perpetuity; but the conveyance shall be made as near the intent of the party as the rules of law will admit, viz. by making all the persons in being but tenants for life; but the limitation to the sons unborn must be in tail.—HUMBERSTON v. HUMBERSTON (1716), 1 P. Wms. 332; 2 Vern. 737; 24 E. R. 412; *sub nom.* HUMBERSTON v. HUMBERSTON, Prec. Ch. 455; Gilb. Ch. 128; 1 Eq. Cas. Abr. 207, pl. 8, L. C.**

*Annotations*:—*Consd.* *Hopkins v. Hopkins* (1738), West temp. Hard. 606; *Marlborough v. Godolphin* (1759), 1 Eden. 404; *Thellusson v. Woodford* (1805), 11 Ves. 112. *Distd.* *Mortimer v. West* (1828), 2 Sim. 274. *Appl.* *Lyddon v. Ellison* (1854), 19 Beav. 565; *Parfitt v. Hember* (1867), L. R. 4 Eq. 443. *Reid.* *Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332. *Consd.* *Re Nash, Cook v. Frederick*, [1909] 2 Ch. 450. *Appl.* *Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 569. *Reid.* *Capillon v. Volee* (1728), Kel. W. 27; *Godolphin v. Godolphin* (1747), 1 Ves. Sen. 21; *Routledge v. Dorril* (1794), 3 Ves. 357; *Vanderplank v. King* (1843), 3 Hare, 1; *Williams v. Teale* (1847), 6 Hare, 239; *Monypenny v. Dering* (1852), 2 De G. M. & G. 145; *Hampton v. Holman* (1877), 5 Ch. D. 183.

**577. ———.]—VANDERPLANK v. KING, No. 569, *ante*.**

**578. ———.]—Testatrix directed her trustees to settle her property but in such a way that some of the limitations would be void for remoteness:—Held: in carrying the direction into effect the ct. would modify the limitations so as to make them consistent with the rules of law & equity.—LYDDON v. ELLISON (1854), 19 Beav. 565; 24 L. T. O. S. 123; 18 Jur. 1066; 2 W. R. 680; 52 E. R. 470.**

*Annotation*:—*Mentd.* *Re White, White v. Edmond*, [1901] 1 Ch. 570.

**579. ———.]—PARFITT v. HEMBER, No. 571, *ante*.**

**580. ———.]—HAMPTON v. HOLMAN, No. 309, *ante*.**

**581. ——— Successive estates for years determinable on lives.]—Under a devise of lands to trustees in fee in trust for A., an infant, for ninety-nine years if he shall so long live, & after that term to his first, second, third, & fourth sons, & the issue**



male of their bodies, for the like term of ninety-nine years, as they shall be in seniority of birth, & in default of such issue male in him or them, then to B. & the issue male of his body, for the like term of ninety-nine years, & in default of such issue male then to the right heirs of the deviser, A. takes an estate for ninety-nine years determinable with his life, & upon his death his first son takes a like estate; but the subsequent limitations to his other sons & to B. are void.—*SOMERVILLE v. LETHBRIDGE* (1795), 6 Term Rep. 213; 101 E. R. 517.

*Annotations*:—*Refd.* *Beard v. Westcott* (1814), 5 Taunt. 393; *Monypenny v. Dering* (1852), 19 L. T. O. S. 320; *Re Hewett's Settlement*, *Hewett v. Eldridge*, [1915] 1 Ch. 810.

—[See, also, Sub-sect. 2, B. & C., *post*.

**582. To deeds.**—*ADAMS v. ADAMS* (1777), 2 Cowp. 651; 98 E. R. 1289.

*Annotations*:—*Distd.* *Haydon v. Willsheare* (1789), 3 Term Rep. 372. *Consd.* *Tomkyns v. Blane* (1800), 28 Beauv. 422. *Refd.* *Robinson v. Hardcastle* (1786), 2 Bro. C. C. 22; *Robinson v. Hardcastle* (1788), 2 Term Rep. 241. *Mentd.* *Waller & Smyth v. Hewell* (1789), 1 Phillim. 170; *Piper v. Piper* (1834), 3 My. & K. 159.

**583.** —[*BRUDENELL v. ELWES*, No. 573, *ante*.

**584. To personality.**—Testator directs £20,000 which he has in the 3 Per Cents. to be firmly fixed, there to remain during the life of his wife, for her to receive the interest; & after her death to be in the same manner firmly fixed on the infant W. C. "to be so secured that he may only receive the interest during his life; & after his decease, to the heir male of his body, & so on in succession to the heir-at-law, male or female"; with a direction that the principal sum is never to be broken into, but the interest only to be received, "his intent being that there should always be the interest, to support the name of Cobb as a private gentleman."

Though the intention be manifest to give only a life interest to W. C., yet there being nothing to show that "heir male" was not used in a strict technical sense, held that W. C. took the absolute interest, the words being such as would create an estate tail of freehold property.

*Scrus*, if the words "for life" had been added to the words "heir male," in which case the latter words might have been construed to be a mere *designatio personae*:—*Held*: the declaration that the principal stock should not be broken into, not sufficient to turn the heir into a tenant for life, being like an attempt at perpetual restraint of alienation, which, in the case of land, would not prevent the creation of an estate tail.—*BRITTON v. TWINING* (1817), 3 Mer. 170; 30 E. R. 68.

*Annotations*:—*Consd.* *Ex p. Wynch* (1851), 5 De G. M. & G. 188. *Refd.* *Smith v. Frederick* (1826), 1 Russ. 174; *Shulton v. Watson* (1849), 18 L. J. Ch. 223.

**585.** —[*ROUTLEDGE v. DORRIL*, No. 567, *ante*.

**586.** —[Gift of stock in the public funds, upon trust to pay the dividends to the four brothers & two sisters of testator, in equal shares, for their respective lives, & after their respective deceases, to pay the dividends unto & amongst the eldest sons or son of his said brothers, & the survivors & survivor of them, for their lives or life, in equal shares & proportions, upon their attaining twenty-one, with a provision for maintenance in the meantime; & after the decease of such eldest sons or son, to pay the dividends unto & amongst the eldest male issue only for the time

being of their bodies, *ad infinitum*, for ever:—*Held*: the bequests to the brothers & sisters of testator were valid; the bequests in remainder to the four eldest sons of the four brothers, each of whom had a son living at the death of testator, were valid; but such eldest sons took absolute interests in their several shares of such stock; according to the language of the will, the issue of the nephews would take, if at all, as purchasers; but if the limitation to their issue male should be construed as words of limitation, the nephews would have taken a life estate only.

But if the bequest to the issue male of the nephews, in this case, is not to be construed as a limitation to the nephews themselves, the right of the nephews to a larger estate than for their lives, would have depended upon the *cy-près* doctrine; & that doctrine being inapplicable to personal estate, the life estate of the nephews would not be enlarged (WIGRAM, V.-C.).—*HARVEY v. TOWELL* (1847), 7 Hare, 231; 17 L. J. Ch. 217; 12 Jur. 241; 68 E. R. 91.

**587. Benefit to persons not object of testator's bounty.**—*MONYPENNY v. DERING*, No. 548, *ante*.

**588.** —[A *cy-près* estate cannot be implied in lieu of excessive limitations of real estate under a testamentary power, unless it will include all persons intended to take under those limitations, & no others.—*Re RISING, RISING v. RISING*, [1904] 1 Ch. 533; 73 L. J. Ch. 455; 90 L. T. 504.

*Annotation*:—*Apld.* *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502.

**589.** —[*Re RICHARDSON, PARRY v. HOLMES*, No. 599, *post*.

**590.** —[*Re MORTIMER, GRAY v. GRAY*, No. 108, *ante*.

**591. Exclusion of persons objects of testator's bounty.**—*Re RISING, RISING v. RISING*, No. 588, *ante*.

**592.** —[*Re MORTIMER, GRAY v. GRAY*, No. 108, *ante*.

*B. Devises of Life Interests with Remainders in Tail.*

**593. Life estate to unborn person—Remainder to issue in tail.**—Life estate construed as estate tail.—By a devise to the second son, then unborn, of A. for life, & after his decease, or the accession of his paternal estate, to his second son & his heirs male, with remainders over; such second son of A., when born, will take an estate in tail male, by way of executory devise, determinable of the accession of the family estate, & in the interim, the lands will descend to the heir of testator.—*NICHOLL v. NICHOLL* (1777), 2 Wm. Bl. 1159; 90 E. R. 683.

*Annotations*:—*Consd.* *Robinson v. Hardcastle* (1786), 2 Bro. C. C. 22. *Expd.* *Monypenny v. Dering* (1817), 16 M. & W. 418. *Refd.* *Monypenny v. Dering* (1852), 2 De G. M. & G. 145. *Distd.* *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502. *Refd.* *Vanderplank v. King* (1843), 3 Hare, 1; *Whiting v. Whiting* (1908), 53 Sol. Jo. 100.

**594.** —[*ROUTLEDGE v. DORRIL*, No. 567, *ante*.

**595.** —[*MONYPENNY v. DERING*, No. 548, *ante*.

**596.** —[Testator devised a freehold estate to trustees upon trust to permit his son, G. A., & his assigns to receive the rents, issues, & profits during his life, & after his death upon trust to permit the first son of G. A. & the heirs male of his body to receive the rents, etc., during their respective lives severally & successively in tail male:—*Held*: the first son of G. A. took an estate tail in the property, & not merely a life

**Sect. 2.—The *cy-près* doctrine: Sub-sect. 2, B. & C.]**

estate.—**HUGO v. WILLIAMS** (1872), L. R. 14 Eq. 224; 41 L. J. Ch. 661; 26 L. T. 901.

**Annotation:—Foll. *Re Mountgarrot, Mountgarrot v. Ingilby*, [1919] 2 Ch. 294.**

**597. ————.]—*Re MORTIMER, GRAY v. GRAY*, No. 108, ante.**

**598. ————.]—**Testator, who died in 1873, by his will appointed three trustees, & devised & bequeathed to them, their heirs, exors., administrators, & assigns, all his real & leasehold estate "upon trust to receive for or permit my son W. to receive the rents, issues & profits during his life of" two specified freehold hereditaments, he keeping the same in repair & paying the expenses of insuring the same against fire, & the taxes & other outgoings affecting the same. Then followed a proviso that if W. should do or suffer anything to deprive himself of the personal enjoyment of any of the rents, etc., the trust thereinbefore declared should "immediately cease & determine," & the rents, etc., should be received by the trustees during the then residue of W.'s life, " & be applied to & for the support & maintenance or use & benefit of the lawful issue for the time being, if any, of W." as therein provided; but, if W. should have no issue then living, testator empowered his trustees to apply the income as far as possible to secure its application for W.'s personal enjoyment & prevent the same "from becoming the property of his alienees or creditors"; but if in certain circumstances, which did not happen, W. should be absent from England, testator directed his trustees until his return & afterwards to pay a weekly sum to X. & to invest & accumulate the rest of this income. Next followed a trust to "permit" testator's wife "to receive the rents, issues & profits during her life" of other freehold properties & some leasehold houses, & a trust to sell as soon as convenient after testator's decease some other leasehold properties & also, after his wife's death, the leaseholds given to his wife for life, & to pay the proceeds of one of the other leaseholds, not given to her, to his wife. Then testator declared that if W. should not be in England at the time of testator's death, an absence which did not occur, but should return within ten years, he was to have the surplus income of the property in which a life interest had been given to him & of the accumulation thereof after paying the weekly sum; but if W. should not have returned within the ten years testator directed his trustees to pay the surplus income & investments thereof to J. W., & "to permit & empower" him to receive the rents, etc., for his own life of the two freeholds given in trust for W. for life, subject to an annuity of £50 to X. in lieu of the weekly sum. Then testator said that on W.'s death, if, as happened, he should have returned, he devised the same two freeholds "unto the lawful issue male in succession of the said W., so that every elder son & his issue may be preferred to every younger son & his issue male, & so that every such son may take an estate for his life, with remainder to his first & every subsequent son successively, according to seniority, in tail male; & on failure of such issue, to the said J. W. & his issue male," charged with the annuity to X., "for the same estates & in the same order as my said hereditaments are hereinbefore limited to the first & every subsequent son of the said W.," & on the failure of such issue as aforesaid of W. & J. W., testator gave the lastly referred to hereditaments unto J. H., a nephew of testator, "for his life, with remainder to his

issue male, for the same estates & in the same order as the said hereditaments are hereinbefore limited to the first & every subsequent son of the said W." Then, if W. was present in England, as he was, testator in that event, on the decease of testator's wife, gave the freeholds in which she had a life interest, charged with the £50 annuity, "unto the said W. for his life, but subject to the provisoes & conditions aforesaid, & subject thereto, I devise the whole of the last-mentioned freehold . . . premises to the same persons, in the same order, & in like manner as I have hereinbefore devised my other freehold estate." Testator's widow died in 1878. W. died in 1905, without having had male issue. J. W. died in 1908, without having had male issue. J. H. died in 1906, having had four sons, all born in testator's lifetime, J. E., Y. H., W. G., & S. S. died leaving a son J. S. J. E. died without issue in 1913, & Y. H. died in 1910, without male issue:—**Held**: (1) applying the doctrine of *cy-près* or approximation, the devises to W. & his male issue & to J. W. & his male issue were not void for remoteness.

(2) J. W. became, on the death of W. without male issue, entitled to an estate for life only, & on the death of J. E. without male issue Y. H. became entitled to an estate for life, & on the death of Y. H. without male issue the property stood limited to the use of W. G. for life, with remainder to his first & other sons successively in tail male, with remainder to J. S. in tail male, with remainders over.—**Re HOBBS, HOBBS v. HOBBS**, [1917] 1 Ch. 509; 86 L. J. Ch. 409; 116 L. T. 270, C. A.

**Annotation:—As to (2) *Consd. Re Elton, Elton v. Elton*, [1917] 2 Ch. 413.**

**C. Devises of Successive Life Interests.**

**599. Limitation of application of doctrine—Only to persons the object of testator's bounty.]**

(1) Testator, who died before Wills Act, 1837 (c. 26), was passed, by his will gave real estate to his children C., G., & M., without any words of limitation, & declared that they & the survivors of them should stand seised thereof in trust to retain the income thereof for their own benefit in equal shares during their natural lives; but the will contained a proviso that if any of such children should die unmarried, or, being married, without leaving a child, his or her share should accrue to the surviving child or children, equally if more than one, & that the last survivor of the three children should take all the estate devised. The will continued as follows: "But in case such son or daughter so dying shall leave issue at his or her decease . . . the share of such child so dying to go & be divided equally amongst his or her child or children . . . for life, share & share alike if more than one, & if but one then the whole share to such only child for life . . . & so to be continued & distributed in a descending line *per stirpes* from issue to issue for life so long as any issue shall be living descended from my children, the children of the parent dying taking parent's share equally between them in all cases of decease." The will contained no gift over in case of default of issue. G. died in 1856 a bachelor & intestate. C. died in 1874 leaving one child only, R. M. died in 1890 without issue, but having devised her real estate to R., who executed a disentailing deed. It was admitted that only half of the property passed to M. as the survivor of the three children:—**Held**: neither C. nor R. took an estate tail in the other moiety according to the *cy-près* doctrine, but on the death of R. there was

an intestacy, & this moiety belonged to testator's heir.

(2) If you find successive limitations for life to persons who stand in such relation to each other as that they would take successively under an estate tail, if the limitations were construed as creating an estate tail, but who cannot take in the literal terms of the gift by reason of the limitations as they stand being void, then it may be possible under certain circumstances to apply the doctrine of *cy pres*, & to say that instead of the estate purported to be given by the will an estate tail has been created (BUCKLEY, J.).

(2) But directly you find that the persons to benefit are a class larger than those who would take under an estate tail . . . then the matter is a totally different one. In the present case the point of the whole matter as it seems to me lies in this—that as you pass from generation to generation the children of the parent dying are to take their parent's share equally between them. As you come to each generation it is not the heir in tail who is to take, but the heir in tail & all his brothers & sisters are to take equally between them. That is a direction hopelessly inconsistent with an estate tail, & the creation by implication of an estate tail will not give effect to that intention at all (BUCKLEY, J.).—*Re RICHARDSON, PARRY v. HOLMES*, [1904] 1 Ch. 332; 73 L. J. Ch. 153; 91 L. T. 169; 52 W. R. 119; 48 Sol. Jo. 33. *Annotation*:—*As to* (1) *Fidd. Re Mortimer, Gray v. Gray* (1905), 92 L. T. 452.

**600. Life estate to living person—Life interests to unborn persons construed as estates tail.**—*HUMBERSTON v. HUMBERSTON*, No. 570, *ante*.

**601.** ———.]—Testator, seised in fee of several estates, devised them to trustees in fee, upon trust to permit his sons & daughters respectively & severally to receive the rents & profits of the respective estates; with a clause for preserving contingent remainders, & from & immediately after the decease of any of his children, testator devised the estate limited to him or her for life unto or among his or her child or children living at his or her decease, for their natural lives as tenants in common, but with equal benefit of survivorship among the rest of the children if more than one, & any one of them should die without leaving issue; the child or children of each son or daughter taking the rents & profits of his or her parent's estate only; & from & after the decease of all the children of each of his sons & daughters without issue, he gave the estate or estates to them respectively limited, to & among all the issue of such child or children during their lives as tenants in common, & to descend in like manner to the issue of his said sons & daughters respectively, so long as there should be any stock or offspring remaining; & for default or in failure of issue of any of his sons & daughters, he devised the estate limited to him or her dying without issue, to the survivors of his sons & daughters, for their respective lives, as tenants in common; & after their respective deaths to the children of the survivors of them during their respective lives as tenants in common, with such benefit of survivorship as aforesaid; & after the decease of all of them, to the issue of such children, in like manner as testator had devised the original estate of each of the sons & daughters; & for default or in failure of issue of all his sons & daughters but one, he devised all the estates to that one in fee:—*Held*: under this devise, a son of testator

did not take an immediate estate tail in the premises devised to him, but an estate for life, with remainder in tail to his children as tenants in common, remainder to himself in tail.—*DOE d. GALLINI v. GALLINI* (1835), 3 Ad. & El. 340; 4 L. J. Ex. 337; 111 E. R. 442; *sub nom. GALLINI v. DOE d. GALLINI*, 4 Nev. & M. K. B. 894, Ex. Ch.

*Annotations*:—*Distd. Coles v. Witt* (1856), 2 Jur. N. S. 1226. *Apld. Forsbrook v. Forsbrook* (1867), 3 Ch. App. 93. *Consd. Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 569. *Reid. Hart v. Tulk* (1852), 2 De G. M. & G. 300; *Roddy v. Fitzgerald* (1858), 6 H. L. Cas. 823; *Atkinson v. Holtby* (1863), 10 H. L. Cas. 313; *Clarke v. Clomman*, *Selway v. Clomman* (1866), 36 L. J. Ch. 171; *Allgood v. Blake* (1872), L. R. 7 Ex. 339; *Andrew v. Andrew* (1875), 1 Ch. D. 410; *Hampton v. Holman* (1877), 5 Ch. D. 183; *Bowen v. Lewis* (1884), 9 App. Cas. 890; *Lalit Mohun Singh Roy v. Chukkan Lal Roy*; *Bipin Mohun Singh Roy v. Chukkan Lal Roy*; *Priambada Roy v. Chukkan Lal Roy* (1897), 13 T. L. R. 356.

**602.** ———.]—*EAST v. TWYFORD*, No. 570, *ante*.

**603.** ———.]—Testator declared his will to be, that his property be inherited by his nephews, C. & T., & the sons of his late brother A., during their lives, & after the decease of C. & T. that the eldest son of C. & the eldest son of T. inherit the property during their lives, & so on, the eldest son of each of the two families to inherit the same for ever; & that each two of the succeeding inheritors should inherit the property free from incumbrances:—*Held*: C. & T. took estates for their lives, with remainder to their eldest sons respectively for their lives, with remainder to C. & T. in tail male.—*FORSBROOK v. FORSBROOK* (1867), 3 Ch. App. 93; 16 W. R. 290, L. J.

*Annotations*:—*Consd. Hampton v. Holman* (1877), 5 Ch. D. 183; *Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332; *Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 569. *Mentd. Pryse v. Pryse* (1872), L. R. 15 Eq. 86; *Bright v. Tyndall* (1876), 4 Ch. D. 189.

**604.** ———.]—*PARFITT v. HEMBER*, No. 571, *ante*.

**605.** ——— *Construed as estate tail.*—Devise of an estate to trustees in trust to permit devisor's six children, A., B., C., D., E., F., B. being a daughter, & the others, sons, to receive a sixth part each, of the rents during their life & lives, & after their respective deceases, to permit the child or children of the child so dying to receive the rents of the share of the child so dying in equal shares & proportions; & so on in like manner from children to children; in case either of devisor's children should die without leaving issue, the rents of the child so dying to go to the survivor or survivors. A., C., E., & F., died without issue, & B., leaving a son & two daughters:—*Held*: the devisor's children took estates tail; upon the death of A., C., E., & F., their shares accrued to D. as survivor, & B.'s son was only entitled to one-sixth.—*WOLLEN v. ANDREWES* (1824), 2 Bing. 126; 9 Moore, C. P. 248; 2 L. J. O. S. C. P. 145; 130 E. R. 253.

*Annotation*:—*Distd. Doe d. Gallini v. Gallini* (1835), 3 Ad. & El. 340.

**606. Successive life estates to unborn persons.**—Under a devise "to A. for life & after him to his eldest son or any other son after him for life, & after them to as many of his descendants issue male as shall be heirs of his or their bodies down to the tenth generation during their natural lives":—*Held*: A. took no more than a life estate; for here was no general intent to create an estate tail, as contradistinguished from the particular intent to give an estate for life to the first taker; but a single intent to create a succession of life estates to persons not in esse which

PART II. SECT. 2, SUB-SECT. 2.—C.

**600 i. Life estate to living person—Life interests to unborn persons construed as estates tail.**—*GUY v. GUY* (1910), 30 N. Z. L. R. 383.—N.Z.  
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the law would not allow.—**SEAWARD v. WILLOCK** (1804), 5 East, 198; 1 Smith, K. B. 390; 102 E. R. 1046.

**Annotations:—***Distd. Britton v. Twining* (1817), 3 Mer. 176. *Apld. Mortimer v. West* (1828), 2 Sim. 274. *Distd. Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332. *Consd. Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502. *Reid. Wight v. Leigh* (1809), 15 Ves. 564; *Harris v. Davis* (1844), 1 Coll. 416; *Ferrand v. Wilson* (1845), 15 L. J. Ch. 41; *Monypenny v. Dering* (1852), 2 De G. M. & G. 145; *Forsbrook v. Forsbrook* (1866), L. R. 2 Eq. 799.

**607. —[.]—**Testator being seised in fee of freehold land, & of copyhold according to the custom of the manor, the freehold & copyhold being intermixed, devised as follows: "As to my worldly estate, I dispose thereof as follows: I give to my nephew T. all my lands, to have & to hold during his life, & to his son if he has one, if not to the eldest son of my nephew T. & to his son after him, if he has one, if not to the regular

male heir of the G. family." By codicil stating that his nephew T. then had a son born, he gave to that son, after his father's decease, all his freehold & copyhold lands; & "to his eldest son, if he had one; but if he had no son, then to the next eldest regular male heir of the G. family." By the custom of the manor, copyhold lands, parcel thereof, of which any tenant died seised in fee, passed by descent to the youngest son:—**Held**: by the will & codicil the son of T. took an estate tail, &, consequently, upon his death the copyhold lands descended to the youngest son.

An estate for life cannot be given to a person not *in esse* in remainder after a present estate for life to a person not *in esse* (LORD TENTERDEN, C.J.).

—**DOE d. GARROD v. GARROD** (1831), 2 B. & Ad. 87; 9 L. J. O. S. K. B. 149; 109 E. R. 1076.

**Annotation:—***Reid. Doe d. Burrin v. Charlton* (1840), 1 Man. & G. 429.

**608. —[.]—****HONYWOOD v. HONYWOOD**, No. 317, *ante*.

## Part III.—Restriction of Accumulation.

### SECT. 1.—APART FROM STATUTE.

**609. Validity of directions for accumulation — if not offending against perpetuity rule.]—****HARRISON v. HARRISON** (OR *Re DFNISON'S (LADY) WILL*) (1787), cited in 4 Ves. at p. 338.

**Annotation:—***Consd. Thellusson v. Woodford* (1798), 4 Ves. 227.

**610. —[.]—**Devise of real estates of the annual value of near £5,000 & other estates directed to be purchased with the residue of the personal estate, amounting to above £600,000, to trustees & their heirs, etc., upon trust during the lives of testator's sons, A., B., & C., & of his grandson D. & of such other sons as A. now has or may have & of such issue as D. may have & of such issue as any other sons of A. may have & of such sons as B. & C. may have & of such issue as such sons may have as shall be living at his decease or born in due time afterwards & during the life of the survivor to receive the rents & profits & from time to time to invest the same & the produce of timber, etc., in other purchases of real estates; & after the death of the survivor of the said several persons, that the said estates shall be divided into three lots, & that one lot shall be conveyed to the eldest male lineal descendant then living of A. in tail male; remainder to the second, etc.; & all & every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is limited, of A. successively in tail male; remainder in equal moieties to the eldest & every other male lineal descendant or descendants then living of B. & C. as tenants in common in tail male in the same manner, with cross remainders; or if but one such male lineal descendant, to him in tail male; remainder to the trustees, their heirs, etc. The other two lots were directed to be conveyed to the male descendants of B. & C. respectively in the same manner, & with similar limitations to the male descendants of their brothers, & to the trustees in fee; & it was directed, that the trustees should stand seised upon the failure of male lineal descendants of A., B. & C. as aforesaid upon trust to sell & pay the produce to His Majesty, his heirs & successors, to the use of the Sinking Fund; the accumulation, till the purchases or sales can

take place, to go to the same purpose; with a direction, that all the persons becoming entitled shall use the surname of testator only. The trusts of the will were established.

(2) It was never held, that executory devises are to be governed by the rules of law as to common law conveyances (BULLER, J.).

(3) It is in the power of testator to direct accumulation of the rents & profits of his estate for as long a time as that during which the law allows him to render the estate unalienable (BULLER, J.).—**THELLUSSON v. WOODFORD, WOODFORD v. THELLUSSON** (1799), 4 Ves. 227; 31 E. R. 117; *affd.* (1805), 11 Ves. 112, H. L.

**Annotations:—***As to* (1) *Reid. Godfrey v. Davis* (1801), 6 Ves. 43; *Underhill v. Horwood* (1804), 10 Ves. 209; *Reard v. Westcott* (1813), 5 Taunt. 393; *Southampton v. Hertford* (1813), 2 Ves. & B. 54; *Blackburn v. Stables* (1814), 2 Ves. & B. 367; *Leake v. Robinson* (1817), 2 Mer. 363; *Cadell v. Palmer* (1833), 10 Bing. 140; *Doe d. Winter v. Perratt* (1843), 6 Man. & G. 314; *Nightingale v. Goulbourn* (1848), 2 Ph. 594; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Rondlesham v. Roberts* (1856), 23 Beav. 321; *Turvin v. Newcome* (1856), 3 K. & J. 16; *Villar v. Gilbey*, [1907] A. C. 139; *Re Stamford & Warrington, Payne v. Grey*, [1911] 1 Ch. 255. *Generally, Reid. Cooke v. Turner* (1844), 14 Sim. 218; *Thellusson v. Rendlesham* (1859), 7 H. L. Cas. 429; *Eastern Counties, etc. Cos. v. Marriage* (1860), 9 H. L. Cas. 32; *Re Burrows, Cleghorn v. Burrows*, [1895] 2 Ch. 497; *Re Wilmer's Trusts, Moore v. Wingfield*, [1903] 1 Ch. 874. *Mentd. St. Paul's (Warden, etc.) v. Morris* (1804), 9 Ves. 316; *Langdale v. Briggs* (1856), 8 De G. M. & G. 391; *Willisford v. Watson* (1872), 42 L. J. Ch. 90; *Income Tax, Special Purposes Comrs. v. Pemsel*, [1891] A. C. 531.

### SECT. 2.—STATUTORY RESTRICTIONS.

#### SUB-SECT. 1.—IN GENERAL.

*See, now, Law of Property Act, 1925 (c. 20), ss. 164–166.*

**611. Accumulations Act, 1800 (c. 98) — Not a penal statute.]—**A contingent liability under a covenant executed but not broken by testator is a debt within the meaning of the provision for payment of debts, excepted from the operation of above Act.

Testator bequeathed shares in a newspaper to his wife, with a proviso that if they should be sold, the purchase-money should be placed in the funds, & that she should have the interest for her life;

but should she not sell the shares, then whatsoever sum might annually accrue from them above £200 was to be reserved as a kind of sinking fund for the protection of the shares:—*Held*: a large fund which had arisen from the income beyond £200 a year, & which was not required for the protection of the shares, formed capital, & the widow was entitled only to a life interest therein.

There was a good deal of discussion at the Bar, whether this statute should or should not be strictly construed. It certainly is not a penal statute. . . . We have only to strive to discover the intention of the legislature in passing the Act looking at the supposed mischief which was to be remedied, & the extent of the remedy meant to be applied. The whole statute must be taken together & construed as if, consisting of one clause, it had begun "unless for payment of debts of any grantor, etc., no person or persons shall," etc. . . . But debts afterwards to accrue, for which the grantor, settlor, or devisor is liable, are surely the debts of the grantor, settlor or devisor, & a *bonâ fide* provision for payment of such debts could not interfere with the policy of the legislature in guarding against accumulations dangerous to the commonwealth (LORD CAMPBELL, C.).—VARLO *v.* FADEN (1859), 1 De G. F. & J. 211; 20 L. J. Ch. 230; 1 L. T. 176; 6 Jur. N. S. 257; 8 W. R. 107; 45 E. R. 339, L. C.

*Annotations*.—*Distd.* Matthews *v.* Keble (1868), 3 Ch. App. 691. *Follid.* *Re* Hurlbatt, Hurlbatt *v.* Hurlbatt, [1910] 2 Ch. 553. *Reid.* *Re* Mason, Mason *v.* Mason, [1891] 3 Ch. 467.

**612.** — How construed.—Trust for accumulation by will or by deed.]—Above Act must receive the same construction in the case of a trust for accumulation created by deed, as it has received in the case of a similar trust created by will; & therefore, where A. transferred a sum of stock to trustees, & by a deed directed them to accumulate the dividends during the joint lives of M. & N., that direction was held to be good for so much only of the joint lives as expired between the date of the deed & A.'s death.—*Re* ROSSLYN'S (LADY) TRUST (1848), 16 Sim. 391; 12 L. T. O. S. 267; 13 Jur. 27; 60 E. R. 925; *sub nom.* *Ex p.* ROSSLYN'S (LADY) TRUST, 18 L. J. Ch. 98.

*Annotations*.—*Reid.* Jagger *v.* Jagger (1883), 25 Ch. D. 729; *Re* Errington, Errington-Turbitt *v.* Errington (1897), 76 L. T. 616.

**613.** — — — — —.] —VARLO *v.* FADEN, No. 611, ante.

**614.** — Application — To executory devise or bequest.]—Above Act applies not to cases in which there is merely an executory devise or bequest, but only to those cases in which there is an express trust for accumulation; & if that trust exceeds the time prescribed by the Act, the next of kin or the heir of testator, according to the nature of the property, & not the residuary devisee or legatee, is entitled to the income accruing after the expiration of the prescribed time.—ELBORNE *v.* GOODE (1844), 14 Sim. 165; 13 L. J. Ch. 394; 8 Jur. 1001; 60 E. R. 320.

*Annotations*.—*Reid.* Tench *v.* Cheese (1855), 6 De G. M. & G. 453; *Oddie v.* Brown (1859), 4 De G. & J. 179; Matthews *v.* Keble (1867), L. R. 4 Eq. 467; Scott *v.* Cumberland (1874), L. R. 18 Eq. 578; Trothway *v.* Helyar (1876), 4 Ch. D. 53. *Mentd.* Barrett *v.* Buck (1848), 11 L. T. O. S. 362; Gowan *v.* Broughton (1874), 31 L. T. 533.

#### PART III. SECT. 2, SUB-SECT. 1.

**612 I. Accumulations Act, 1800 (c. 98)**  
—How construed.—Trust for accumulation by will or by deed.—CAIN *v.* WATSON, [1910] V. L. R. 256.—AUS.

t. — — — — — To trust disposition.]  
—MACKENZIE *v.* MACKENZIE'S TRUSTEES (1877), 4 R. (Ch. of Sess.) 992; 14 Sc. L. R. 596.—SCOT.

**613 I. — — — — —.]**—The above Act prohibits any accumulation after the lapse of twenty-one years from the date of testator's death, although the time specified for accumulation may not commence till long after his death.—CAMPBELL'S TRUSTEES *v.* CAMPBELL (1891), 18 R. (Ch. of Sess.) 992.—SCOT.

a. — — — — — Whether applicable to Ontario.]—The above Act is not in force

**615.** — — — — — Consideration of probable as well as actual events.]—The four different periods beyond which the accumulation of income is unlawful under above Act, sect. 1, are alternative & not cumulative; therefore, when one period has been applied & exhausted, a second period cannot be resorted to & applied, in order to extend the time for accumulation. In applying above Act the ct. is bound to consider not merely the events which have happened, but also those which might have happened. By a post-nuptial settlement the husband assigned all his personal estate to trustees upon trust to apply the income to his own maintenance, & subject thereto, during the joint lives of himself & his wife, & the life of the survivor of them, to apply all or any part of the income for the maintenance of the wife & the children of the marriage, & to accumulate the surplus, if any, so that the accumulations should be added to the principal fund & follow the destination thereof, with liberty for the trustees to resort to the accumulations of any preceding years & apply the same for the maintenance of the wife & children; & after the death of the survivor of the settlor & his wife upon trust, as to both capital & income, for such of their issue as the settlor & his wife by deed jointly, or the survivor by will, should appoint, & in default for the children of the marriage as tenants in common, sons at twenty-one, & daughters at twenty-one or marriage:—*Held*: the only one of the said four periods of above Act applicable to the case was the first, viz., the life of the settlor; & the trust for accumulation contained in the settlement was void as from the death of the husband.

It is clear that this part of the Act [*re* the minorities of persons living or *en ventre sa mère* at the time of the grantor's death] refers only to a direction to accumulate when such accumulation is to begin from the date of the grantor's death (KAY, J.).—JAGGER *v.* JAGGER (1883), 25 Ch. D. 729; 53 L. J. Ch. 201; 49 L. T. 667; 32 W. R. 284.

*Annotations*.—*Consd.* *Re* Cattell, Cattell *v.* Cattell; *Re* Cattell, Cattell *v.* Dodd, [1914] 1 Ch. 177. *Reid.* *Re* Errington, Errington-Turbitt *v.* Errington (1897), 76 L. T. 616.

#### SUB-SECT. 2.—WHEN DIRECTION FOR ACCUMULATION ARISES.

*See, now*, Law of Property Act, 1925 (c. 20), ss. 104–106.

**616. No express direction necessary—Directions leading necessarily to accumulation.]**—A testatrix gave specific legacies absolutely to her sister, & directed her exors. to pay out of her general estate to her sister's two daughters, A. & B., £5,000 each upon their marriage, with all the accumulations of interest thereon from the time of her death. She gave the income of the residue to H., at whose death the whole was to be equally divided between the grandchildren of the father of testatrix. Testatrix died in 1825. Twenty-one years from the decease of testatrix expired in 1840. In 1849 A. died. The tenant for life of the residue died in 1838. On a bill by the grandchildren against the exors. & the representatives of A. & H., &

in Ontario, where the law appears to be as it was in England before that statute.—HARRISON *v.* SPENCER (1888), 15 O. R. 692.—CAN.

#### PART III. SECT. 2, SUB-SECT. 2.

**616 I. No express direction necessary—Directions leading necessarily to accumulation.]**—OTTERTON *v.* GOULD (1892), 11 N. Z. L. R. 577.—N.Z.

**Sect. 2.—Statutory restrictions:—Sub-sects. 2 & 3, A.]**

against B., for a declaration by the ct. of the rights under the will:—*Held*: the legacies to A. & B. were contingent, & the representative of H. was entitled to the income of A.'s legacy till the death of H., but the capital & subsequent accumulations fell into the residue.—*MORGAN v. MORGAN* (1851), 4 De G. & Sm. 164; 20 L. J. Ch. 109, 441; 17 L. T. O. S. 114, 302; 15 Jur. 319; 64 E. R. 781.

*Annotations*:—*Apld.* *Bryan v. Collins* (1852), 16 Beav. 14. *Reid, Bourne v. Buckton* (1851), 2 Sim. N. S. 91; *Barrington v. Liddell* (1852), 2 De G. M. & G. 480; *Middleton v. Loah* (1852), 1 Sm. & G. 61; *Burt v. Sturt* (1853), 10 Hare, 416; *Edwards v. Tuck* (1853), 17 Jur. 921; *Tench v. Cheese* (1855), 6 De G. M. & G. 453; *Watte. Wood* (1862), 31 L. J. Ch. 338; *Re Elliott, Public Trustee v. Pinder*, [1918] 2 Ch. 150.

617. ———.] —(1) Testator gave his real & personal estate to trustees, in trust to pay an annuity to S., & if she should have children to raise £4,000 for the younger children, & he gave the residue "with the accumulation thereof which I hereby direct my said trustee or trustees to place out on mtges. or in govt. securities in the public funds" upon trust for the eldest son of S., on his attaining twenty-one & taking testator's name; & if there should be no child of S., then on trust for T., upon attaining twenty-five & taking testator's name; at the expiration of twenty-one years from testator's death S. had no child:—*Held*: the will contained an express direction to accumulate & the case fell within the Accumulations Act, 1800 (c. 98).

If testator directs his property to go in such a course, that upon certain contingencies there must be an accumulation beyond twenty-one years, he does direct that upon those contingencies the accumulation shall take place beyond that time (LORD CRANWORTH, C.).

(2) When the property comes to an infant, as the infant has no will to say whether it shall be spent or accumulated, the ct. expresses its will for the infant & says that the most advantageous way of applying the rents is to accumulate them for him, that is for the benefit of the person who is in possession. This is a totally different thing from accumulating a fund, so that it goes as a suspense fund after an indefinite lapse of time to somebody for whose benefit it was not accumulated, & who was not in the enjoyment during the time of accumulation (LORD CRANWORTH, C.).—*TENCH v. CHEESE* (1855), 6 De G. M. & G. 453; 3 Eq. Rep. 971; 24 L. J. Ch. 716; 25 L. T. O. S. 189; 1 Jur. N. S. 689; 3 W. R. 500; 43 E. R. 1309, L. C. & L. JJ.

*Annotations*:—*As to* (1) *Apld.* *Mathews v. Koble* (1868), 3 Ch. App. 691. *Generally, Mentd.* *Bentley v. Oldfield* (1854), 19 Beav. 225; *Hagmon v. Blockley* (1855), 4 W. L. 60; *Simmons v. Rose* (1856), 6 De G. M. & G. 411; *Meller v. Stanley* (1864), 2 De G. M. & G. 183; *Allan v. Gott* (1872), 7 Ch. App. 439; *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510; *Howard v. Dryland* (1877), 38 L. T. 24; *Luckcroft v. Pridham* (1879), 48 L. J. Ch. 636; *Re Dumble Williams v. Murrell* (1883), 23 Ch. D. 360; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74.

618. ———.] —*MACPIERSON v. STEWART*, No. 633, *post*.

619. ———.] —Testator directed that his trustees should apply as much as might be necessary of the income of his residuary personal estate for the maintenance of his son, a lunatic, for life, & upon further trust to invest any surplus, & to treat it as part of testator's personal estate; & after his son's death he gave his personal estate to his son's children, & in default of issue to two other persons. By a codicil he directed that two bond debts, & all other debts which should be due from S., one of the residuary

legatees, should not be payable unless & until his share of the residue should become vested & that the amount of the debts & interest should then be deducted from his share. Shortly after the date of this codicil, S. gave testator a bond for £8,000, conditioned to be void if S. should pay £4,000, with lawful interest, within three months after his taking an absolute interest in a moiety of the residue, his interest being contingent during the life of testator's son. S. lived to acquire an absolute vested interest:—*Held*. (1) there was an express direction to accumulate & the accumulations beyond the period of twenty-one years from testator's death were void, & belonged to testator's next of kin; (2) the accumulations were not within the exceptions in the Thellusson Act respecting portions for children or provision for debts.

The whole question here is . . . whether it was the *bond fide* object of testator's direction to make provision for the payment of the debt (PAGE-WOOD, L.J.).—*MATHEWS v. KEBLE* (1868), 3 Ch. App. 691; 37 L. J. Ch. 657; 19 L. T. 243; *sub nom.* *MATHEWS v. KEBLE*, 16 W. R. 1213, L. JJ.

*Annotations*:—*As to* (2) *Reid, Re Walker, Walker v. Walker* (1886), 54 L. T. 792. *Generally, Mentd.* *Re Mason, Mason v. Mason*, [1891] 3 Ch. 467.

620. ———] Direction to "retain & set apart."—*Re COX, COX v. EDWARDS*, [1900] W. N. 89.

621. Bequest of residuary personalty—On future contingency—Gift carrying intermediate income.]—Testator gave the residue of his real estate to uses commencing with an executory devise to an unborn person, & gave two-thirds of the residue of his personalty to trustees upon trust to invest in real estate, to be settled to uses which were the same as those declared of his residuary realty:—*Held*: (1) there was an intestacy as to the intermediate income of the realty, & it resulted to the heir-at-law; (2) & the intermediate income of the personalty should be accumulated & added to the corpus, to be laid out in land, but such accumulation should be restricted to the term permitted by Accumulations Act, 1800 (c. 98), & the income from the expiration of that period to the determination of the contingency would pass to the next of kin.—*BECTIVE v. HODGSON* (1864), 10 H. L. Cas. 656; 3 New Rep. 654; 33 L. J. Ch. 601; 10 L. T. 202; 10 Jur. N. S. 373; 12 W. R. 625; 11 E. R. 1181, H. L.; *varying S. C. sub nom.* *HODGSON v. BECTIVE* (1863), 1 Hem. & M. 376.

*Annotations*:—*As to* (1) *Fold.* *Wade-Gery v. Handley* (1876), 3 Ch. D. 374. *As to* (2) *Apld.* *Re Eddel's Trusts* (1871), L. R. 11 Eq. 559. *Fold.* *Wade-Gery v. Handley* (1876), 3 Ch. D. 374. *Reid.* *Holmes v. Prescott* (1864), 3 New Rep. 559; *Chamberlayne v. Brockett* (1872), 8 Ch. App. 206; *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261. *Generally, Consd.* *Mathews v. Koble* (1867), L. R. 4 Eq. 467. *Reid.* *Re Townsend's Estate, Townsend v. Townsend* (1886), 34 Ch. D. 357; *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30; *Re Rubbings, Gille v. Worrall* (1898), 78 L. T. 218; *Re Taylor, Smart v. Taylor*, [1901] 2 Ch. 134; *Re Stevens, Stevens v. Stevens*, [1915] 1 Ch. 429; *Re Mellor, Alvarez v. Dodgson*, [1922] 1 Ch. 312. *Mentd.* *A-G v. Lomas* (1873), 29 L. T. 749; *Re Dumble, Williams v. Murrell* (1883), 23 Ch. D. 360; *Re Woodin, Woods v. Glass*, [1895] 3 Ch. 309; *Re Conyngham, Conyngham v. Conyngham*, [1920] 2 Ch. 495.

622. ———.] —Under a testamentary trust settlement, the intermediate income of the heritage, as well as of the personalty, though not expressly disposed of, was held to accompany the principal. The intermediate income both of the real & personal estate follows the capital; & there will result a trust for accumulation. The accumulation in excess of that permitted by this statute [Accumulations Act, 1800 (c. 98)] will go to the next of kin.—*PURSELL v. ELDER* (1865), 4 Macq. 992; 13 L. T. 203, H. L.



**623.** ————.] — Testatrix bequeathed £1,000 on trust for E. for life, with remainder to the children of E. She directed her residuary estate to be converted, & divided into sixteen parts, two of which she directed to be paid to S. & two to be held on the same trusts as the legacy of £1,000. By a codicil she revoked all gifts to or in favour of E. & S. respectively. By a second codicil, after reciting that she had purchased certain realty since the date of her will, which, in fact, was bought before the date of the first codicil, she devised the same upon the trusts declared in her said will in respect of her residue :—*Held* : (1) the first codicil was not revoked, & the property devised by the second codicil was subject to the trusts of the residue as declared by the will & first codicil taken together ; (2) the gift to the children of E. was accelerated, but until she should have a child the income of the £1,000 fell into residue, & the income of two-tenths of the residue as to personality belonged to the next of kin, & as to realty to the heir of testatrix.—*GREEN v. TRIBE* (1878), 9 Ch. D. 231 ; 38 L. T. 914 ; 27 W. R. 39 ; *sub nom. Re LOVE, GREEN v. TRIBE*, 47 L. J. Ch. 783.

*Annotations* :—*As to* (2) *N.F. Re Taylor, Smart v. Taylor*, [1901] 2 Ch. 134. *Generally, Re Whitehorn, Whitehorn v. Best*, [1906] 2 Ch. 121. *Mentd. Pollett v. Pettman* (1883), 23 Ch. D. 337 ; *Prentice v. Tabor* (1884), 52 L. T. 85.

**624.** ————.] — Testator, who died in June, 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full pow. to sell all or any part of his estates or to demise the same ; & directed them out of the moneys produced or out of the rents to pay the testamentary expenses & debts, & then gave certain legacies, & directed that after the death of his wife & after the payment of all debts & legacies the whole residue of all his remaining property should be divided into twelve portions, & be given "to the children" of his late aunts "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive . . . & should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. Testator declared that it should not be incumbent on his exors. to pay the legacies sooner than two years after his decease ; nor to divide the residue amongst his relatives until two years after the death of his wife, & made provision for payment of his wife's jointure. The wife died in 1876.

It was not the intention of testator that the wife during her life should be entitled to the whole income of the residuary estate. It follows that the whole income goes along with the capital of the fund, subject only to this that the accumulation must stop, under the provisions of the Thellusson Act [Accumulations Act, 1800 (c. 98)] at the end of twenty-one years from testator's death, & from that time the income must be separated, & it must be ascertained how much arose from the realty, & how much from personality, & each of those funds will belong & be payable accordingly to the persons whom I may describe as the real & personal representatives of testator, or those who claim through them respectively (*HALL, V.-C.*).—*RALPH v. CARRICK* (1877), 5 Ch. D. 984 ; 46 L. J. Ch. 530 ; 37 L. T. 112 ; 25 W. R. 530 ; *on appeal* (1879), 11 Ch. D. 873, C. A.

*Annotations* :—*Mentd. Woodhouse v. Spurgeon* (1883), 52 L. J. Ch. 825 ; *Re Judd's Trusts*, [1884] W. N. 206 ; *Re Moran, Moran v. Moran* (1893), 69 L. T. 407 ; *Re*

*Springfield, Chamberlin v. Springfield*, [1894] 3 Ch. 603 ; *Re Roberts, Percival v. Roberts*, [1903] 2 Ch. 200 ; *Re Willatts, Willatts v. Arley*, [1905] 1 Ch. 378 ; *Re Rawlinson, Hill v. Wythall*, [1909] 2 Ch. 36 ; *Re Embury, Page v. Bower* (1913), 109 L. T. 511 ; *Re Timson, Smiles v. Timson*, [1913] 2 Ch. 362 ; *Re Burnham, Carriok v. Carriok*, [1918] 2 Ch. 196 ; *Re Swain, Brett v. Ward*, [1918] 1 Ch. 399.

**625.** ————.] — Testator devised & bequeathed his residuary real & personal estate to trustees upon trust for sale & conversion, & out of the income to arise therefrom, to pay certain annuities to his wife & children respectively. The trustees were then directed to stand possessed of the balance thereof upon the trusts therein-after declared ; & testator directed that, if any of his children should die in his lifetime or afterwards, without having acquired a vested interest in the income or trust moneys, leaving any child or children, then & in such case such last-mentioned child or children should be entitled to the same share of the income as his, her, or their deceased parent would have been entitled to, if living ; & from & after the determination of the estates & interests in the trust property thereinbefore limited & given, upon trust to divide the same between & amongst the whole of testator's grandchildren in equal shares *per capita*, as & when they, being respectively a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, for their own use & benefit absolutely.

Upon the questions as to what would be the period of distribution of the capital, & amongst whom, such capital would be divisible :—*Held* : no distribution could take place until the death of the last surviving annuitant, & all testator's grandchildren then existing would be entitled to share equally.—*Re HISCOR, HISCOR v. WAITE* (1883), 48 L. T. 510.

**626.** ————.] — The proceeds of a trust for sale & conversion were given by will to such of the children of a married woman as should attain twenty-one, or being daughters attain that age or marry, with a gift over. There was, in the events which had happened, no express disposition of the income. The married woman was forty-six years old & childless. The ct. directed the income to be accumulated for twenty-one years from testator's death, or until the gift over took effect.—*Re TAYLOR, SMART v. TAYLOR*, [1901] 2 Ch. 134 ; 70 L. J. Ch. 535 ; 84 L. T. 758 ; 49 W. R. 615.

#### SUB-SECT. 3.—APPLICATION OF RESTRICTIONS.

##### A. In General.

*See, now, Law of Property Act, 1925 (c. 20), ss. 164–166.*

**627. Partial accumulations—Two-thirds of produce of estate.**—Testator devised his freehold & copyhold estates, charged with annuities for his sons & daughter, upon trust, to invest & accumulate the surplus produce thereof for the benefit of his grandchildren then born, or thereafter to be born, until the youngest should attain twenty-one, when the accumulations were to be equally divided among such of his grandchildren as should then be living ; & he directed that, in case any of his sons & daughter should be living after the youngest of his grandchildren should have attained twenty-one, the residue of the rent & profits should be further accumulated, & that such last-mentioned accumulation should be equally divided among all his grandchildren who should be living at the death of the survivor of his sons & daughter ; &

**Sect. 2.—Statutory restrictions: Sub-sect. 3, A. & B.]**

charged as aforesaid, he directed that, immediately after the decease of such survivor, the whole of his estates should stand charged for twenty years with the payment of two-third parts of the clear produce of his estates, in equal shares & proportions of so much money as would, in fifteen years, make in the whole £30,000 which sum, with the interest & produce thereof, he directed should be divided equally among all his grandchildren who should live to attain the age of twenty-one, their exors. or administrators. Testator died in the year 1812, leaving ten grandchildren, of whom nine were the children of one of the annuitants, & the tenth was the child of a son of testator, who died before the will was made; no grandchildren were born afterwards, but those who survived testator lived to attain twenty-one, the eldest having come of age before the execution of the will, & the youngest, in the year 1830; the last survivor of the testator's children died in the year 1831:—*Held*: the limitation creating a charge of two-thirds of the produce of the estates for twenty years, was a provision for accumulation within Accumulations Act, 1800 (c. 98); it was necessarily to be connected with the two prior trusts for accumulation, which determined in the year 1831; & it was therefore effectual for two years only, & was void for the remaining eighteen, being the period by which, when super-added to the duration of the preceding trusts, it exceeded the limits within which accumulation was allowed.—*SHAW v. RHODES* (1835), 1 My. & Cr. 135; 40 E. R. 328; *affd. sub nom. EVANS v. HELMER* (1837), 5 Cl. & Fin. 114, H. L.

*Annotations*:—*Consd. Barrington v. Liddell* (1852), 2 De G. M. & G. 480. *Apld. Re Clulow's Trust* (1859), 1 John. & H. 639. *Reid. Boughton v. James* (1844), 1 Coll. 26; *Bourne v. Buckton* (1851), 2 Sim. N. S. 91; *Morgan v. Morgan* (1851), 4 De G. & Sm. 164; *Burt v. Sturt* (1853), 22 L. J. Ch. 1071; *Edwards v. Tuck* (1854), 23 L. J. Ch. 204; *Ludlow v. Stevenson* (1854), 23 L. T. O. S. 294; *Wilson v. Peake* (1856), 3 Jur. N. S. 155.

**628. Immediate application of property to appointed purpose impossible.]**—Testator, after devising his estates in strict settlement, directed that, in case he should not erect a mansion house on his estates in his lifetime, his trustees should, forthwith after his death, erect the same according to such plan as he should approve of in his lifetime; or, if he should die before such plan should be prepared & completed, then according to such plan as his trustees, with the consent of the person, for the time being beneficially entitled to the immediate freehold of his estates, should think proper to adopt; & he gave £20,000 to the trustees, to be applied in erecting the house, & in the meantime, to be laid out in the funds & the dividends to be accumulated, & the accumulations as well as the original fund to be applied in erecting the house, & the surplus, if any, to be laid out in the purchase of lands to be settled to the same uses as the devised estates. Owing to opposition on the part of the tenant for life, the trustees did not build the house until more than twenty-one years after testator's death; & they invested the £20,000 & accumulated the income of it during the whole of the interval:—*Held*: the direction for accumulation was not within Accumulations Act, 1800 (c. 98), but the whole of the accumulated fund was applicable to purposes directed by the will.—*LOMBE v. STOUGHTON*

*LOMBE v. JODRELL* (1841), 12 Sim. 304; 59 E. R. 1148.

*Annotations*:—*Apld. Tench v. Cheese* (1854), 19 Beav. 3. *Consd. Matthews v. Keble* (1867), L. R. 4 Eq. 467.

**629. Accumulation by operation of law—Maintenance of infant.]**—By operation of law, an accumulation for more than twenty-one years may legally take place.

Testatrix, who died in 1819, bequeathed a legacy to accumulate in trust for the eldest daughter of A., to be paid at twenty-one, & if none, to the eldest daughter of C., payable in like manner. A. never had a daughter, & died in 1851. C. had a daughter G. born in 1821, & who died in 1827, & other daughters:—*Held*: the representative of G. was entitled to the legacy & to the accumulations accrued down to 1827, together with simple interest thereon from that time to the day of payment in 1852.

A great distinction exists between the incidents affecting such an accumulation, made by operation of law, & one made under a direction, if valid, contained in the will. In the former case it is the property of the infant, & might, if necessary, be applied for his maintenance or advancement; but, in the latter case, it could not be touched until he attained the age of twenty-one years (*ROMILLY, M.R.*).—*BRYAN v. COLLINS* (1852), 16 Beav. 14; 51 E. R. 680.

*Annotations*:—*N.F. Re Cattell, Cattell v. Cattell, Re Cattell, Cattell v. Dodd*, [1914] 1 Ch. 177. *Reid. Tench v. Cheese* (1854), 19 Beav. 3.

**630. ———.]—TENCH v. CHEESE**, No. 617, *ante*.

*See, also*, Nos. 612, 614, 615, *ante*.

**Accumulations to pay legacy.]—See** Nos. 271, 285, *ante*.

**B. In respect of What Property.**

*See, now*, Law of Property Act, 1925 (c. 20), ss. 104–106.

**631. Property abroad—Income arising therefrom.]**—The rents of Irish estates were directed to be accumulated & become part of the personal estate:—*Held*: although Accumulations Act, 1800 (c. 98), did not apply to Irish estates, yet that it applied to the rents, as invested from time to time, & although the rents, which ought to be considered as *corpus* might be invested for more than twenty-one years from testator's death, yet that the income thereof could not.—*ELLIS v. MAXWELL* (1849), 12 Beav. 104; 13 L. T. O. S. 398; 50 E. R. 1000.

*Annotations*:—*Reid. Weatherall v. Thornburgh* (1878), 8 Ch. D. 261. *Mentd. Temple v. Thring* (1887), 56 L. J. Ch. 767.

**632. ——— Settled by foreign settlement.]**—Upon the marriage in Ireland of a domiciled Englishman with the daughter of a domiciled Irishman, funds provided by the husband & by the father of the lady were settled on trusts for accumulation during the lives of the husband & wife:—*Held*: the trust was valid, during the life of the husband, as to the whole fund; for, so far as it was a settlement by the lady's father, it was an Irish settlement, & not affected by Accumulations Act, 1800 (c. 98); & so far as it was a settlement by the husband, the accumulation might, under the Act, lawfully continue at least during the life of the settlor.—*HEYWOOD v. HEYWOOD* (1860), 29 Beav. 9; 30 L. J. Ch. 155;

**PART III. SECT. 2, SUB-SECT. 3.—B.**

**631 1. Property abroad—Income arising therefrom.]—HOARE v. KEITH**

(1857), 19 Duml. (Ct. of Sess.) 1040.—**SCOT.**

b. Savings out of income—After

*accumulation period exceeded—Whether rule applies.]—LINDSAY'S TRUSTEES*, [1911] S. C. 584.—**SCOT.**



3 L. T. 429; 7 Jur. N. S. 228; 9 W. R. 62; 54 E. R. 527.

*Annotation*.—*Mentd. Re Jones, Last v. Dobson*, [1915] 1 Ch. 246.

**633. Accumulations to be invested abroad—Testator domiciled in England.**—Testator gave the income of all his property to his mother for life, & after her death he gave an annuity of £100 to each of his two sisters, the longer liver to have £200. After the decease of his two sisters, he gave two legacies of £500 each. Testator then left the whole of his property, real & personal, to trustees, to be placed out on such securities as they should think most advisable, for the benefit of his heirs; & after the decease of his mother & two sisters, the amount of the same to be invested in landed property in Scotland, which was to be strictly entailed on his nephew & his heirs lawfully begotten:—*Held*: the gift for the benefit of the heirs of testator was a gift of the *corpus* of the property, as it existed at his death for the benefit of all those who were entitled to any of his property real or personal; the directions in the will rendered accumulations of income necessary, which could not be done for more than twenty-one years after the death of testator, by reason of Accumulations Act, 1800 (c. 98); & the direction to invest accumulations on land in Scotland did not prevent the operation of Accumulations Act, 1800 (c. 98).—*MACPHERSON v. STEWART* (1858), 28 L. J. Ch. 177; 32 L. T. O. S. 143; 7 W. R. 34.

**634. — Testator domiciled abroad.**—Testator being at the time of his death domiciled in Jersey, & having a large personal estate in England, by his will gave all his personal estate to his trustees, upon a trust for accumulation, which would according to Accumulations Act, 1800 (c. 98), be wholly invalid, in case of an English will, & upon trust, to invest the fund thereby produced in purchase of real estate in Scotland or in any other country that A. might choose, & settle the same according to the law of entail in Scotland or other the country wherein the estate should be purchased, or as near thereto as the law of that country would admit, upon A. & his issue in tail, with remainders in tail. In a suit to administer the English assets, it appearing that by the law of Jersey entails of land in Jersey were not permitted, but it not appearing that there was any law in Jersey restricting the time for which accumulations might be directed:—*Held*: the will was valid according to the law of Jersey, & the trustees were bound to carry out the trust declared thereby.—*HALDANE v. ECKFORD* (1871), 24 L. T. 934.

**635. Accumulation in respect of property in England—Testator domiciled abroad—Leaseholds.**—The validity of a testamentary disposition of an English leasehold is governed by the law of England, & not by the law of testator's domicile. Where, therefore, testator domiciled in Ireland by his will gave an English leasehold to trustees upon trusts for sale & investment, & directed the investment to be held upon such trusts as were thereby declared concerning his general personal estate, & the trusts declared of the general personal estate included trusts for accumulation extending beyond any of the periods allowed by Accumulations Act, 1800 (c. 98), which does not apply to Ireland:—*Held*: although the validity of the trusts of the general personal estate was not questioned, still Accumulations Act, 1800 (c. 98), applied to the English leasehold & the proceeds of the sale thereof, & the trust for accumulation of the investments of the proceeds of sale in excess

of the periods permitted by that Act was invalid.—*FREKE v. CARBERY (LORD)* (1873), L. R. 16 Eq. 461; 21 W. R. 835.

*Annotations*.—*Fold. Re Grassi, Stubberfield v. Grassi*, [1905] 1 Ch. 584. *Mentd. Blackwood v. R.* (1882), 8 App. Cas. 82; *Duncan v. Lawson* (1889), 41 Ch. D. 394; *Re Cathness* (1891), 7 T. L. R. 354; *In the Goods of Tamplin*, [1894] P. 39; *Stewart v. Rhodes*, [1900] 81 L. T. 807; *Peplin v. Bruyere*, [1902] 1 Ch. 24; *Re Fitzgerald, Surman v. Fitzgerald*, [1904] 1 Ch. 573; *Re Moses, Moses v. Valentine*, [1903] 2 Ch. 235; *Re Hoyles, Row v. Jagg*, [1910] 2 Ch. 333; *Re Lyne's Settltm. Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80; *Re Berchtold, Berchtold v. Capron*, [1923] 1 Ch. 192.

**636. — — — — —**—24 & 25 Vict. c. 114, s. 1, provides that every will made out of the United Kingdom by a British subject, whatever may be his domicile, shall as regards personal estate be held to be well executed for the purpose of being admitted in England & Ireland to probate if made according to the forms required by the law of the place where the same was made:—*Held*: personal estate includes leaseholds, & when the will of a British subject made abroad in the form required by the law of the place has been proved in England, the beneficial interest in the leaseholds passes to the person pointed out in the will as the donee of that interest, provided the bequest does not infringe the law of England, e.g., that relating to accumulations or perpetuity.

It is clear on the authority of *Freke v. Carbery (Lord)*, No. 635, *ante*, that provisions in a will infringing Accumulations Act, 1800 (c. 98), or the English Law against perpetuities would not be validated by 24 & 25 Vict. c. 114, s. 1 (*BUCKLEY, J.*).—*Re GRASSI, STUBBERFIELD v. GRASSI*, [1905] 1 Ch. 584; 74 L. J. Ch. 341; 92 L. T. 455; 53 W. R. 396; 21 T. L. 1. 343; 49 Sol. Jo. 306.

*Annotation*.—*Mentd. Re Lyne's Settltm. Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

**637. Apportioned rents.**—Apportionment Act, 1834 (c. 22), applies to the case of the expiration of a term in trustees to accumulate rents, for payment of debts, legacies & other charges, with remainder to a tenant for life; as well as to the common case of an estate for life to A., remainder to B., & the term being for twenty-one years from testator's death, Accumulations Act, 1800 (c. 98), does not apply to prevent apportionment.—*ST. AUBYN v. ST. AUBYN* (1861), 1 Drew. & Sm. 611; 30 L. J. Ch. 917; 5 L. T. 519; 9 W. R. 922; 62 E. R. 512.

*Annotations*.—*Fold. Wheeler v. Tootel* (1867), L. R. 3 Eq. 571. *Mentd. Llewellyn v. Rous* (1866), L. R. 2 Eq. 27; *Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635.

**638. — — — — —**—Testator gave the residue of his real & personal estate to trustees upon trust to receive & accumulate the rents & profits till his nephew should attain twenty-one when he was to be put in possession of the estate for his life:—*Held*: there must be an apportionment of the rents up to the period of the tenant for life attaining twenty-one.—*WHEELER v. TOOTEL* (1867), L. R. 3 Eq. 571; 36 L. J. Ch. 221; 15 L. T. 529; 15 W. R. 382.

*Annotation*.—*Mentd. Donaldson v. Donaldson* (1870), L. R. 10 Eq. 635.

**639. Accumulations to be capitalised—To be capital money subject to powers of Settled Land Acts.**—55 & 56 Vict. c. 58, s. 1, applies to accumulations for the purchase of land only, & therefore does not apply to accumulations directed to be capitalised for twenty-one years & to become capital money subject to the powers of the Settled Land Acts, those Acts authorising permanent investments other than land.—*Re DANSON, DANSON v. BELL* (1895), 11 T. L. R. 455; 39 Sol. Jo. 557; *sub nom. Re DANSON, BELL v. DANSON*, 13 R. 633.

*Annotation*.—*Consd. Re Clutterbuck, Fellowes v. Fellowes*, [1901] 2 Ch. 285.

### SECT. 3.—EXCEPTIONS FROM STATUTORY RULES.

#### SUB-SECT. 1.—PROVISIONS FOR PAYMENT OF DEBTS OR INCUMBRANCES.

*See, now, Law of Property Act, 1925 (c. 20), s. 184 (2) (1).*

**658. What debts within exception—Mortgage debts—Whether in existence or made pursuant to testator's will.**—*Pltf.'s father, upon the marriage of his daughters, demises an estate to trustees, upon trusts for raising certain sums, which are settled upon the daughters & their children; & by his will, after charging the estate with other sums to be settled upon the same trusts, with portions for sons, & with a further sum in discharge of a mtge. of another estate, devises it to other trustees, upon trust from time to time to receive the rents & profits, & to invest the same in the purchase of stock, so as to accumulate & form a fund for the payment of the charges; " & after the same should have been raised & paid, upon trust to pay the net rents, issues, & profits unto or for the benefit of such person of his own name, blood & family, as for the time being should succeed to & be invested with his title & dignity of a baronet, to the end that his estate might be continued in his name, blood, & family, & be enjoyed & go along with his title, so long as the rules of law & equity would permit; but if upon failure of issue male of his body there should not be any person who should be entitled to enjoy his title, upon trust to stand seised of the estate, for the benefit of the person or persons who should be his right heir or heirs at law, & to convey & assure the same accordingly":—Held: the trust for accumulation was good, & *pltf.*, the succeeding baronet, took a vested estate for life.*

The enjoyment, & not the property, is tied up; & the estate vests in the same manner as if testator had created a term for payment of his debts (GRAHAM, B.).—*BACON v. PROCTOR* (1822), *Turn. & R.* 31; 37 E. R. 1005.

*Annotations:—Consd. Montague v. Inchiquin* (1875), 23 W. R. 692. *Distd. Re Stamford & Warrington, Payne v. Grey*, [1911] 1 Ch. 255. *Reid. Dunganion v. Smith* (1846), 12 Cl. & Fin. 546; *Bateman v. Hotchkiss* (1847), 10 Beav. 426.

**659.** — — — — —.] — Testator devised his real estate in strict settlement, subject to a term of two thousand years, limited to trustees for raising £500 a year, & accumulating it as a sinking fund for payment of his mtge. debts, etc., to a considerable amount:—*Held: the trust, though unlimited in its duration, was valid.*

With regard to the term & the trust for accumulation, it may be observed: that the debts, for the payment of which the accumulation is directed, are mtges. either existing at testator's death or made pursuant to his will; charges on the estate of an amount ascertained or to be ascertained in the execution of valid trusts (LORD LANGDALE, M.R.).—*BATEMAN v. HOTCHKIN* (1847), 10 Beav. 426; 16 L. J. Ch. 514; 10 L. T. O. S. 282; 11 Jur. 809; 50 E. R. 646.

*Annotations:—Distd. Re Stamford & Warrington, Payne v. Grey*, [1911] 1 Ch. 255. *Reid. Oddie v. Brown* (1859), 4 De G. & J. 179; *Tewart v. Lawson* (1874), L. R. 18 Eq. 490.

**660.** — — — — — Debts of stranger.] — (1) By a marriage settlement, dated in 1823, certain family estates at B., of which Lord B. was tenant for life in remainder, were limited to uses for raising

£40,000 as portions for the younger children of Lord B., to be payable & divided among such children as Lord B. should appoint; & in default of appointment, equally to be divided among them; & payable at the decease of Lord B., or during the lifetime of Lord B., with his consent. The Bishop of D., the great-uncle of Lord B., by his will, dated in 1825, reciting the settlement of 1823, bequeathed £15,000 to trustees, upon trust to accumulate the same during the life of Lord B., or for such further period as should make up the space of twenty years from testator's death, in order by means of the accumulated fund to exonerate the family estates of B. from the charge of £40,000; with a proviso that, if before the expiration of the period of accumulation the accumulated fund should be of sufficient amount for answering the purpose aforesaid, then the accumulation should thereupon immediately cease. Testator then gave certain chattels to go as heirlooms with the settled estates, & bequeathed £30,000 for building a mansion house upon the same. Testator died in 1826. In 1847, being twenty-one years after testator's death, the accumulated fund amounted only to £35,000, but at the time of the institution of the suit it amounted to £43,000:—*Held: as Lord B. took an interest under the will, the directions for accumulation were within Accumulations Act, 1800 (c. 38), s. 2, & valid for the whole period of Lord B.'s life.*

(2) To bring a case within the exception of Accumulations Act, 1800 (c. 98), s. 2, it is not necessary that the parent should take an interest in the estate or fund out of which the accumulations are directed; but it is sufficient that he take an interest generally under the instrument directing the accumulations.

(3) *Seemle:* the exception in Accumulations Act, 1800 (c. 98), s. 2, as to accumulation for payment of debts, is to be construed as extending to the payment of the debts of a stranger, as well as to the debts of the grantor, settlor, or deviser directing the accumulation.

The Legislature then meant that a man should, within the limit allowed by law, be able to provide not only for his own debts, but for the debts of such other person as he should think fit (LORD ST. LEONARDS, C.).

(4) It is clear also that the provision as to debts must relate to past debts; & nobody can deny that a man being able by his will under this Act [Accumulations Act, 1800 (c. 98)] to provide for his debts generally, this will include his future debts (LORD ST. LEONARDS, C.).

(5) But . . . it was said that the words, "such conveyance, settlement, or devise," make it necessary that the gift to the person who is to take an interest under the conveyance, settlement, or devise, must be by the very clause which creates the portion. With that construction I cannot, however, agree. . . . There is no magic in the word "devise"; it means a disposition by will, & in the sentence "under such conveyance, settlement, or devise" stands as representing the instrument in which it is contained (LORD ST. LEONARDS, C.).—*BARRINGTON v. LIDDELL* (1852), 2 De G. M. & G. 480; 22 L. J. Ch. 1; 20 L. T. O. S. 133; 17 Jur. 241; 1 W. R. 41; 42 E. R. 958, L. C.

*Annotations:—As to (1) Apld. Middleton v. Losh* (1852), 1 Sm. & G. 61. *Consd. Burt v. Sturt* (1853), 10 Hare, 416;

PART III. SECT. 3, SUB-SECT. 1.  
d. *Deed indemnifying purchaser of other lands from certain rents—Whether analogous to trust for payment of debts.*—*MASSEY v. O'DELL* (1859), 10 L. Ch. R. 32.—*IR.*

e. *Debts incurred by trustees—During limitation period—Whether within exception.*—After the lapse of twenty-one years from the date of a testator's death his trustees were not entitled to apply surplus revenue in

paying off debts incurred by them in the purchase of lands during the twenty-one years, such payments, being accumulations in breach of the Thelluson Act, whether the debts were incurred by directions of testator or

*Edwards v. Tuck* (1853), 3 De G. M. & G. 40; *Watt v. Wood* (1862), 2 Drew. & Sm. 56; *Re Elliott, Public Trustee v. Pinder*, [1918] 2 Ch. 150. *Reid, Mathews v. Koble* (1868), 3 Ch. App. 691. *As to* (2) *Reid, Watt v. Wood* (1862), 2 Drew. & Sm. 56. *As to* (3) *Reid, Varlo v. Faden* (1859), 1 De G. F. & J. 211. *As to* (4) *Reid, Varlo v. Faden* (1859), 1 De G. F. & J. 211. *Generally, Reid, Re Chilow's Trust* (1859), 1 John. & H. 639. *Mentd. Re Colson's Trusts* (1853), Kay, 133; *Ewart v. Ewart* (1853), 17 Jur. 1022.

**661.** — *Future debts.*] — *BARRINGTON v. LIDDELL*, No. 660, *ante*.

**662.** — — — — —] — *VARLO v. FADEN*, No. 611, *ante*.

**663.** — — — — —] — *Re COX, COX v. EDWARDS*, [1900] W. N. 89.

**664.** — — — — —] — Testatrix bequeathed leaseholds to trustees upon trust that they should yearly during the residue of the terms of years for which she held the property reserve one-fourth part of the net rents & annual profits thereof, & upon further trust to pay the remaining three-fourths to her four nieces & her nephew; & she directed that the one-fourth part thereinbefore directed to be reserved should once, or oftener if convenient, in every year be invested & that all dividends & interests arising from the investments should be added thereto by way of accumulation, & that the same & all accumulations thereof should be held as a reserve fund to indemnify her exors. & trustees from all claims for dilapidations which might arise in respect of the leaseholds; & subject to such indemnity & claims upon trust for the equal benefit of her said four nieces & nephew in like manner as she had declared of the other three-fourths of the rents & profits & to the end & intent that her said four nieces & nephew might have the benefit of an accumulated fund to meet the loss of income which would arise at the expiration of the leases of the property. The will also contained a residuary bequest. Testatrix died in 1879, so that the twenty-one years allowed by Accumulations Act, 1800 (c. 98) for accumulations terminated in 1900. The last of the leases expired in 1909. One-fourth of the rents & profits had been duly accumulated & the dilapidations had been paid for out of the fund:—*Held*: the trust to accumulate until the end of the terms was valid & did not come within Accumulations Act, 1800 (c. 98).—*Re HURLBATT, HURLBATT v. HURLBATT*, [1910] 2 Ch. 553; 80 L. J. Ch. 29; 103 L. T. 585.

**665.** What amounts to provision for payment of debts—Charge of debts due from legatee on accumulation.] — *MATHEWS v. KEBLE*, No. 619, *ante*.

**666.** — — — — —] — Provision for recoupment of debts already paid out of capital.]—A provision for accumulating income to recoup capital applied in payment of debts is not a provision for payment of debts within Accumulations Act, 1800 (c. 98), s. 2.—*Re HEATHCOTE, HEATHCOTE v. TRENCH*, [1904] 1 Ch. 826; 73 L. J. Ch. 543; 90 L. T. 505. *Annotations*.—*Consd. Re Stamford & Warrington, Payne v. Grey*, [1925] 1 Ch. 162. *Reid, Re Cresswell, Lineham v. Cresswell* (1913), 57 Sol. Jo. 578.

**667.** — — — — —] — Discretionary power to apply accumulations to payment of debts.]—By his will testator directed his trustees to pay certain annuities out of the income of his real & personal estate, & during the lives of the annuitants to accumulate the residue of such income, & empowered his trustees to apply such accumulations in payment of mortgage debts. Testator died in 1808, & the

last of the annuitants in 1911:—*Held*: the power to apply accumulations in the payment of debts was not a provision for payment of debts within Accumulations Act, 1800 (c. 98), s. 2, & it ceased to operate after the expiry of twenty-one years from testator's death.—*Re CRESSWELL, LINEHAM v. CRESSWELL* (1913), 57 Sol. Jo. 578; *on appeal* (1914), 58 Sol. Jo. 360, C. A.

#### SUB-SECT. 2.—PROVISIONS FOR RAISING PORTIONS.

##### A. In General.

*See, now, Law of Property Act, 1925* (c. 20), s. 164 (2) (ii).

**668.** Meaning of portion.] — *JONES v. MAGGS*, No. 673, *post*.

**669.** — — — — —] — *Re STEPHENS, KILBY v. BETTS*, No. 679, *post*.

**670.** Instrument which may create portion.] — Testator gave his residuary personal estate to A. & B. in trust to accumulate the income during the life of his niece, & on her death to transfer the capital & accumulations to her children in equal shares; the shares to be vested in her sons at twenty-one & in her daughters at that age or marriage. The niece lived more than twenty-one years after testator's death:—*Held*: the direction to accumulate was not a provision for raising portions within Accumulations Act, 1800 (c. 98), s. 2, & therefore, it became void under Accumulations Act, 1800 (c. 98), s. 1, at the expiration of twenty-one years from testator's death; & his next of kin were thenceforth entitled to the income of the capital & accumulations.

I do not conceive that sect. 2 of the Act [Accumulations Act, 1800 (c. 98)] was intended to apply only to portions created by another instrument (*KINDERLEY, V.-C.*).—*BOURNE v. HUCKTON* (1851), 2 Sim. N. S. 91; 21 L. J. Ch. 193; 19 L. T. O. S. 372; 61 E. R. 275.

*Annotations*.—*Consd. Burt v. Sturt* (1853), 10 Haro. 415; *Edwards v. Tuck* (1853), 3 De G. M. & G. 40; *Oddo v. Brown* (1859), 4 De G. & J. 179. *Reid, Barrington v. Liddell* (1852), 22 L. J. Ch. 1; *Jones v. Maggs* (1852), 9 Haro. 605; *Middleton v. Losh* (1852), 1 Sm. & G. 61; *Watt v. Wood* (1862), 31 L. J. Ch. 338; *Re Walker, Walker v. Walker* (1866), 54 L. T. 792.

#### B. Accumulations of Pecuniary Legacy or Annuity.

**671.** Whether valid as portion.] — Testator devised estates to trustees for ninety nine years, upon trust, during twenty-one years, & so much longer during the life of his only son as there should be in existence any younger children or child of his son, to raise £2,000 per annum, & to invest & accumulate this annual sum, & stand possessed of it & the accumulations, upon certain trusts thereby declared, being trusts for the son's younger children; & subject to the term, the estates were devised to the use of the son for life, with remainder to the use of his first & other sons successively in tail, with remainders over:—*Held*: the trusts for accumulation were valid, being a provision for raising portions within the exception in Accumulations Act, 1800 (c. 98).—*BEECH v. ST. VINCENT (LORD)* (1850), 3 De G. & Sm. 678; 19 L. J. Ch. 130; 14 L. T. O. S. 503; 14 Jur. 731; 64 E. R. 658; *subsequent proceedings* (1857), 3 Jur. N. S. 762.

*Annotations*.—*Follid. Re Stephens, Kilby v. Betts*, [1904] 1 Ch. 322. *Reid, Jones v. Maggs* (1852), 9 Haro. 605; *Middleton v. Losh* (1852), 1 Sm. & G. 61.

*not*.—*SMYTH'S TRUSTEES v. KINLOCH* (1880), 7 E. (Ch. of Sess.) 1176; 17 Sc. L. R. 733.—*SCOT*.

**PART III. SECT. 3, SUB-SECT. 2.—A.**  
**668** 1. Meaning of portion.] — *MOON'S*

*TRUSTEES v. MOON* (1899), 2 F. (Ch. of Sess.) 201; 37 Sc. L. R. 140; 7 S. L. T. 257.—*SCOT*.

**668** ii. — — — — —] — *COLQUHOUN'S TRUSTEES v. COLQUHOUN*, [1907] S. C. 346 *SCOT*.

#### PART III. SECT. 3, SUB-SECT. 2.—B.

1. Direction to invest income—To form subsequent gift—Whether within rule.] — *SMITH v. CUNNINGHAM* (1884), 13 L. L. R. 480.—*IR*.

*Sect. 3.—Exceptions from statutory rules: Sub-sect. 2, B. & C.]*

672. —.]—*MORGAN v. MORGAN*, No. 616, *ante*.

673. —.]—A sum of money was bequeathed to trustees to accumulate the same at compound interest until a child of A. should attain the age of twenty-one years, & then to divide the accumulated fund among all the children of A. who should be then living, & if but one, the whole to be paid to that one. The residue was given to A. A. had one child living at the date of the will & at the death of testatrix, which died under twenty-one. A. filed a claim for the payment to him of the dividends on the sum, & the accumulation of such dividends beyond twenty-one years from the death of testatrix:—*Held*: the sum of money bequeathed was not a portion within Accumulations Act, 1800 (c. 98); & a portion means a sum of money secured to a child out of property, the income of which is given to its parent; & a gift to a parent of a residue does not make a previous gift to his child out of the general personal estate a portion within the meaning of Accumulations Act, 1800 (c. 98).

Portions for children are sums of money secured to them out of property, out of the income of which a provision is made for the parents; & although gifts have been held protected, as being portions within the meaning of this exception, in some cases, where the parents took no interest in the subject-matter of the gift, still this will only be where there is some settlement on the parent, & where the nature of the gift or of the context shows that the gift ought to be so held to be within the exception (*TURNER, V.-C.*).—*JONES v. MACOS* (1852), 9 Hare, 605; 22 L. J. Ch. 90; 19 L. T. O. S. 213; 16 Jur. 325; 68 E. R. 654.

*Annotations*.—*Consd.* *Watt v. Wood* (1862), 31 L. J. Ch. 338. *Reid*, *Barrington v. Liddell* (1852), 2 De G. M. & G. 480; *Middleton v. Losh* (1852), 1 Sm. & G. 61; *Re Walker*, *Walker v. Walker* (1886), 54 L. T. 792. *Mentd.* *Re Peel's Settlement*, *Biddulph v. Peel*, [1911] 2 Ch. 165.

674. —.]—Testator gave a sum which, together with £150,000, to which her four sons were otherwise entitled, would make up £50,000 to each of them. She directed that the "portion" of £50,000 for one of such sons should be paid to trustees, to invest the same during his life & to dispose of a competent part of the income in his maintenance, & from time to time to invest the surplus income, to the intent that the same might accumulate for the benefit of the persons who, under her will, should be entitled thereto; & upon trust, after the decease of her said son, to dispose of a competent part of the £50,000, & accumulations in the maintenance of the son's children during their minorities, or until their portions should become payable under the will, & to divide the £50,000 & accumulations among the children of the son at twenty-one or marriage; & if the son should die without leaving issue, testatrix directed the £50,000 with the accumulations to sink into the residue given for the benefit of another of her four sons:—*Held*: the trust for accumulations was within the exception in Accumulations Act, 1800 (c. 98), as being of a "portion," & was a valid trust.—*MIDDLETON v. LOSH* (1852), 1 Sm. & G. 61; 22 L. J. Ch. 422; 20 L. T. O. S. 138; 17 Jur. 175; 1 W. R. 78; 65 E. R. 27.

*Annotations*.—*Distd.* *Burt v. Sturt* (1853), 10 Hare, 415; *Edwards v. Tuck* (1853), 22 L. J. Ch. 523. *Distd.* *Watt v. Wood* (1862), 2 Drew. & Sm. 56; *Re Elliott*, *Public Trustee v. Pinder*, [1918] 2 Ch. 150.

675. —.]—*BARRINGTON v. LIDDELL*, No. 680, *ante*.

676. —.]—Testator gave a sum of stock,

producing £180 *per annum*, in trust to pay life annuities of £20 each to seven persons, & at the decease of any, to accumulate his annuity, & after the death of the last annuitant, to divide the stock & accumulations amongst the surviving children of the annuitants:—*Held*: this was not within the exceptions of Accumulations Act, 1800 (c. 98), of "portions" for "children" of persons taking an interest under the will, & the trust for accumulation, beyond twenty-one years after testator's death was void.—*DREWETT v. POLLARD* (1859), 27 Beav. 196; 54 E. R. 76.

*Annotations*.—*Reid*, *Mathews v. Keble* (1868), 3 Ch. App. 691; *Re Walker*, *Walker v. Walker* (1886), 54 L. T. 792.

677. —.]—Testator gave a sum of money to trustees upon trust to receive the dividends during the life of his niece's husband, & invest & accumulate such dividends in the way of compound interest for the benefit of his niece for her life; & after the death of his niece & her husband for the benefit of all his niece's children, except an eldest or only son. The money had been invested, & the dividends invested & accumulated for a period of considerably over twenty-one years:—*Held*: the gift was not a gift to raise portions under Accumulations Act, 1800 (c. 98), s. 2, & therefore, that the parties entitled under it were only entitled to the accumulation for twenty-one years from the death of testator.

Whatever meaning the term "portions" may be capable of bearing, I am of opinion that the gift of a legacy to a parent for life, & after her death to her children, is not a provision for "raising portions for children"—the words used in the second sect.—within the meaning of that sect.—*WATT v. WOOD* (1862), 2 Drew. & Sm. 56; 31 L. J. Ch. 338; 10 W. R. 335; 62 E. R. 542.

*Annotation*.—*Foll.* *Re Elliott*, *Public Trustee v. Pinder* [1918] 2 Ch. 150.

678. —.]—Testator by his will gave the income of a share to his granddaughter, & the corpus, at her decease, to her children on their respectively attaining twenty-one. By a codicil he directed, in an event which happened, that the gift to the granddaughter was to be revoked, the income to be accumulated, & the accumulations to be "considered as part of the original fund from which the same arose, & thenceforth to be added thereto:—*Held*: though more than twenty-one years had elapsed, that the case did not fall within Accumulations Act, 1800 (c. 98), & all the children of the granddaughter were entitled during her life to have the accumulations of income added to the corpus.—*ST. PAUL v. HEATH* (1865), 13 L. T. 271; 11 Jur. N. S. 903.

679. —.]—Testator, who died in Mar. 1888, directed that his trustees should out of the income of his residuary estate set apart a yearly sum of £24, "while & so long as there shall be a child of my daughter S., the wife of H., for the time being under the age of twenty-one years, subject as hereinafter mentioned," invest the same & accumulate the income thereof, & should hold the aggregated & accumulated fund in trust for such of the children of his daughter S. as being sons should attain twenty-one, or being daughters should marry, in equal shares, the shares to be vested interests & to be paid & payable in the case of a son at twenty-one, & in the case of a daughter at twenty-one or marriage. Subject as aforesaid, testator directed the trustees to pay the income of his residuary estate to S. for life; but he directed that if S. should survive H. the trustees should during the rest of her life pay her the whole income of his residuary estate, & should

no longer set apart the annual sums, without prejudice to the sums already set apart & invested & the income thereof.

S. & H. survived testator & had five children, three of whom were born in testator's lifetime, & two after his death. The eldest child was born in 1882, & attained twenty-one in 1903, & the youngest was born in 1896, & would not attain twenty-one until 1917:—*Held*: (1) the period prescribed for aggregation & accumulation, subject to earlier cesser by the death of H. in the lifetime of S., & to later cesser by the birth of other children, was, so long as there was a child of S. under twenty-one, whether it was born before or after its eldest brother or sister attained twenty-one, namely, until 1917; (2) the accumulated fund was a "portion" within Accumulations Act, 1800 (c. 98), s. 2, & the direction to accumulate was valid.

It [the period] is protected if it is a provision for raising portions for children of any person taking an interest under the will. . . . Now the meaning of the word portion as generally understood, is a sum of money secured to a child out of property either coming from or settled upon its parents. The benefit is none the less a portion because it is given to all the children including the eldest child & not to younger children only (BUCKLEY, J.).

(3) The class of children to take was not closed when the eldest child attained twenty-one, but only at the end of the period for accumulation, & the accumulated fund was not until then divisible.—*Re STEPHENS, KILBY v. BETTS*, [1904] 1 Ch. 322; 73 L. J. Ch. 3; 91 L. T. 167; 52 W. R. 89; 48 Sol. Jo. 15.

*Annotations*:—*As to* (2) *Reid*. *Re Peol's Settlement*, Biddulph v. Peol, [1911] 2 Ch. 165. *As to* (3) *Reid*. *Re Faux*, Taylor v. Faux (1915), 84 L. J. Ch. 873.

680. —[*Testator, who died in 1891, by his will directed his trustees to pay the income of his residuary estate to his wife during her life, & that after her death they should set apart out of the investments thereof the sum of £8,000 & out of the interest on that sum should pay his daughter an annuity of £60 per annum for her life; & he directed the remainder of the interest to be added to the principal sum, & that after the daughter's death the trustees should hold the £8,000 & the accumulations thereof upon trust to pay the income thereof to M. the daughter's only child, & that after her decease the fund should fall into testator's residuary estate. The widow died in 1917:—Held: the trust for accumulation after the widow's death was not a "provision for raising a portion" within Accumulations Act, 1800 (c. 98), s. 2, & was invalid.—Re ELLIOTT, PUBLIC TRUSTEE v. PINDER*, [1918] 2 Ch. 150; 87 L. J. Ch. 449; 118 L. T. 675; 62 Sol. Jo. 383.

#### C. Addition of Income to Capital to Provide Aggregate Fund.

681. *Whether treated as portion.*—Testator gave certain annuities out of his residuary estate to his three children, " & requested the surplus of the annual income to be applied in accumulation of the capital of his property for the benefit of his grandchildren " & which was to be divided between them after the death of the survivor of testator's three children. Thirty years elapsed between the death of testator & of the survivor of his children:—*Held*: (1) the direction for accumulation, beyond twenty-one years from testator's death was void under Accumulations Act, 1800 (c. 98), s. 1, & the case did not come

with the exceptions of Accumulations Act, 1800 (c. 98), s. 2.

*As two of the grandchildren for whose benefit the accumulation is directed were not the children of any person taking an interest under the will, & as the accumulation which is directed does not appear to me to be a provision for raising portions, but a provision for making addition to the capital for the purpose of making one gift of an aggregate fund, I think this case is not within the proviso of Accumulations Act, 1800 (c. 98) (LORD LANGDALE, M.R.).*

(2) The void accumulations did not belong to the residuary legatees, but they were undisposed of.—*Eyre v. MARSDEN* (1838), 2 Keen, 564; 7 L. J. Ch. 220; 2 Jur. 583; 48 E. R. 744; *affd.* (1839), 4 My. & Cr. 231, L. C.

*Annotations*:—*As to* (1) *Consd.* *Bourne v. Buckton* (1851), 2 Sim. N. S. 91; *Barrington v. Liddell* (1852), 2 De G. M. & G. 489; *Jones v. Maggs* (1852), 9 Haro, 605; *Burt v. Sturt* (1853), 10 Haro, 415; *Tench v. Cheneo* (1854), 10 Beav. 3. *Apld.* *Re Elliott, Public Trustee v. Pinder*, [1918] 2 Ch. 150. *Reid*. *Middleton v. Loah* (1852) 1 Sm. & G. 61; *Re Clulow's Trust* (1859), 1 John. & H. 639; *Watt v. Wood* (1862), 31 L. J. Ch. 338; *Re Walker, Walker v. Walker* (1866), 54 L. T. 792. *As to* (2) *Consd.* *Edwards v. Tuck* (1853), 3 De G. M. & G. 40. *Reid*. *Elborne v. Goode* (1844), 14 Sim. 165; *Smith v. Palmer* (1849), 7 Haro, 225; *Simmons v. Pitt* (1873), 8 Ch. App. 978; *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261; *Re Walker, Walker v. Walker* (1886), 54 L. T. 792; *Re Parry, Powell v. Parry* (1889), 60 L. T. 489; *Wharton v. Masterman*, [1895] A. C. 186; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345; *Re Hawkins, White v. White*, [1910] 2 Ch. 570. *Generally, Reid.* *Ellis v. Maxwell* (1841), 3 Beav. 587; *Goodman v. Goodman* (1847), 1 De G. & Sm. 695; *Nuttleton v. Stephenson* (1849), 3 De G. & Sm. 366; *Hughes v. Perrens* (1853), 1 Eq. Rep. 385; *Re Corbett's Trusts* (1860), John. 591; *Dutton v. Crowdy* (1863), 33 Beav. 272; *Re Arnold's Trusts* (1870), L. R. 10 Eq. 252; *Talbot v. Jovers* (1875), L. R. 20 Eq. 255; *Re Bowman, Re Lay, Whytehead v. Boulton* (1889), 41 Ch. D. 525. *Mentd.* *Christian v. Foster* (1846), 2 H. N. 161; *Barrett v. Buck* (1848), 11 L. T. O. S. 352; *Oddo v. Brown* (1859), 4 De G. & J. 179; *Jauncy v. A. G.* (1861), 3 Giff. 308; *Maddison v. Pro* (1863), 32 Beav. 658; *Gowan v. Broughton* (1874), L. R. 19 Eq. 77; *Scott v. Cumberland* (1874), L. R. 18 Eq. 578; *Trothow v. Helyar* (1876), 46 L. J. Ch. 125; *Ralph v. Carrick* (1877), 5 Ch. D. 984; *Lockcraft v. Pridham* (1879), 48 L. J. Ch. 636; *Hurst v. Hurst* (1884), 28 Ch. D. 159; *Re Giles* (1888), 55 L. J. Ch. 695; *Indervick v. Tatchell, Tatchell v. Tatchell, Indervick v. Indervick*, [1901] 2 Ch. 738; *Re Hall-Dare, Le Marchant v. Leo Warner*, [1916] 1 Ch. 272.

682. —[*Property was directed to be accumulated for such children as A., B. & C. should leave at their deaths; with power to the trustee to apply such part of the income, as in his judgment might be proper, for their education & maintenance during their minority, & for their future advancement in life:—Held: as to a daughter of C., the power for maintenance did not cease on her marriage, but it ceased on her attaining twenty-one: & as to the power of advancement, it continued, notwithstanding she had attained twenty-one & had married, & notwithstanding the period for accumulation limited by Accumulations Act, 1800 (c. 98), had expired.—PRIDE v. FOOKS* (1840), 2 Beav. 430; 9 L. J. Ch. 234; 4 Jur. 213; 48 E. R. 1248.

*Annotations*:—*Reid*. *Conolly v. Farrell* (1845), 8 Beav. 347; *Gardner v. Barber* (1854), 18 Jur. 508. *Mentd.* *Thorp v. Owen* (1843), 2 Haro, 607.

683. —[*Use of word portion.*]—Testator directed the rents of his freehold estates, & the income of his residuary real & personal estate to children of his niece & of E., each of whom took an interest under his will; & in the clauses for the maintenance & advancement of the children he termed the provision which he had so made for them, sometimes their portions, & sometimes their portions or shares:—*Held: the provision was not a provision for raising portions within the proviso in Accumulations Act, 1800 (c. 98), s. 2, & therefore, was not exempted from the operation of Accumulations Act, 1800 (c. 98),*

**Sect. 3.—Exceptions from statutory rules: Sub-sect. 2, C.; sub-sects. 3, 4 & 5. Sect. 4: Sub-sect. 1.]**

s. 1.—HALFORD v. STAINS (1840), 10 Sim. 488; 13 Jur. 73; 60 E. R. 903.

**Annotations:—**Consd. *Bourne v. Buckton* (1851), 2 Sim. N. S. 91. *Refd.* *Barrington v. Liddell* (1852), 2 De G. M. & G. 480; *Edwards v. Tuck* (1853), 3 De G. M. & G. 40; *Re Fremo, Fremo v. Logan* (1891), 60 L. J. Ch. 562.

684. ———.] — *BOURNE v. BUCKTON*, No. 670, *ante*.

685. ———.] — (1) S., by his will, made gifts to all of his seven sons & daughters by name, & then directed the surplus interest of his residuary estate to be accumulated during the lives of his children, & the longest liver of them; & after the decease of the survivor, the whole to be divided equally among all the grandchildren of the testator then living; & if but one, the whole to such one:—*Held*: these gifts to the grandchildren were not portions within the exception in Accumulations Act, 1800 (c. 98), s. 2.

(2) The income arising during the period beyond the permitted limits of accumulation goes to the next of kin or to the heir, according to the nature of the fund from which the accumulations are directed.—*BURT v. STURT* (1853), 10 Hare, 415; 22 L. J. Ch. 1071; 22 L. T. O. S. 54; 17 Jur. 728; 1 W. R. 145; 68 E. R. 989.

**Annotations:—**As to (1) *Apld.* *Drewett v. Pollard* (1859), 27 Beav. 196; *Mathews v. Koble* (1868), 3 Ch. App. 691. *Refd.* *Watt v. Wood* (1862), 2 Drew. & Sm. 56; *Re Walker, Walker v. Walker* (1886), 54 L. T. 792. *Generally, Refd.* *Edwards v. Tuck* (1853), 17 Jur. 921; *Re Elliott, Public Trustee v. Pinder*, [1918] 2 Ch. 160. *Mentd.* *Scott v. Cumberland* (1874), L. R. 18 Eq. 578.

686. ———.] — **Gift of whole of testator's estate.]**—W. devised & bequeathed all his real & personal estates to trustees, upon trust as to certain parts thereof, to pay the rents & profits to his granddaughter F. for life, & after her death to sell the same & divide the proceeds among her children on their respectively attaining twenty-one, with remainder to the children of his nephew C. in like manner as he had bequeathed unto them the moiety of the residue of his estate & effects: testator then empowered his trustees to sell & convert into money the residue of his real & personal estate; & subject to the payment of his debts & legacies he directed them to invest the proceeds & accumulate the income, & to divide the principal & accumulation into two equal parts & to pay or transfer one of such parts unto & amongst the children of his granddaughter F., & the remaining part among the children of his nephew C., & testator directed that the share of each child of F. & C. respectively should be a vested interest as to sons at twenty-one or earlier death leaving issue & as to daughters at twenty-one or marriage; & that if any such child died without having attained a vested interest, the share of such child should accrue to the survivors of the children; & that if there should not be any child of C., & of F., or of either of them or, being such, if all such children should die without having attained any vested interest, the trust property should be held in trust for testator's heir & next of kin according to the natures thereof; testator died in 1826; & in 1847 the granddaughter F. having never been married, & being between fifty & sixty years of age instituted a suit for the opinion of the ct. as to the disposition of the accumulation of the moiety of the residue left to her children:—*Held*: (1) the direction for accumulation was void beyond the period of twenty-one years from testator's death & the subsequent accumulations were undisposed of by the will, & went, according to the nature of the property, to testator's heir-at-law & next of kin; (2) a direction to accu-

mulate residue for the benefit of an infant is not a provision for raising a portion for that child within Accumulations Act, 1800 (c. 98), s. 2.—*EDWARDS v. TUCK* (1853), 3 De G. M. & G. 40; 1 Eq. Rep. 470; 23 L. J. Ch. 204; 22 L. T. O. S. 6; 17 Jur. 921; 1 W. R. 521; 43 E. R. 17, L. C. & L. JJ.

**Annotations:—**As to (2) *Apld.* *Drewett v. Pollard* (1859), 27 Beav. 196; *Mathews v. Koble* (1868), 3 Ch. App. 691. *Consd.* *Re Walker, Walker v. Walker* (1886), 54 L. T. 792.

687. ———.] — Testator directed trustees, out of the income of his estate to pay a fixed annual sum to his son, a lunatic, & to accumulate the surplus until his death or recovery, with a trust in case his son should recover, to pay the accumulations to the son, & he appointed residuary legatees:—*Held*: the direction to accumulate beyond twenty-one years was void under Accumulations Act, 1800 (c. 98), & the gift being of the whole of testator's effects, it was not, though for the benefit of a son, within Accumulations Act, 1800 (c. 98); & the accumulations in excess vested in the heir of testator as personal estate.—*WILDES v. DAVIES* (1853), 1 Sm. & G. 475; 22 L. J. Ch. 495; 21 L. T. O. S. 206; 1 W. R. 253; 65 E. R. 208.

**Annotations:—***Refd.* *Weatherall v. Thornburgh* (1878), 20 W. R. 593; *Re Appleton, Barber v. Tobbit* (1885), 29 Ch. D. 893; *Re Walker, Walker v. Walker* (1886), 54 L. T. 792.

688. ———.] — A direction in a will to accumulate rents & profits of an estate up to a sum certain, for portions for children of a devisee, who dies without having had any child is not within the protection of Accumulations Act, 1800 (c. 98).

Where, subject to such a direction, the estate itself is devised to several in succession, the direction to accumulate operates as a charge on the successive estates; & accumulations made after twenty-one years from testator's death belong not to his heir-at-law, but from time to time to the several persons entitled to the rents & profits.

In the events which have happened the direction [to accumulate] in question, like that in *Eyre v. Marsden*, No. 681, *ante*, has become, in the words of LORD LANGDALE, "not a provision for raising portions, but a provision for making additions to the capital for the purpose of making one gift of an aggregation fund" (PAGE WOOD, V.-C.).—*Re CLULOW'S TRUST* (1859), 1 John & H. 639; 28 L. J. Ch. 696; 33 L. T. O. S. 359; 5 Jur. N. S. 1002; 7 W. R. 594; 70 E. R. 900.

**Annotation:—***Refd.* *Smith v. Lomas* (1864), 4 New Rep. 318.

689. ———.] — Testator, who died in 1858, by his will, dated in that year, gave life annuities to his wife & two brothers, & directed that the income of his residuary personal estate, & the rents & profits of certain freehold & leasehold properties, should be accumulated during the life of his wife & brothers & the survivor; & after the decease of the survivor he bequeathed his residuary personal estate & the accumulation of the income thereof, & of the rents & profits of the freeholds & leaseholds, to his nephews & nieces, children of his two brothers, "the same to be paid to them on their respectively attaining the age of twenty-one years." Testator gave the freeholds & leaseholds to other persons. The wife & brothers survived testator, & lived for more than twenty-one years after his death. The questions were, whether the direction to accumulate was invalid as being contrary to Accumulations Act, 1800 (c. 98), or whether it came within the exception contained in Accumulations Act, 1800 (c. 98), s. 2. For the nephews & nieces it was argued that, although, according to the authorities, the gift of the capital of the residuary personal estate



together with the accumulations thereof, was not a "provision for raising, portions" within the exception to Accumulations Act, 1800 (c. 98), yet the gift of the accumulations of the rents & profits of the freeholds & leaseholds, not being accompanied by a gift of the freeholds & leaseholds themselves, was such a provision; & therefore, as to such rents & profits, the direction for accumulations was effectual:—*Held*: the rents & profits could not be severed from the aggregate fund, as a part of which they were given; & the direction for accumulating them was not a "provision for raising portions" within the exception, & was ineffectual beyond the twenty-one years allowed by Accumulations Act, 1800 (c. 98).—*Re WALKER, WALKER v. WALKER* (1886), 54 L. T. 792.

#### SUB-SECT. 3.—DIRECTIONS AS TO TIMBER.

*See, now, Law of Property Act, 1925 (s. 20), s. 164 (2) (iii).*

**690. Power void under rule against perpetuity.]**—*FERRAND v. WILSON*, No. 41, *ante*.

#### SUB-SECT. 4.—REPAIRS AND REPLACEMENT OF WASTING CAPITAL.

**691. Accumulation to maintain in repair.]**—Testator directed his trustees to invest his residuary moneys, together with all accumulations, in the purchase of landed estate, & that out of the income thereof an annuity should be paid to his nephew for life, & that the surplus income should from time to time during the life of the nephew be expended in the purchase of additional land, "or in the improvement of the landed estate, & in maintaining in good habitable repair houses & tenements on the property;" & that, on the death of the nephew, his son (if any) should have a life interest in the whole of the landed property, subject to one-third of the yearly rental being expended year by year in improving, keeping up, or extending the estate; with remainder to the male heir of his nephew in succession for ever. Testator died in 1865. His nephew survived him & had a son, an infant. Shortly after testator's death an action was commenced for the administration of his estate, & a receiver was appointed. Subsequently the trustees purchased out of money in ct., representing testator's residuary estate, a freehold estate, which was conveyed to them upon the trusts of the will. Under an order made in the action the income of testator's estate, after keeping down the annuity to the nephew & providing for repairs, was, during twenty-one years from testator's death, invested & accumulated. Upon the expiration of the twenty-one years a further order was made directing the receiver, after keeping down the annuity & maintaining in good habitable repair the houses & tenements on the property," to divide the residue of the income, as from the expiration of the twenty-one years, among testator's next of kin; whereupon the receiver applied part of the income of the landed estate, after keeping down the nephew's annuity, in repairs & "improvements" on the

estate. The question was then raised, on a summons by the next of kin, whether the trust or direction in the will to expend surplus income in improvements was not, though indirectly, a trust or direction for "accumulation," & therefore void, under Accumulations Act, 1800 (c. 98), after the expiration of twenty-one years from testator's death; & thus whether the expenditure by the receiver for such purposes was valid:—*Held*: all improvements in substance, which could in any fair sense be regarded as coming under the words "maintaining in good habitable repair houses & tenements on the property," were outside Accumulations Act, 1800 (c. 98), altogether; money laid out in building houses on the land would be within the Act.—*VINE v. RALEIGH*, [1891] 2 Ch. 13; 60 L. J. Ch. 675, C. A.

*Annotations*:—*Apld. Re Gardiner, Gardiner v. Smith*, [1901] 1 Ch. 697. *Reid. Re Mason Mason v. Mason*, [1891] 3 Ch. 467.

**692. —.]—*Re MASON, MASON v. MASON*, No. 656, *ante*.**

**693. Accumulation to keep up property to present value.]**—A direction in a will to apply a yearly sum out of the rents of leaseholds, held for a term of more than twenty-one years, from testator's death, in effecting & keeping on foot a policy of insurance to secure the replacement at the end of the term of the capital that would be lost through not selling the leaseholds, is not a direction to accumulate & does not fall within Accumulations Act, 1800 (c. 98).

This so-called accumulation being one which simply keeps up the property to its present value is valid & is not within Accumulations Act, 1800 (c. 98) (*BUCKLEY, J.*).—*Re GARDINER, GARDINER v. SMITH*, [1901] 1 Ch. 697; 70 L. J. Ch. 407.

#### SUB-SECT. 5.—SAVINGS OUT OF INCOME AND INSURANCE.

**694. Directions to pay premiums on policy on life of another.]**—A direction by will, to pay out of testator's property the premiums upon a policy of insurance, effected by testator upon the life of another person, is valid for the whole life insured, & is not an accumulation, by Accumulations Act, 1800 (c. 98), restricted to twenty-one years only.—*BASSIL v. LISTER* (1851), 9 Hare, 177; 20 L. J. Ch. 641; 17 L. T. O. S. 263; 15 Jur. 964; 68 E. R. 464.

*Annotations*:—*Follid. Re Vaughan, Halford v. Close*, [1883] W. N. 89. *Apld. Vine v. Raleigh*, [1891] 2 Ch. 13; *Re Gardiner, Gardiner v. Smith*, [1901] 1 Ch. 697.

**695. —.]—*Re VAUGHAN, HALFORD v. CLOSE*, [1883] W. N. 89.**

#### SECT. 4.—EFFECT OF EXCESSIVE ACCUMULATIONS.

##### SUB-SECT. 1.—WHEN OFFENDING AGAINST PERPETUITY RULE.

**696. Direction to accumulate altogether void.]**—*SOUTHAMPTON (LORD) v. HERTFORD (MARQUIS)*, No. 40, *ante*.

**697. —.]**—If there be a trust for accumulation & part of it would have been bad before the Act, [Accumulations Act, 1800 (c. 98)] that part

**PART III. SECT. 3, SUB-SECT. 4.**  
*g. Accumulations for improvement of land.]—M'LARTY'S TRUSTEES v. M'LAVERTY* (1864), 2 Macph. (Ct. of Sess.) 489; 36 Sc. Jur. 237.—*SCOT.*

**PART III. SECT. 4, SUB-SECT. 1.**  
**696 i' Direction to accumulate alto-**

*gether void.]*—Testator directed his execs. to lease & rent & invest his lands, money & mtees. for the term of sixty years, after which the property was to be divided as in his will provided:—*Held*: this infringed the rule against perpetuities, 52 Vict. c. 10, & was invalid.—*BAKER v. STUART* (1897), 28

O. R. 439.—*CAN.*

**696 II. —.]—*FONSECA v. JONES* (1911), 21 Man. L. R. 168.—*CAN.***

**696 III. —.]—*COCHRANE v. COCHRANE* (1883), 11 L. R. Ir. 361.—*IR.***

**Sect. 4.—Effect of excessive accumulations: Sub-sects. 1 & 2.]**

remains bad notwithstanding the Act (LORD ELDON, C.).—MARSHALL v. HOLLOWAY (1820), 2 Swan. 432; 36 E. R. 681, L. C.

**Annotations:—***Reid*, Ibbetson v. Ibbetson (1840), 10 Sim. 495; Ferrand v. Wilson (1845), 4 Hare, 344; Browne v. Stoughton (1846), 14 Sim. 369; Dungannon v. Smith (1846), 12 Cl. & Fin. 546; Turvin v. Newcome (1856), 3 K. & J. 16; Christie v. Gosling (1866), L. R. 1 H. L. 279; Martelli v. Holloway (1872), L. R. 5 H. L. 532; *Re* Stamford & Warrington, Payne v. Grey, [1911] 1 Ch. 255. **Mentd.** Morison v. Morison (1838), 4 My. & Cr. 215; Bainbridge v. Blair (1845), 8 Beav. 588; Holloway v. Webber, Holloway v. Holloway (1868), L. R. 6 Eq. 523; Tewart v. Lawson (1874), L. R. 18 Eq. 490; *Re* Lewis, Busk v. Lewes, [1918] 2 Ch. 308.

698. —.]—PALMER v. HOLFORD, No. 85, *ante*.

699. —.]—Testatrix gave the interest of her residuary estate to her four sisters during their lives, & directed that, on their deaths, the interest of their respective shares should, at the discretion of her exor., be applied to the maintenance & education, or accumulated for the benefit of the children of each of them so dying, until such children should respectively attain the age of twenty-two years, when they were to be entitled to their mother's share of the principal; with limitations over, in the event of the death of any of them under that age:—*Held*: the children of the sisters were not to take a vested interest, till they attained twenty-two; & all the gifts, subsequent to the life estates given to the sisters, were void, as being too remote.—VAWDRY v. GEDDES (1830), 1 Russ. & M. 203; Tambl. 301; 8 L. J. O. S. Ch. 63; 39 E. R. 78.

**Annotations:—***Consd.* Davies v. Fisher (1842), 5 Beav. 201; Patching v. Barnett (1880), 49 L. J. Ch. 665. *Reid*. Bland v. Williams (1834), 3 L. J. Ch. 218; Doed. Dolley v. Ward (1839), 9 Ad. & El. 582; Saunders v. Vautier (1841), Cr. & Ph. 240; Packham v. Gregory (1845), 4 Hare, 396; Southern v. Wollaston (1852), 16 Beav. 166; Courtier v. Oram (1855), 21 Beav. 91; *Re* Hart's Trusts, *Re* Trustee Relief Act (1855), 32 L. T. O. S. 98; Hardecastle v. Hardecastle (1862), 1 New Rep. 83; *Re* Bulley's Trust Estate (1865), 13 L. T. 264; Spencer v. Wilson (1873), L. R. 16 Eq. 501; *Re* Martin, Tuke v. Gilbert (1887), 57 L. T. 471. **Mentd.** Watson v. Hayes (1839), 5 My. & Cr. 125; Lister v. Bradley (1841), 1 Hare, 10; Fosting v. Allen (1844), 5 Hare, 573; Smith v. Palmer (1849), 7 Hare, 225; *Re* Judkin's Trusts (1884), 50 L. T. 200; *Re* Wintle, Tucker v. Wintle, [1896] 2 Ch. 711; *Re* Nunburnholme, Wilson v. Nunburnholme, [1912] 1 Ch. 489.

700. —.]—Testator gave annuities to his widow & son, & directed the surplus of his personal estate & the rents of his real estate to be invested in stock, & the dividends to be accumulated, & to be & remain assets for improvement, in the hands of his exors., until the time & times should arrive when distribution should be made, as thereby directed. Testator then directed his real estates to be sold after the decease of the survivor of his wife & son & the proceeds to be invested in stock, & the dividends to be accumulated, to be & remain assets for improvement in the hands of his exors., for the benefit of his grandchildren & his nephew T., & to be distributed as they should become of the age of twenty-five years. Testator had two grandchildren born in his lifetime, both of whom died infants, one in his lifetime & the other after his death. Another grandchild was born after testator's death who was an infant when the bill was filed. T. survived testator & attained twenty-five:—*Held*: the bequest was void for remoteness.—PORTER v. FOX (1834), 6 Sim. 485; 58 E. R. 676.

**Annotations:—***Expld.* Peard v. Kekewich (1852), 15 Beav. 166. *Distd.* Wilson v. Wilson (1858), 28 L. J. Ch. 95. *Reid*. James v. Wynford (1852), 1 Sm. & G. 40; *Re* Featherstone's Trusts (1882), 22 Ch. D. 111. **Mentd.**

Crockett v. Crockett (1848), 17 L. J. Ch. 230; *Re* Chaplin's Trusts (1863), 33 L. J. Ch. 183; Drakeford v. Drakeford (1863), 11 W. R. 977.

701. —.]—Bequest in trust to accumulate for all the children of A. & B. (who were living) equally, the shares of sons to be vested at twenty-five, & of daughters at twenty-five or marriage, & if one child only to be paid at twenty-five or marriage:—*Held*: too remote.—GRIFFITH v. BLUNT (1841), 4 Beav. 248; 10 L. J. Ch. 372; 49 E. R. 334.

**Annotations:—***Reid*. Picken v. Matthews (1878), 10 Ch. D. 264; *Re* Finch, Abbliss v. Burney (1880), 49 L. J. Ch. 710.

702. —.]—CURTIS v. LUKIN, No. 16, *ante*.

703. —.]—A demise to trustees, upon trust for A. for life, remainder to the first & other sons of A. in tail, with various other remainders; with the following direction to accumulate, "that, if any person for the time being beneficially entitled to the possession or to the receipt of the rents, etc., should be under the age of twenty-one years" trustees were, during such time, to receive the rents, etc., & apply part towards the maintenance & education of such person, & invest the residue in the purchase of real estate, to be settled to the same uses, etc. A. was an infant at the death of testator:—*Held*: upon bill filed by A. the trust for accumulation was void *in toto*, as being too remote.—BROWNE v. SROUGHTON (1846), 14 Sim. 369; 60 E. R. 401; *sub nom.* BROWNE v. HOUGHTON, 15 L. J. Ch. 391; 10 Jur. 745.

**Annotations:—***Apld.* Turvin v. Newcome (1856), 3 K. & J. 16; *Re* Stamford & Warrington, Payne v. Grey, [1912] 1 Ch. 343.

704. —.]—SCARISBRICK v. SKELMERSDALE, No. 244, *ante*.

705. —.]—Devise, in 1826, of real estate to trustees, in fee, upon trust for one life, & then for his first & other sons successively, in tail, with a direction to the trustees, during the minority of any *cestui que trust*, to receive the rents & invest & accumulate the same, & to hold such accumulations upon the same trusts as were declared concerning the real estates:—*Held*: the trust for accumulation was void.

There is a positive trust for accumulation fixed upon this property during the whole period, while the successive *cestuis que trust* are under age; & it has been settled that this exceeds the limit which the law will permit for the duration of such a trust (PAGE-WOOD, V.-C.).—TURVIN v. NEWCOME (1856), 3 K. & J. 16; 5 W. R. 35; 69 E. R. 1003; *sub nom.* TURVIN v. NEWCOME, 3 Jur. N. S. 203.

**Annotation:—***Reid*. *Re* Stamford & Warrington, Payne v. Grey, [1912] 1 Ch. 343.

**SUB-SECT. 2.—WHEN EXCEEDING STATUTORY PERIODS.**

*See, now*, Law of Property Act, 1925 (c. 20), ss. 164–166.

706. Direction valid within statutory provisions.]—Trust by will for accumulation during a life, contrary to Accumulations Act, 1800 (c. 98), is good for twenty-one years by that statute.—GRIFFITHS v. VERE (1803), 9 Ves. 127; 32 E. R. 550, L. C.

**Annotations:—***Consd.* Elborne v. Goode (1844), 14 Sim. 165; Wilson v. Wilson (1851), 1 Sim. N. S. 288. *Apld.* Barrington v. Liddell (1852), 2 De G. M. & G. 480. *Consd.* Edwards v. Tuck (1853), 3 De G. M. & G. 40. *Reid*. *Re* Rosslyn's Trust (1848), 16 Sim. 391; Burt v. Sturt (1853), 10 Hare, 415; Trench v. Cheese (1855), 6 De G. M. & G. 453; Mathews v. Kebble (1868), 3 Ch. App. 691.

**PART III. SECT. 4, SUB-SECT. 2.**

*h. Directions to trustees—To make payments out of residue—To such persons as they think most deserving—Whether within rule.*—MITCHELL'S TRUSTEES v. MITCHELL'S TRUSTEES (1916), 52 Sc. L. R. 293.—SCOT.



**707.** —.]—Trust by will for accumulation beyond Accumulations Act, 1800 (c. 98), is void only for the excess. Therefore, where directed until the age of twenty-one of the legatee, not then born, it is good for twenty-one years. Legacy to A. for life; then to her children for maintenance, & to be equally divided among them on their arriving at twenty-one; followed by a legacy to B. "on the same conditions, on his attaining the age of twenty-one." The legacy to B. construed in the same manner as the other: viz. for life only, etc.—*LONGDON v. SIMSON* (1806), 12 Ves. 295; 33 E. R. 113.

*Annotations* :—*Apld.* *Barrington v. Liddell* (1852), 2 De G. M. & G. 480. *Reid.* *Ellis v. Maxwell* (1841), 3 Beav. 587; *Elborne v. Goode* (1844), 14 Sim. 165; *Edwards v. Tuck* (1853), 22 L. J. Ch. 523; *Re Cattell*, *Cattell v. Cattell*, [1907] 1 Ch. 587.

**708.** —.]—Testator having declared that the dividends should accumulate during the life of his daughters, & until their children respectively should attain twenty-five, when the principal should be transferred to the children, the ct. directed the dividends to accumulate for twenty-one years, if the daughter should so long live; but the ct. would not decide on the question of remoteness, as if the daughter left no issue the question would not arise, & the ct. will not decide an hypothetical case.—*BANKS v. SLADEN* (1830), as reported in *Taml.* 407; 48 E. R. 102.

**709.** —.]—Testator bequeathed the residue of his personal estate to trustees in trust for his daughter, & after her decease for all & every the child or children of his daughter, share & share alike, when they should respectively attain twenty-one, with maintenance in the meantime; & in case any of said children should die under twenty-one, & have one or more child or children who should survive testator's daughter, & live to attain twenty-one, such child or children to be entitled to his or their parent's share: provided also, that in case any child or children of his daughter should die before attaining twenty-one the share or shares of such child or children should go to the survivor or survivors, & the issue of any deceased child or children who should marry & die under twenty-one, to be equally divided between them, if more than one, the issue of any deceased child or children to stand in the place of the parent or parents; with a limitation over, provided there should be no child of his daughter, or there being any such, no one of them should live to attain twenty-one, nor leave any issue who should live to attain that age:—*Held*: the limitation over was intended to take effect only on failure of grandchildren who should survive testator's daughter, & not live to attain twenty-one, & was, therefore, not too remote.

The daughter having lived for twenty-six years after the death of testator, I am of opinion that the accumulations of the dividends & interest exceeding the annual sum of £200 were good for twenty-one years, & the daughter during the rest of her life was entitled only to the interest of the accumulated fund, which, after her death, passed by the limitation. The accumulation having ceased at the end of twenty-one years, from that time, during her life, the daughter was entitled to the whole sum beyond the £200, being the person who would have been entitled if such accumulation had not been directed (*LEACH, M.R.*).—*TRICKEY v. TRICKEY* (1832), 3 My. & K. 560; 40 E. R. 213.

*Annotation* :—*Reid.* *Ellcombe v. Gompertz* (1837), 3 My. & Cr. 127.

**710.** —.]—(1) Testatrix having given legacies to be paid to such children as should attain

twenty-one, & also a sum, which, in the meantime, was to accumulate, to be paid to A., an infant, in case he attained twenty-five, gave the residue of her property to *pltf.* for life, etc. The time allowed to accumulate would have expired before A. attained twenty-five. The ct. directed the latter sum to be raised & to accumulate for the statutory period, & then, that the future interest & the interest upon the then accumulations, till the time of payment, should fall into the residue; that a sufficient sum of stock should be raised to satisfy the other legacies, the dividends upon which, till they were paid, should be paid to the tenant for life.

(2) Part of the residue consisted of a redeemable annuity. The ct. directed that the annuity should be sold, & that, until the sale, the receipts should form part of the residue.—*CRAWLEY v. CRAWLEY* (1835), 7 Sim. 427; 4 L. J. Ch. 265; 58 E. R. 901.

*Annotations* :—*As to* (1) *Apld.* *Re Whitehead*, *Peacock v. Lucas*, [1894] 1 Ch. 678. *Fold.* *Re Pope*, *Sharp v. Marshall*, [1901] 1 Ch. 84. *N.F.* *Re Hawkins*, *White v. White*, [1916] 2 Ch. 570; *Re Garside*, *Wragg v. Garside*, [1919] 1 Ch. 132. *Reid.* *Allhusen v. Whittell* (1867), 36 L. J. Ch. 929; *Re Phillips*, *Phillips v. Levy* (1867), 40 L. J. Ch. 198; *Re Hollebhone*, *Hollebone v. Hollebhone*, [1919] 2 Ch. 93.

**711.** —.]—Testator devised his freehold & copyhold estates, charged with annuities for his sons & daughter, upon trust, to invest & accumulate the surplus produce thereof for the benefit of his grandchildren, until the youngest should attain twenty-one, when the accumulations were to be divided among such of them as should be then living; & he directed that in case any of his sons & daughter should be living after the youngest of his grandchildren should have attained twenty-one, the residue of the said rents & profits should be further accumulated, & such accumulation divided among his grandchildren, who should be living at the death of the survivor of his sons & daughter; & charged, as aforesaid, he directed that after the death of such survivor his said estates should stand charged for twenty years with the payment of two third parts of the clear produce of them, in equal proportions of so much money as would in fifteen years make £30,000, which sum, with the interest thereof, he directed should be equally divided among all his grandchildren who should live to attain the age of twenty-one, their exors. or administrators. Testator died in 1812, leaving ten grandchildren, nine of them children of one of the annuitants. All of them lived to attain twenty-one, the youngest having attained that age in 1830. The last survivor of testator's sons & daughter died in 1831:—*Held*: the charge of two-thirds of the produce of the estates was a provision for accumulation, within Accumulations Act, 1800 (c. 98), & therefore void, so far as it extended to any period after the expiration of twenty-one years from testator's death.—*EVANS v. HELLIER* (1837), 5 Cl. & Fin. 114; 7 E. R. 347, H. L.; *affg.* *S. C. sub nom.* *SHAW v. RHODES* (1835), 1 My. & Cr. 135.

*Annotations* :—*Consd.* *Barrington v. Liddell* (1852), 2 De G. M. & G. 480. *Apld.* *Re Clulow's Trust* (1859), 1 John. & H. 639. *Reid.* *Boughton v. James* (1844), 1 Coll. 26; *Morgan v. Morgan* (1850), 4 De G. & Sm. 164; *Bourne v. Buckton* (1851), 2 Sim. N. S. 91; *Burt v. Sturt* (1853), 22 L. J. Ch. 1071; *Edwards v. Tuck* (1853), 3 De G. M. & G. 40; *Ludlow v. Stevenson* (1854), 23 L. T. O. S. 394; *Wilson v. Peake* (1856), 3 Jur. N. S. 155.

**712.** —.]—*MILES v. DYER* (1837), 8 Sim. 330; 59 E. R. 131.

*Annotation* :—*Mentd.* *Bentley v. Meech* (1858), 25 Beav. 197.

**713.** —.]—*Re ROSSLYN'S (LADY) TRUST*, No. 612, *ante*.

**714.** —.]—*HEYWOOD v. HEYWOOD*, No. 632, *ante*.

**Sect. 4.—Effect of excessive accumulations: Sub-sect. 2. Sect. 5: Sub-sects. 1, 2 & 3, A. (a).]**

**715. —.]**—(1) Testator by his will devised real estates charged with life annuities to trustees, upon trust, after the decease of the surviving annuitant, for sale; & he directed his trustees to stand possessed of his residuary personal estate, & of the money to arise from the sale of his real estates, & of the rents of his said estates until the same should be sold, & all accumulations thereof, & also the rents of the estates after the same should become saleable, upon certain trusts therein mentioned. Testator then declared that in the meantime & until his real estates should be sold, the trustees should, after payment of the annuities, invest & accumulate the rents, etc., in the way of compound interest, & when & so soon as the estates should be sold or become saleable, should stand possessed of said rents, etc., & the accumulations thereof upon the several trusts, etc., therein-before declared concerning same & concerning the money arising from the sale of said estates respectively. One of the annuitants having survived the period, twenty-one years from the death of testator, beyond which the trust for accumulation was invalidated by Accumulations Act, 1800 (c. 98):—*Held*: the gift of the rents until sale & all accumulations thereof was, upon the true construction of the will, tantamount only to a gift of the fund to arise from the accumulation directed to be made, & could not be held to embrace rents set free, by the operation of the statute, from the trust for accumulation; & so far as the trust to accumulate was void, the gift itself became inoperative; & the rents arising between the period when the accumulation was made to cease by the operation of Accumulations Act, 1800 (c. 98), & the period when the same was directed by the will to cease were undisposed of & belonged to the heir-at-law.

(2) The ct. is not at liberty to apply the Accumulations Act, 1800 (c. 98), in such a manner as to accelerate the enjoyment of any gift or disposition contained in a will.

(3) Accumulations Act, 1800 (c. 98), while cutting down the trust for accumulation to the period prescribed, leaves the rest of the will the same in point of disposition as if no such operation had been performed by it.—*GREEN v. GASCOYNE* (1865), 4 De G. J. & Sm. 565; 5 New Rep. 227; 34 L. J. Ch. 268; 12 L. T. 35; 11 Jur. N. S. 145; 13 W. R. 371; 46 E. R. 1038, L. C.

*Annotations*:—*As to* (1) *Consd. Coombe v. Hughes* (1865), 34 Beav. 127. *Reid. Talbot v. Jevors* (1875), L. R. 20 Eq. 255; *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261; *Wharton v. Masterman*, [1895] A. C. 186.

**716. —.]**—*JAGGER v. JAGGER*, No. 615, *ante*.

**717. —.]**—*Re ERRINGTON, ERRINGTON-TURBUTT v. ERRINGTON*, No. 644, *ante*.

**718. Instrument otherwise unaffected.]**—*GREEN v. GASCOYNE*, No. 715, *ante*.

**SECT. 5.—APPLICATION OF SURPLUS ACCUMULATIONS.**

**SUB-SECT. 1.—IN GENERAL.**

*See, now, Law of Property Act, 1925 (c. 20), s. 104 (1).*

**719. Primary gift absolute—Direction to accumulate disregarded.]**—*TRICKEY v. TRICKEY*, No. 709, *ante*.

**720. —.]**—Testator gave to his sons & his daughter shares of his residue; he directed

immediate payment to the sons, but as to the daughter's share, that it should not be paid to her, but should be retained by his trustees & allowed to accumulate during the life of her husband; that upon his death it should be secured for her & her children; that if there should be no child it should be paid to her; & that if she should die before it became payable it should go to the two sons. The accumulations were duly made during twenty-one years from testator's death, at the expiration of which period the daughter & her husband were both living. On bill filed by the trustees for the direction of the ct.:—*Held*: the accumulations could not continue after the twenty-one years had expired, but the original gift in the daughter's favour was valid, & she was entitled to the income of the original fund & the accumulations from the cessation of the accumulations during the joint lives of herself & her husband.

The general rule may well be taken to be this: if there is an absolute gift, & then a series of limitations modifying that gift, so far as the limitations do not extend, the absolute gift remains (*TURNER, L.J.*).—*COMBE v. HUGHES* (1865), 2 De G. J. & Sm. 657; 6 New Rep. 76; 34 L. J. Ch. 344; 12 L. T. 438; 11 Jur. N. S. 380; 46 E. R. 531; *sub nom.* *COOMBE v. HUGHES*, 13 W. R. 700, L. J.J.

*Annotation*:—*Mentd. Bousfield v. Bousfield* (1869), 21 L. T. 136.

**721. —.]**—Where there is an absolute vested gift made payable at a future event, with direction to accumulate the income in the meantime & pay it with the principal, the ct. will not enforce the trust for accumulation in which no person has any interest but the legatee; in other words, the ct. holds that a legatee may put an end to an accumulation which is exclusively for his benefit.

Where such an accumulation is directed for more than twenty-one years from the death of the testator & for the above reason is not effective, Accumulations Act, 1800 (c. 98), has no application.—*WHARTON v. MASTERMAN*, [1895] A. C. 186; 64 L. J. Ch. 369; 72 L. T. 431; 43 W. R. 449; 11 T. L. R. 301; 11 R. 169, H. L.; *affg.* S. C. *sub nom.* *HARBIN v. MASTERMAN*, [1894] 2 Ch. 184, C. A.

*Annotations*:—*Consd. Re Travis, Frost v. Greatorex*, [1900] 2 Ch. 541. *Reid. Re Deloitte, Griffiths v. Deloitte*, [1926] Ch. 56.

**722. Primary gift not absolute—Interests of persons entitled after accumulation not accelerated.]**

—*NETTLETON v. STEPHENSON*, No. 754, *post*.

**723. —.]**—*GREEN v. GASCOYNE*, No. 715, *ante*.

**724. —.]**—Testator, who died in 1852, gave freehold & leasehold estates to trustees upon trust for his wife for life or second marriage, & in case she should marry again, then from & after that event, during the remainder of her life, in trust to receive the rents & to hold the same during her life upon the trusts thereafter mentioned, & after her death to the use of G. absolutely. He then gave his personal estate to the same trustees, & directed them to pay the income to his wife during her widowhood, but if she should marry again, then from & after such marriage all these bequests in her favour were to cease, & in lieu thereof they were to pay her, out of the rents & income, an annuity of £500, & during her life, to invest the surplus, if any; & after her decease such trust moneys, surplus rents, funds, & accumulations of income were to be disposed of by the trustees in paying certain legacies; & the residue he gave to T. absolutely.

The widow married again in 1854. Her annuity had been paid, as well as the rents & legacies, & since her marriage the residue of the rents & income had been invested & accumulated:—*Held*: (1) as to the surplus rents & income which would accrue between the expiration of twenty-one years from testator's death & the death of his widow, there was an intestacy; & (2) T. was not entitled during the life of the widow to ask for payment of the accumulated funds, subject to provision being made for payment of the annuity & legacies.

(3) Accumulations which fail under the Thelluson Act [Accumulations Act, 1800 (c. 98)] must be treated in the same way as a gift which fails under Mortmain Act. It has never been held that property that is set free by the operation of Mortmain Act will accrue for the benefit of the persons entitled in remainder (JAMES, L.J.).

(4) Applt. is not appointed residuary legatee by an independent clause, he is only legatee in remainder of the accumulated fund, & there is a gap between the expiration of the period of twenty-one years & the time when he will become entitled to it (COTTON, L.J.).

(5) The effect of the statute [Accumulations Act, 1800 (c. 98)] is not to accelerate the enjoyment of any interest under the will (THESSIGER, L.J.).—WEATHERALL v. THORNBURGH (1878), 8 Ch. D. 261; 47 L. J. Ch. 658; 39 L. T. 9; 26 W. R. 593, C. A.

*Annotations*:—As to (3) *Appld. Re Parry, Powell v. Parry* (1889), 60 L. T. 489; *Re Travis, Frost v. Greatorex*, [1900] 2 Ch. 541. *Reid. Re Deloitte, Griffiths v. Deloitte*, [1926] Ch. 56. As to (4) *Reid. Wharton v. Masterman*, [1895] A. C. 186. As to (5) *Appld. Re Parry, Powell v. Parry* (1889), 60 L. T. 489. *Generally, Reid. Harbin v. Masterman*, [1894] 2 Ch. 184.

725. —.—.]—Testator devised & bequeathed his estate & effects to trustees, upon trust to pay out of the income thereof an annuity of £200 to his niece during her life, & he directed that the surplus income of his trust estate should accumulate & be invested until the death of his niece, & subject & without prejudice to the trusts aforesaid, his trust estate should be held in trust for the children of his niece living at his decease, or born afterwards, who should attain twenty-one, or who dying under that age should have issue living at his or her decease, if more than one in equal shares; & in case there should be no such issue of the niece then, subject & without prejudice to the trusts aforesaid, after her death & the failure of her issue, as to one-third of his trust estate the same should be held in trust for some cousins named in the will, & as to the other two-thirds the same should be held in trust for the trustees of a charity:—*Held*: (1) as to the surplus income from the expiration of twenty-one years after testator's death down to the death of the niece there was an intestacy; (2) on the construction of the will, the persons who should become on the death of the niece entitled to the trust fund would become entitled also to the accumulations of the surplus income during the period of twenty-one years from the death of testator.—*Re TRAVIS, FROST v. GREATOREX*, [1900] 2 Ch. 541; 69 L. J. Ch. 663; 83 L. T. 241; 49 W. R. 38; 44 Sol. Jo. 625, C. A.

*Annotation*:—*Generally, Reid. Re Deloitte, Griffiths v. Deloitte*, [1926] Ch. 56.

## SUB-SECT. 2.—UNDER SETTLEMENTS.

726. Resulting trust to settlor's executors.]  
*Re ROSSLYN'S (LADY) TRUST*, No. 612, *ante*.

## SUB-SECT. 3.—UNDER WILLS.

A. Where Residue Disposed of.

(a) Accumulations of Income of Residue.

*See, generally, WILLS.*

727. Surplus devolves as undisposed of residue.]  
—*RYRE v. MARSDEN*, No. 681, *ante*.

728. —.—.]—Testator gave the residue of his property to R., the eldest son of P.; & failing him, to the next & other sons in succession of P.; & failing the male children of P., to the legatees named in the residuary clause; & he directed his exors. to apply the dividends of his residuary property to the maintenance of R. during his minority, & of the other sons in succession of P. in case of the death of R. before attaining the age of twenty-one. R. survived testator, & died an infant, & P., who was far advanced in years, had no other son. The period allowed by the statute for the accumulation of the income of the residue having expired:—*Held*: the next of kin, & not the residuary legatees, were entitled to the income of the residue, until the contingency upon which the residue was given, either to a male child of P. or to the legatees named in the residuary clause, should be determined.—*M'DONALD v. BRYCE* (1838), 2 Keen, 276; 7 L. J. Ch. 173; 2 Jur. 295; 48 E. R. 634; *subsequent proceedings*, 2 Keen, 517.

*Annotations*:—*Distd. Elborne v. Goode* (1844), 14 Sim. 165. *Consd. Trench v. Cheese* (1854), 19 Beav. 3; *Mathews v. Keble* (1867), L. R. 4 Eq. 467. *Reid. Burt v. Sturt* (1853), 10 Hare, 415; *Edwards v. Tuck* (1853), 3 De G. M. & G. 40; *Trench v. Cheese* (1855), 6 De G. M. & G. 453; *Wharton v. Masterman*, [1895] A. C. 186.

729. —.—.]—*ELBORNE v. GOODE*, No. 614, *ante*.

730. —.—.]—*BOURNE v. BUCKTON*, No. 670, *ante*.

731. —.—.]—Testator, after giving A. an annuity of £50, for her life, gave real & personal estate to trustees upon trust to accumulate & invest the proceeds during the life of A. & after her decease to stand possessed of the same, & the accumulations upon trust for the children of A. equally; & as to the share of each child, in trust for such child for life, & afterwards for his or her children equally, & the heirs of their bodies, with cross-remainders. Testator then, after reciting that A. might have children born after his decease who would not take any interest except upon the contingency therein mentioned, gave to each such child the sum of £5,000, with interest from A.'s death, such legacies to be vested at twenty-one; & testator empowered his trustees to raise so much money as might be necessary for paying these legacies, either by the rents & profits of the trust estates, or by creating a term of years thereout:—*Held*: this was not a provision for raising portions within Accumulations Act, 1800 (c. 98), s. 2; & the accumulation stopped at the end of twenty-one years from testator's death, & the income from that time belonged to the heir-at-law & next of kin.—*HAMER v. HAMER* (1851), 17 L. T. O. S. 308.

732. —.—.]—*BURT v. STURT*, No. 685, *ante*.

## PART III. SECT. 5, SUB-SECT. 2.

k. Resulting trust to beneficiaries—*Discretion of court—On distribution of excess.*—*MAXWELL v. DE SATGE* (1922), 22 S. & N. S. W. 260; 39 N. S. W.

## W. N. 54.—AUS.

## PART III. SECT. 5, SUB-SECT. 3.—A. (a).

727 i. Surplus devolves as undisposed of residue.]—*Re MUNDY*, [1924] S. A.

## S. R. 306.—AUS.

727 ii. —.—.]—*HARRISON v. HARRISON* (1904), 7 O. L. R. 297.—CAN.

727 iii. —.—.]—*OGILVIE'S TRUSTEES v. KIRK-SESSION OF DUNDEE* (1846), 8 Dunl. (Cl. of Sess.) 1229.—SCOT.

**Sect. 5.—Application of surplus accumulations: Subsect. 3, A. (a) & (b), & B.]**

**733.** —[—]—Where testator by a will, made previously to Wills' Act, 1837 (c. 26), directed the income of real estate to be accumulated beyond the period allowed by Accumulations Act, 1800 (c. 98):—*Held*: the income accruing after such period belonged to the heir-at-law of testator, & not to the residuary devisees.—*SMITH v. LOMAS* (1864), 4 New Rep. 318; 33 L. J. Ch. 578; 10 L. T. 746; 10 Jur. N. S. 742; 12 W. R. 949.

*Annotation*:—*Mentd.* Springett v. Jennings (1871), 24 L. T. 643.

**734.** —[—]—*PURSELL v. ELDER*, No. 622, *ante*.

**735.** —[—]—*MATHEWS v. KEBLE*, No. 619, *ante*.

**736.** —[—]—Testator having power to charge real estates did, by deed, charge them with the payment, after the deaths of himself & his wife, of £6,000 & interest, to trustees upon such trusts as he should by will appoint. By his will he directed that the £6,000 & interest should form part of his residuary personal estate & directed the residue to be invested in the purchase of land, of which the trustees were to accumulate the rents in a manner which in part was void under Accumulations Act, 1800 (c. 98):—*Held*: that part of the interest as to which the directions to accumulate were void went to the next of kin of testator, & did not sink into the estates on which it was charged, or go to his heir.—*SIMMONS v. PITT* (1873), 8 Ch. App. 978; 43 L. J. Ch. 267; 29 L. T. 320; 21 W. R. 860, L. J.

**737.** —[—]—*RALPH v. CARBICK*, No. 624, *ante*.

**738.** —[—]—*Re WALKER, WALKER v. WALKER*, No. 689, *ante*.

**739.** —[—]—The heir-at-law, & not the next of kin, is entitled to the accumulations of the income of the proceeds of sale of real estate sold by trustees under a power contained in a will, which have arisen during such part of the period during which accumulation was directed by the will as exceeds the legal limit.—*Re PERKINS, BROWN v. PERKINS* (1909), 101 L. T. 345; 53 Sol. Jo. 698.

**740.** —[—]—Testator gave five annuities to be paid, "out of the residuary estate & my bank shares" & "subject as aforesaid" directed the surplus income to be accumulated until the death of the last annuitant, & disposed of the residue. One annuitant lived beyond the period of accumulation allowed by Accumulations Act, 1800 (c. 98):—*Held*: there was an intestacy as to the income accumulated beyond the period.—*Re CABABÉ, CABABÉ v. CABABÉ* (1914), 59 Sol. Jo. 129.

*Annotations*:—*Expld. & Distd.* *Re Hawkins, White v. White*, [1916] 2 Ch. 570. *Refd.* *Re Garside, Wragg v. Garside*, [1919] 1 Ch. 132.

**(b) Accumulations of Income of Property not Part of Residue.**

**741. Surplus accumulations fall into residue.**—*HALEY v. BANNISTER*, No. 645, *ante*.

**742.** —[—]—*A.-G. v. POULDEN*, No. 654, *ante*.

**743.** —[—]—C. by his will gave £10,000 Consols to trustees upon trust to pay the dividends of different specified sums together making up the whole £10,000, to specified annuitants during their respective lives, & after the death of each annuitant to accumulate the dividends set free by her death until all the annuitants were dead, when he gave the principal to his grandnephew, F. Testator gave the residue equally between the five children

of his nephew L., of whom F. was one. One of the annuitants who was entitled to the dividends of £500 Consols having died, F. claimed immediate payment of the capital of £500 Consols to him:—*Held*: F. was not entitled under the special bequest to him to any income which might accrue in the interval between the expiration of twenty-one years from testator's death, & the death of the surviving annuitant, but such income belonged to the residuary legatees; F. was therefore not entitled to the immediate payment of the whole £500 Consols, but being one of the residuary legatees, he was entitled to payment of one-fifth thereof.—*Re PARRY, POWELL v. PARRY* (1889), 60 L. T. 489.

**744.** —[—]—**Whether treated as capital of residue.**—*CRAWLEY v. CRAWLEY*, No. 710, *ante*.

**745.** —[—]—Testator gave £3,000 stock to trustees, in trust to authorise his bankers to receive the dividends, & invest the same from time to time in the purchase of more capital in the same stock, to be accumulated for so many years as M. should live; & after the death of M., in trust, to pay the £3,000 stock, with the increased capital & accumulations, to R. & his issue. Testator, after disposing of other parts of his property, gave the residue of his personal estate to R., & his issue. Twenty-one years elapsed from the death of the testator, & M. was still living:—*Held*: the income of the £3,000 stock & accumulations, after the twenty-one years, & until the death of M., was undisposed of, & belonged to the residuary legatees.—*O'NEILL v. LUCAS* (1838), 2 Keen, 313; 48 E. R. 649.

*Annotations*:—*Expld.* *Eyre v. Marsden* (1838), 2 Jur. 583. *Consd.* *Mathews v. Keble* (1867), L. R. 4 Eq. 467. *Foll.* *Re Pope, Sharp v. Marshall*, [1901] 1 Ch. 64. *N.F. Re Garside, Wragg v. Garside*, [1919] 1 Ch. 132.

**746.** —[—]—*MORGAN v. MORGAN*, No. 616, *ante*.

**747.** —[—]—*Re CLULOW'S TRUST*, No. 688, *ante*.

**748.** —[—]—Where the income of a particular fund is directed by a testator to be accumulated for more than twenty-one years from his death, & the residue of the personal estate is given to A. for life, with remainder over, the income of the particular fund, & of the accumulations, forms, after the twenty-one years, part of the income of the tenant for life, & does not fall into the capital of the residue.—*Re PHILLIPS, PHILLIPS v. LEVY* (1880), 49 L. J. Ch. 198; 28 W. R. 340.

*Annotations*:—*N.F. Re Pope, Sharp v. Marshall*, [1901] 1 Ch. 64. *Appl.* *Re Hawkins, White v. White*, [1916] 2 Ch. 570. *Foll.* *Re Garside, Wragg v. Garside*, [1919] 1 Ch. 132.

**749.** —[—]—Testator, who died in 1865, by his will gave two freehold houses to trustees, & directed them to apply the income arising therefrom at their discretion for the benefit of his daughter F. for life, & after her death he gave the premises, together with any surplus accumulation of rents that might not be applied for the benefit of F., upon trust for her children who should attain twenty-one, & in default of such children then over. He gave his residue upon trust for certain persons for life with remainders over. F. died in 1900, at which time the trustees had in their hands a considerable sum representing the accumulated surplus rents:—*Held*: the accumulations beyond the period of twenty-one years from testator's death were bad under Accumulations Act, 1800 (c. 98), & fell into residue; & the tenant for life of the residue was not entitled to the surplus

**PART III. SECT. 5, SUB-SECT. 3.—A. (b).**

**741 i. Surplus accumulations fall into residue.**—*HASTIE v. CURDIE* (1869), 6 W. W. & A'B. (Eq.) 91.—*AUS.*

rents themselves, but only to the income arising from the investment thereof.—*Re POPE, SHARP v. MARSHALL*, [1901] 1 Ch. 64; 70 L. J. Ch. 26; 49 W. R. 122; 45 Sol. Jo. 45.

*Annotations*:—*M.F. Re Cababé, Cababé v. Cababé* (1914), 59 Sol. Jo. 129; *Re Hawkins, White v. White*, [1916] 2 Ch. 570; *Re Garside, Wragg v. Garside*, [1919] 1 Ch. 132.

750. ———.]—Testator bequeathed to trustees a sum of £10,000 upon trust to provide out of the income thereof & of any accumulations thereof a sum sufficient for the maintenance of his daughter A. during her life, & to accumulate the surplus income for any period not exceeding the term of twenty-one years from his death, & to hold the accumulations on the like trusts as the original sum of £10,000, but with liberty to apply any such accumulations as if they were income arising in the then current year; & directed that all surplus income arising after the expiration of the said term & not so applied should fall into & form part of his residuary estate, & subject to the trusts aforesaid directed that the said sum of £10,000 & the income thereof & the accumulations of income or so much thereof as should not have been so applied should be held on trusts in favour of the children of A., & in default of children should fall into & form part of his residuary estate. Testator bequeathed a second sum of £10,000, on similar trusts in favour of his daughter B. & her children, with similar trusts in default of children; & gave his residuary estate upon trusts under which each of his daughters C. & D. took a life interest with a general testamentary power of appointment, with a trust in default of appointment for her statutory next of kin.

At the expiration of the period of twenty-one years the trustees had made certain accumulations of the unapplied income of each legacy of £10,000, & since that date the surplus income of the two legacies & of the past accumulations had also been accumulated by the trustees. All four daughters were still living. On a summons taken out for the purpose of ascertaining how such surpluses ought to be dealt with:—*Held*: (1) according to the true construction of the will, the surplus income of the legacies after the expiration of the term of twenty-one years, was not given to the tenants for life of the residuary estate as income, but was to be added to the capital of the residuary estate & dealt with accordingly.

(2) On this construction of the will the addition of the surplus income to the capital was in effect an accumulation within the provisions of Accumulations Act, 1800 (c. 98), & the will must be read as if this direction were eliminated.

(3) On this footing the surplus income of the original legacies after the expiration of the term of twenty-one years, & also the income of the accumulations made during the term of twenty-one years, were not undisposed of, but were properly payable to the tenants for life of the residuary estate.—*Re HAWKINS, WHITE v. WHITE*, [1916] 2 Ch. 570; 86 L. J. Ch. 25; 115 L. T. 543; 61 Sol. Jo. 29.

*Annotation*:—*As to* (2) & (3) *Foll.* *Re Garside, Wragg v. Garside*, [1919] 1 Ch. 132.

751. ———.]—An implied trust to accumulate the surplus income of freeholds specifically

devised on trust for sale exceeded twenty-one years from testator's death. The accumulations & surplus income being otherwise undisposed of were caught by a general residuary bequest with a trust to invest for a life tenant & remaindermen:—*Held*: the valid accumulations during the twenty-one years from testator's death fell into the residue as capital, but the accumulations after that date were invalid & went to the life tenant as income.—*Re GARSIDE, WRAGG v. GARSIDE*, [1919] 1 Ch. 132; 88 L. J. Ch. 116; 120 L. T. 339; 35 T. L. R. 129; 63 Sol. Jo. 156.

752. ———.]—It is not permissible in determining rights at law to inquire into the capacity of a woman to bear children.

Testatrix, who died in Jan. 1904, bequeathed a fund of £25,000 to trustees upon trust out of the income to pay to a niece the annual sum of £500 during her life & to accumulate the surplus income; & from & after the death of the niece testatrix directed her trustees to hold the fund & the accumulations, subject to a discretionary power to apply part of the income of the fund for the benefit of the niece's husband, in trust for all the children of the niece who should, whether living at testatrix's death or born afterwards, attain the age of twenty-one years. The will also contained a residuary gift.

At the end of twenty-one years from testatrix's death, there were six children of the niece, all of whom had long since attained twenty-one years of age; & the niece was sixty five years old:—*Held*: the ct. ought not, for the purpose of closing the class of the niece's children, to make the presumption that the niece was past child bearing; the existing children could not therefore be treated as the only persons interested so as to be entitled to stop the accumulations; that there was, therefore, an effective direction for accumulations beyond the period sanctioned by Accumulations Act, 1800 (c. 98), with the result that as from the end of that period the surplus income fell into residue.—*Re DELOITTE, GRIFFITHS v. DELOITTE*, [1926] Ch. 56; 95 L. J. Ch. 154; 135 L. T. 150.

#### B. Where Residue not Disposed of.

753. *Realty—Devolves on heir at law.*—A testator, after devising & bequeathing all his real & personal estates to trustees, on trust, from time to time to receive the rents & profits, & therewith to pay various legacies & annuities, directed that they should invest the surplus rents & profits at interest, & suffer the same to accumulate; & he declared that they should stand seised of his said trust estate & the accumulations, upon trust, that when & as soon as any son of either of his nephews, A. & B., should have attained the age of twenty-five years, a valuation of his said trust estate should be made, & that the same should then be divided into as many equal lots as there should be sons of his said nephews then living, & thenceforth separate accounts should be kept of the respective portions; & that each of his said nephews' sons, when & as they should respectively arrive at the age of twenty-five years, should choose one of such portions as the share to

#### PART III. SECT. 5, SUB-SECT. 3.—B.

1. *On heir-at-law—Or next of kin—According to nature of property.*—*MACVEAN v. MACVEAN* (1899), 24 V. L. R. 835.—AUS.

m. ———.]—PERPETUAL TRUSTEE CO., LTD. v. PUBLIC TRUSTEE (1922), 23 S. R. N. S. W. 1; 29 N. S. W. N. 246.—AUS.

n. ———.]—PUBLIC TRUSTEE v. GIBSON (1913), 32 N. Z. L. R. 777.—N.Z.

o. ———.]—LORD v. COLVIN (1860), 23 Duml. (Ct. of Sess.) 111.—SCOT.

p. ———.]—PURSELL v. ELDER (1865), 3 Macph. (Ct. of Sess.) (H. L.) 59; 4 Macq. 992; 37 Sc. Jur. 394.—SCOT.

q. ———.]—MACKENZIE v. MACKENZIE'S TRUSTEES (1877), 4 R. (Ct. of Sess.) 982.—SCOT.

r. ———.]—CATHCART'S TRUSTEES v. HENRAGE'S TRUSTEES (1883), 10 R. (Ct. of Sess.) 1205.—SCOT.

t. ———.]—Testator directed his trustees upon the death of the last of certain annuitants, to "realise & convert into cash" his

**Sect. 5.—Application of surplus accumulations: Sub-sect. 3, B. & C.]**

be allotted to him & his children, & that thenceforth the said portion or share should be held by trustees, upon trust for the person so selecting the same for his life, & after his decease upon trust, as to one equal moiety, for his eldest son, & his heirs, exors., etc., & as to the other moiety for the rest of his children, & their heirs, exors., etc., in equal proportions, & if but one child, both moieties for such child absolutely; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others & other of the said nephews' sons; & if all but one should die without leaving issue, the trustees, should stand seised & possessed of the whole trust estate, in trust for such one surviving nephew's son for his life, & for his children & child as aforesaid; but if all the testator's said nephews' sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death, A. & B. had several sons living, & B. had another son born afterwards:—*Held*: upon the construction of the will, the trusts for accumulation & division of the property comprised all the sons of the nephews, who should be living when the first of them should attain twenty-five; & as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, & therefore void; & the testator's real estates upon his death became vested in the heir.

(2) It was agreed that this obvious construction of the gift is controlled by other parts of the will, & that upon the true construction of the whole together the shares were given to sons living at testator's death, & vested in them before twenty-five, though the payment or enjoyment was intended to be postponed till that age. It cannot be said that any words can be so strong in a will as to preclude the qualification of them by other parts of it; but it would be very hazardous to permit terms, perfectly unambiguous in themselves, to be so qualified by anything short of a very clear exposition of testator's meaning. . . . I am of opinion that there is nothing in the other parts of the will to affect the obvious meaning of the words used in the gift, & that the direction is to divide the property amongst such of the sons of the two nephews as may be living, when the first of such sons shall attain twenty-five; & that such gift is too remote & therefore void (*LORD COTTENHAM, C.*).—*BOUGHTON v. BOUGHTON, BOUGHTON v. JAMES* (1848), 1 H. L. Cas. 406; 10 L. T. O. S. 497; 9 E. R. 815, L. C.

*Annotations*.—As to (1) *Reid, Re Finch, Abbas v. Burney* (1881), 17 Ch. D. 311; *Patching v. Barnett* (1881), 45 L. T. 292; *Re Roberts, Reington v. Roberts* (1881), 19 Ch. D. 530; *Re Gage, Hill v. Gage*, [1898] 1 Ch. 498. *Generally, Reid, Greenwood v. Roberts* (1851), 15 Beav. 92; *Wainwright v. Miller*, [1897] 2 Ch. 255. *Mentel, Early v. Benbow* (1848), 2 Coll. 842; *Blann v. Bell* (1859), 5 De G. & Sm. 558; *Robinson v. London Hospital* (1853),

10 Hare, 19; *Tidd v. Lister, Bassil v. Lister* (1853), 3 De G. M. & G. 857; *Bentley v. Oldfield* (1854), 19 Beav. 225; *Craddock v. Owen* (1854), 2 Sm. & G. 241; *Tench v. Cheese* (1855), 6 De G. M. & G. 453; *Simmons v. Rose* (1856), 6 De G. M. & G. 411; *Meller v. Stanley* (1864), 2 De G. J. & Sm. 183; *Diney v. Crossie, Eyre v. Parker* (1866), L. R. 2 Eq. 592; *Allan v. Gott* (1872), 7 Ch. App. 439; *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510; *Howard v. Dryland* (1877), 38 L. T. 24; *Wells v. Row* (1879), 48 L. J. Ch. 476; *Re Dumble, Williams v. Murrell* (1883), 23 Ch. D. 360; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74.

754. ———.]—Testator devised estates, on trust to pay the rents to a tenant for life; & after her death, on trust to accumulate the same for twenty-one years from the death of the tenant for life, & at the end of that period, to divide the accumulations among defined classes of objects, & with limitations in remainder after the expiration of the twenty-one years, but no residuary devise:—*Held*: (1) the time of distribution was not accelerated by the operation of the Accumulations Act, 1800 (c. 98); but (2) the rents accruing between the end of the legal period for accumulation & the time of distribution belonged to the heir-at-law of testator.—*NETTLETON v. STEPHENSON* (1849), 3 De G. & Sm. 366; 18 L. J. Ch. 191; 13 L. T. O. S. 42; 13 Jur. 618; 64 E. R. 518.

755. ———.]—*GREEN v. GASCOYNE*, No. 715, ante.

756. ———.]—Testator devised a landed estate, & bequeathed all his personalty to a trustee upon trust so to vest his real estate in, & cause his personal estate to be placed under the control of, the Ct. of Ch., as that the ct. might administer same; & then bequeathed several annuities to be paid out of the rents & profits of the realty & the proceeds of the personalty & directed that, subject to the payment of the annuities, the rents, income, & produce of the trust estate should be accumulated at compound interest until the decease of the last surviving annuitant, "or during such portion of such surviving annuitant's life as the rules of law will permit," & on the decease of the last surviving annuitant the whole of the trust estate funds & accumulations to be applied by the ct. in the purchase of freehold land to be conveyed to testator's nephew, G., & his heirs:—*Held*: (1) of the rents of the realty, & the income of the personalty which would accrue during the interval, if any, which should elapse after the expiration of twenty-one years from the death of testator & the death of the surviving annuitant, there was an intestacy; (2) G. was not entitled, during the life of the surviving annuitant, to ask for payment of the fund to himself, subject to provision being made for the annuities. The ct. refused to make any order at present, except to pay the annuities & continue the accumulations.

If the period of twenty-one years should expire during the life of the surviving annuitant, my opinion is that, as to the rents & profits during that period, there is an intestacy, & that the rents of the real estate belong to the heir-at-law, & the income of the personalty to the next of kin (*BACON, V.-C.*).—*TALBOT v. JEVERS* (1875), L. R. 20 Eq. 255; 44 L. J. Ch. 646; 23 W. R. 741.

*Annotations*.—*Fold, Weatherall v. Thornburgh* (1878), 8 Ch. D. 261. *Consd. Wharton v. Masterman*, [1895] A. C. 186; *Talbot v. Jevvers* (1917), 117 L. T. 430.

whole estate, & "divide" the residue among certain persons who until that event were to have no vested right. The surplus revenue was accumulated in the hands of the trustees.

At the expiry of twenty-one years from testator's death two of the annuitants still survived:—*Held*: further accumulations being prohibited by the *Thellusson Act*, & no one having a vested right to residue, the surplus income as it accrued fell to testator's heirs *ab intestato*.—*LOGAN'S*

*TRUSTEES v. LOGAN* (1896), 23 R. (Ct. of Sess.) 848; 33 Sc. L. R. 638; 4 S. L. T. 57.—*SCOT*.

a. ———.]—*MACKAY'S* *TRUSTEES v. MACKAY*, [1909] S. C. 139, 143.—*SCOT*.

b. ———.]—*SMITH v. GLASGOW ROYAL INFIRMARY*, [1909] S. C. 1231; 46 Sc. L. R. 860; [1909] 2 S. L. T. 167.—*SCOT*.

c. ———.]—Testatrix

directed her trustees to pay the income of her residuary estate to her daughter during her life, & after her death to hand over the residue to the daughter's child or children, with a gift over in default of issue. The trustees accumulated the income in consequence of a claim by the daughter for payment of *legitim* & at the end of twenty-one years from the death of testatrix, the loss caused to the estate by the payment of *legitim* had not been made good:—*Held*: the accumu-

757. ———.]—WEATHERALL *v.* THORNBURGH, No. 724, *ante*.

*See, now*, Administration of Estates Act, 1925 (c. 23), ss. 45, 46.

758. **Personalty**—**Devolves on next of kin.**]—TALBOT *v.* JEVERS, No. 756, *ante*.

759. ———.]—WEATHERALL *v.* THORNBURGH, No. 724, *ante*.

*C. Nature of Heir's Interest in Surplus Accumulations.*

760. **Heir takes accumulations as personalty.**]—Testator devised his real estate to trustees in fee to accumulate until the youngest child of A. attained twenty-one, & then to divide it. After the expiration of twenty-one years, & before the youngest child attained twenty-one, the heir of

testator died :—*Held* : the forbidden accumulation subsequent to the heir's death, being in the nature of a chattel interest, passed to the personal representatives of the heir of testator.—SEWELL *v.* DENNY (1847), 10 Beav. 315 ; 50 E. R. 603.

*Annotations* :—*Reid*, Halford *v.* Stains (1849), 13 Jur. 73. *Mentd. Re Freame*, Freame *v.* Logan (1891), 60 L. J. Ch. 562.

761. ———.]—Under a direction in a will to sell real estate, & invest the proceeds & accumulate the income thereof until the death of A. & then to divide the fund between the surviving issue of A. If A. survive testator more than twenty-one years, the heir is entitled to the income of the whole fund from the expiration of the twenty-one years, to the death of A. & he will take it as personal, not as real estate.—BARRETT *v.* BUCK (1848), 11 L. T. O. S. 352 ; 12 Jur. 771.

lation of income after the expiration of twenty-one years was illegal under Accumulations Act, 1800, & the accumulations were payable to the daughter as heir *ab intestato* of testatrix.  
—*Trusts v. Trustees & Executors* (1901)

S. C. 133.—SCOT.

d. ———.]—WATSON'S TRUSTEES *v.* BROWN, [1923] S. C. 228.—SCOT.

a ———.]—MURDOCH'S

TRUSTEES *v.* STOCK, [1923] S. C. 906.—SCOT.

f. ———.]—STEWART'S TRUSTEES *v.* WHITEHEAD, [1926] S. C. 761.—SCOT.

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## Part I.—Definitions and Enumeration.

### SECT. 1.—DEFINITIONS.

“Personal estate.”—*See* EXECUTORS, Vol. XXIII., pp. 284 *et seq.*; SETTLEMENT; WILLS.

—For purpose of legacy duty.—*See* ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 54–58, Nos. 358–378.

“Personal chattels”—Subject-matter of bills of sale.—*See* BILLS OF SALE, Vol. VII., pp. 31–39, Nos. 159–203.

“Goods”—Within Factors Acts.—*See* AGENCY, Vol. I., p. 335, No. 491.

—Within Bankruptcy Acts.—*See* BANKRUPTCY, Vol. V., pp. 743–750, Nos. 6416–6469.

—Within Sale of Goods Act, 1893 (c. 71).—*See* SALE OF GOODS.

Movable & immovable property.—*See* CONFLICT OF LAWS, Vol. XI., pp. 340–344, Nos. 290–313.

Corporeal hereditaments—Within County Courts Acts.—*See* COUNTY COURTS, Vol. XIII., pp. 478, 479, Nos. 283–289.

“Contract”—Within Statute of Frauds.—*See, generally,* CONTRACT, Vol. XII., pp. 118 *et seq.*; SALE OF GOODS.

### SECT. 2.—ENUMERATION.

#### SUB-SECT. 1.—CHATELLE REAL.

*See, generally,* REAL PROPERTY.

1. Leaseholds.—Devise of all testator's real estates wheresoever situate, lying, & being:—*Held*: not to include leaseholds as well as freeholds.—*WHITAKER v. AMBLER* (1758), 1 Eden, 151; 28 E. R. 642.

2. —.—A fine was levied of certain premises by a man & his wife to the use of B, his exors. etc., for nine hundred & ninety-nine years, & at the same time the lessor covenanted that if B., his heirs, or assigns shall by deed express his will & mind to have the freehold & inheritance of the premises, then such fine should enure to such persons, & for such estates as by such deed should be expressed. This lease is a mere chattel, & will pass by a general residuary bequest of personal estate.—*WILLIAMS v. LANDAFF* (Bf.) (1786), 1 Cox, Eq. Cas. 254; 29 E. R. 1153.

3. —.—An Englishman resident in Scotland bequeathed his whole means & estate to a trustee to pay certain pecuniary legacies, & all the rest of his means & estate to be divided equally

PART I. SECT. 2, SUB-SECT. 1.  
1. Leaseholds.—The English law relating to personality applies to per-

sonality in India held by British subjects & others to whom the English law is applicable. A term of years

is therefore personality in India as it is in England.—*NICHOLAS v. ASPHAR* (1896), L. L. R. 24 Calc. 216.—IND.

**Sect. 2.—Enumeration: Sub-sects. 1 & 2, A. & B.]**

among certain of his godchildren. The execution of the will was valid according to the law of Scotland, but invalid according to English law. Testator possessed leasehold property in England:—*Held*: the English leaseholds passed under the will by virtue of Wills Act, 1861 (c. 114), s. 2.

I think that the English leaseholds pass under the will as being personal estate (NORTH, J.).—*Re WATSON, CARLTON v. CARLTON* (1887), 35 W. R. 711.

*Annotations*:—*Apld. Re Grassi, Stubbsfield v. Grassi* (1905), 74 L. J. Ch. 341. *Consd. Re Lyne's Settltmt. Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

4. —[Wills Act, 1861 (c. 114), s. 1, provides that every will made out of the United Kingdom by a British subject, whatever may be his domicile, "shall as regards personal estate be held to be well executed for the purpose of being admitted in England & Ireland to probate" if made according to the forms required by the law of the place where the same was made:—*Held*: "personal estate" includes leaseholds, & when the will of a British subject made abroad in the form required by the law of the place has been proved in England, the beneficial interest in the leaseholds passes to the person pointed out in the will as the donee of that interest, provided the bequest does not infringe the law of England, e.g. that relating to accumulations or perpetuity.

Leaseholds are immovables, but are nevertheless personal estate although they savour of the realty (BUCKLEY, J.).—*Re GRASSI, STUBBSFIELD v. GRASSI*, [1905] 1 Ch. 534; 74 L. J. Ch. 341; 92 L. T. 455; 53 W. R. 396; 21 T. L. R. 343; 49 Sol. Jo. 366.

*Annotation*:—*Reid. Re Lyne's Settltmt. Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

—[See EXECUTORS, Vol. XXIII., pp. 302–305, Nos. 3674–3698; LANDLORD & TENANT, Vol. XXXI., pp. 396, 397, Nos. 5426–5431.

—Whether within Mortmain & Charitable Uses Acts.]—See CHARITIES, Vol. VIII., pp. 268, 269, Nos. 317–324.

Proceeds of sale of real estate.]—See Sect. 2, sub-sect. 2, C., *post*.

5. Real estate purchased with partnership profits.—Not solely for purpose of trade.]—Co-owners of lands, partly customary freehold & partly leasehold, worked a quarry on part of them, & let the rest to agricultural tenants. Part of the undivided profits were from time to time laid out in purchases of other lands for purposes of the quarry, the lands so purchased being, in most cases, conveyed to trustees on trust for the persons expressly by name who were interested in the undivided profits constituting the purchase-moneys, their heirs & assigns, & being in other cases conveyed to trustees without any express declaration of trust. One of the co-owners, a woman, married, & on her marriage a settlement of her shares & interest in the lands & quarry, plant & machinery, was executed, by which her shares & interest in the customary freeholds were treated as real estate, & her shares & interest in the entire property, both real & personal, were settled on behalf for life for her separate use without power of anticipation, with remainder to her husband for life, with remainder, in default of issue, in trust for her, her heirs, exors., administrators, & assigns. Further purchases of customary freehold land were, after her marriage, made from time to time out of the undivided profits of the quarry, the land so purchased being conveyed to trustees, but without any trusts being declared, except in one instance, that of a

purchase made in 1849, in which case trusts were expressed on the instrument of conveyance, & were for the benefit of the co-owners, by name, in undivided shares, their heirs & assigns. In the books of account kept by the manager of the business these purchases were treated as if they had been purchases of stock in trade. These accounts were from time to time submitted to the parties interested, & in particular, to the husband of the married woman. She having died without issue:—*Held*: her share in the purchases of land so made after her marriage devolved as real estate, & not as personalty, & having been made with savings of income, were not comprised in the settlement, but passed at once on her death to *pltf.*, her heir-at-law & customary heir.—*STEWART v. BLAKEWAY* (1869), 4 Ch. App. 603, L. JJ.

*Annotations*:—*Distd. A.-G. v. Hubbuck* (1883), 10 Q. B. D. 488; *Re Hulton, Hulton v. Lister* (1890), 62 L. T. 200. *Consd. Davis v. Davis*, [1894] 1 Ch. 393.

6. Real estate of partnership—Share of partner.]—H., who was a solr., had for many years previously to his death been engaged in various land speculations jointly with C. The speculations consisted in the buying & selling of plots of land, the laying out of the land for building purposes, & the advancing of money to builders. The lands were generally bought in consideration of chief rents, & then sold to builders at increased chief rents, which were retained by H. & C. The conveyances of the lands bought were taken either to H. & C. jointly or to C. alone. A banking account was kept in the names of H. & C., & statements of account were made out every half-year, but there were no partnership arts. between H. & C. Upon the death of H., there being an intestacy as to certain lands & chief rents which had been acquired by him in the course of his joint speculations with C., the question arose as to whether H.'s share of the property went to his heir-at-law, or to his next of kin, as being partnership property & subject to conversion:—*Held*: the proper inference to be drawn from the evidence & statements of account was, that the relation which had existed between H. & C. was that of partners, & that they were not co-owners of real estate, but that the property in question constituted partnership assets, therefore the property must be treated for the purpose of devolution as personal estate of H., to which his next of kin were consequently entitled.—*Re HULTON, HULTON v. LISTER* (1890), 62 L. T. 200; *sub nom. Re LISTER, HULTON v. LISTER*, 6 T. L. R. 160, C. A.

*Annotation*:—*Reid. Davis v. Davis*, [1894] 1 Ch. 393.

—[See PARTNERSHIP, Vol. XXXVI., pp. 435–437, Nos. 1021–1043.

7. Right of presentment to living.]—This title to present could not pass by these general words, *bona et catalla*, for they do not extend to a right, or things in action, but to such things only which are commonly known & understood by such words. By grant of goods, chattels real do not pass. For when men speak of goods, household stuff, money, & the like, personal things only are understood. So a man cannot be said to have a chattel but where he is possessed of it, & here this interest is but *jus praesentandi* (ANDERSON, C.J.).

This interest is a chattel; for if the church became void & before presentment the patron dies his exors. shall have the presentment, for that it was a chattel vested in their testator, etc. (PERIAM, J.).—*R. v. CANTERBURY (ARCHBP.)*, FANE & HUDSON (1588), 4 Leon. 107; Owen, 155; 74 E. R. 761.

*Annotations*:—*Consd. Mirehouse v. Rennell* (1832), 8 Bing. 490. *Mentd. Foot v. Berkley* (1870), 2 Keb. 654.

8. —.]—**LINCOLN (EARL) v. CLYSAM** (1673), 3 Keb. 152; 84 E. R. 647.

*Annotation* :—**Reid. Mirehouse v. Rennell** (1832), 8 Bing. 490.

9. —.]—An advowson belongs to a prebendary in right of his prebend: the church becomes vacant, & prebendary dies without having presented: the presentation belongs to his personal representative, according to the opinion of six judges out of eight, delivered in the House of Lords.

The presentation is the mode of enjoyment, the profit or rent of the estate, & like the rent or profit, belongs to the owner of the estate at the time; it accrues in the nature of a personal chattel, distinct & severed from the inheritance (**PARKE, J.**).—**MIREHOUSE v. RENNELL** (1833), 1 Cl. & Fin. 527; 8 Bing. 490; 7 Bli. N. S. 241; 1 Moo. & S. 683; 131 E. R. 482, H. L.; *affg.* S. C. *sub nom.* **RENNELL v. LINCOLN (Bp.)** (1827), 7 B. & C. 113.

*Annotations* :—**Reid. Alston v. Atlay** (1837), 7 Ad. & El. 269; **Walsh v. Lincoln (Bp.)** (1875), L. R. 10 C. P. 518. **Mentd. Edwards v. Exeter (Bp.)** (1839), 7 Scott. 652; **Bradburne v. Botfield** (1845), 14 M. & W. 559; **Howley v. Knight** (1849), 10 L. J. Q. B. 3; **Ford v. Harington** (1869), L. R. 5 C. P. 282.

#### SUB-SECT. 2.—CHATTELS PERSONAL.

##### A. Corporeal Chattels.

**Animals.**—*See* **ANIMALS**, Vol. II., p. 208, Nos. 41, 42.

**Emblements.**—*See* **AGRICULTURE**, Vol. II., pp. 58, 59, Nos. 324–332; **EXECUTORS**, Vol. XXIII., pp. 286, 287, Nos. 3525–3533.

**Fish in ponds.**—*See* **EXECUTORS**, Vol. XXIII., p. 287, Nos. 3534–3536.

**Fixtures.**—*See, generally*, **LANDLORD & TENANT**, Vol. XXXI., pp. 181–213, Nos. 3161–3522; **REAL PROPERTY**; **SETTLEMENTS**; **WILLS**.

— **Attached to mines & quarries.**—*See* **MINES**, Vol. XXXIV., pp. 612, 613, Nos. 109–115.

— **Whether passing with real property under mortgage.**—*See* **MORTGAGE**, Vol. XXXV., pp. 302–310, Nos. 516–569.

— **Whether goods within Bankruptcy Acts.**—*See* **BANKRUPTCY**, Vol. V., pp. 744–748, Nos. 6424–6446.

— **Whether goods & chattels within Statute of Frauds, s. 17.**—*See* **SALE OF GOODS**.

— **Whether "goods, wares & merchandise" within Stamp Acts.**—*See* **REVENUE**; **SALE OF GOODS**.

— **Whether within Mortmain & Charitable Uses Acts.**—*See* **CHARITIES**, Vol. VIII., p. 273, No. 393.

10. **Fossilised boat.**—(1) In land demised to a gas co. for ninety-nine years, with a reservation to the lessor of all mines & minerals, & covenants under which the lessees were authorised, under the inspection of the lessor's surveyor & according to plans to be previously approved, to erect a gasholder & other buildings, a prehistoric boat, embedded in the soil six feet below the surface, was discovered by the lessees in the course of excavating for the foundations of the gasworks:—**Held**: the boat, whether regarded as a mineral, or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property

of the lessor though he was ignorant of its existence at the time of granting the lease.

(2) Further if it ought to be regarded as a chattel, debts. did not acquire any property in the chattel by mere finding as against pltf., who upon the grounds already stated was the owner of the chattel (**CHITTY, J.**).

(3) Pltf., then, had a lawful possession, good against all the world, & therefore the property in the boat. In my opinion it makes no difference in these circumstances that pltf. was not aware of the existence of the boat (**CHITTY, J.**).

(4) For the boat was embedded in the land; a mere trespasser could not have taken possession of it, he could only have come at it by further acts of trespass involving spoil & waste of the inheritance (**CHITTY, J.**).—**ELWES v. BRIGG GAS CO.** (1886), 33 Ch. D. 502; 55 L. J. Ch. 734; 55 L. T. 831; 35 W. R. 192; 2 T. L. R. 782.

*Annotation* :—*As to* (1) **Reid. South Staffordshire Waterworks Co. v. Sharmen** (1896), 74 L. T. 761.

**Growing crops.**—*See* **BILLS OF SALE**, Vol. VII., p. 36, Nos. 190–192.

**Heirlooms.**—*See* **REAL PROPERTY**.

11. **Manure heap.**—**YEARWORTH v. PIERCE** (1647), Aleyn, 31; 82 E. R. 900; *sub nom.* **CARVER v. PIERCE**, Sty. 66.

**Money directed to be laid out in land.**—*See, generally*, **EQUITY**, Vol. XX., pp. 335 *et seq.*

**Railway ticket.**—*See* **CARRIERS**, Vol. VIII., pp. 109, 110, Nos. 738, 739.

**Trees & timber.**—*See* **AGRICULTURE**, Vol. II., p. 72, Nos. 499–501.

##### B. Incorporeal Chattels.

12. **Arrears of rent.**—Shares in canal cos. the Grand Junction Waterworks co. & arrears of rent, are pure personality.—**EDWARDS v. HALL** (1855), 6 De G. M. & G. 74; 25 L. J. Ch. 82; 26 L. T. O. S. 170; 20 J. P. 38; 1 Jur. N. S. 1189; 4 W. R. 111; 43 E. R. 1158, L. C.; *affg.* (1853), 11 Hare, 1.

*Annotations* :—**Consd. Ware v. Cumberlege** (1855), 20 Beav. 503. **Follid. Linley v. Taylor** (1859), 28 L. J. Ch. 686. **Distd. Alexander v. Brame** (No. 2) (1861), 30 Beav. 153. **Apld. Bennett v. Blain** (1863), 15 C. B. N. S. 518. **Consd. Chandler v. Howell** (1876), 4 Ch. D. 651. **Follid. Re Corcoran, Corcoran v. Riddell** (1892), 62 L. J. Ch. 367. **Reid. Marsh v. A.-G.** (1860), 30 L. J. Ch. 233; **Entwistle v. Davis** (1867), L. R. 4 Eq. 272; **R. v. Southampton Port Comrs.** (1870), L. R. 4 H. L. 449; **Holdsworth v. Davenport** (1876), 3 Ch. D. 185; **Shepherd v. Beetham** (1877), 6 Ch. D. 597; **Re Hollon, Forbes v. Hardcastle** (1893), 68 L. T. 160; **Re Pickard, Elmsley v. Mitchell**, [1894] 2 Ch. 88. **Mentd. Dunn v. Bownas** (1855), 1 K. & J. 596; **Fisher v. Brorley** (1860), 1 De G. F. & J. 643; **Tatham v. Drummond** (1864), 3 New Rep. 706; **Re Holburne, Coates v. Mackillop** (1885), 63 L. T. 213; **Re Somers-Cocks, Wegg-Prosser v. Wegg-Prosser**, [1895] 2 Ch. 449.

13. —.]—(1) There was a sum of £861 due to testator as arrears of rent from leaseholds, in respect of which ground rent & other outgoings were payable:—**Held**: the arrears of rent due were not liable to reduction for ground rent & outgoings, but must be treated as pure personality.

(2) There was a further sum of £2,202, due for the apportionment of the quarter's rent of leasehold estates:—**Held**: this was pure personality.—**THOMAS v. HOWELL** (1874), L. R. 18 Eq. 198; 43 L. J. Ch. 511; 22 W. R. 676.

*Annotations* :—*As to* (1) **Distd. Halse v. Rumford** (1875), 47 L. J. Ch. 559. *As to* (2) **Apld. Re Corcoran, Corcoran v. Riddell** (1892), 62 L. J. Ch. 367. *Generally, Reid. Nickall v. Fawkes* (1905), 50 Sol. Jo. 126; *In the Estate of Southenden, Adams v. Southenden*, [1925] P. 177.

#### PART I. SECT. 2, SUB-SECT. 2.—A.

a. **Electric railway cars.**—Under R. S. O., 1897, s. 39 (2), the personal property of applt. railway co. is exempt from assessment, while its

real estate by sect. 2, sub-sect. 8, includes everything affixed to the land, & all machinery & other things so fixed to any building as to form in law part of the realty:—**Held**: its electric cars are personal estate inasmuch as they

are not part of the railway & are not fixed in any sense to anything which is real estate.—**TORONTO RY. CO. v. TORONTO CORPN.**, [1904] A. C. 809, P. C.—CAN.

**Sec. 2.—Enumeration: Sub-sect. 2, B. & C. Part II.****Sec. 1.]**

14. —.] — At testator's death there were certain rents accruing which would have to be apportioned when paid:—*Held*: the apportioned share which would be payable to the exors. was pure personality at testator's death.—*Re CORCORAN, CORCORAN v. RIDDELL* (1892), as reported in 62 L. J. Ch. 267.

*Annotation*.—*Mentd. Re Hamilton, Cadogan v. Fitzroy*, [1896] 2 Ch. 617.

15. —.] — It is settled law that arrears of rent are pure personality (NORTH, J.).—*Re PICKARD, ELSLEY v. MITCHELL*, [1894] 2 Ch. 88; 70 L. T. 395; 42 W. R. 375; *sub nom. Re PICKARD, ELSLEY v. MITCHELL*, 63 L. J. Ch. 254; 10 T. L. R. 290; *affd.*, [1894] 3 Ch. 704, C. A.

*Annotations*.—*Reid. Re Crossley, Birrell v. Greenhough*, [1897] 1 Ch. 928; *Re Deane, Goodwin v. Brocklehurst* (1902), 19 T. L. R. 26.

**Charges & securities on land.—Whether within Mortmain & Charitable Uses Acts.**—*See CHARITIES*, Vol. VIII., pp. 267, 268, Nos. 293–316.

**Choses in action.**—*See EXECUTORS*, Vol. XXIII., pp. 288–301, Nos. 3545–3667; **CHOSSES IN ACTION**, Vol. VIII., pp. 421–423, Nos. 4–19.

**Copyrights.**—*See COPYRIGHTS*, Vol. XIII., p. 163, No. 8.

16. **Exclusive right to take photographs.**—An exclusive right to take photographs is not a form of property known to the law.

The promoters of a dog show purported to assign the sole photographic rights in connection with the show. The assignee purported to assign to plffs. the sole press photographic rights at the show. The promoters of the show did not cause any notice to be placed on the tickets of admission or otherwise forbid the taking of photographs at the show. An independent photographer took photographs of the dogs exhibited & sold certain of them to defts., & defts. published the photographs so bought in an illustrated journal. In an action by plffs. for an injunction to restrain them from continuing to do so:—*Held*: the action would not lie, inasmuch as the promoters of the dog show had, in law, no exclusive right of photographing anything there, & therefore could not assign that right as property. They could have acquired such a right by contract by making conditions as to admission, but they had not done so, & therefore plffs. had failed to make out any cause of action.—*SPORTS & GENERAL PRESS AGENCY, LTD. v. "OUR DOGS" PUBLISHING CO., LTD.*, [1917] 2 K. B. 125; 86 L. J. K. B. 702; 116 L. T. 626; 33 T. L. R. 204; 61 Sol. Jo. 299, C. A.

17. **Goodwill.**—A public-house belonging to an intestate in fee, & in which he had carried on business, was sold, on lease, in the administration of his estate:—*Held*: the goodwill could not be separated from the real estate.—*BOOTH v. CURTIS* (1869), 20 L. T. 152; 17 W. R. 303.

**Land directed or agreed to be sold.**—*See, generally, EQUIT, Vol. XX., pp. 335 et seq.*

18. **Patent.**—(1) A patentee's right is distinct from the right of property in a chattel.

(2) A patent right is not a chose in possession.—*BRITISH MUTOSCOPE & BIOGRAPH CO., LTD. v. HOMER*, [1901] 1 Ch. 671; 70 L. J. Ch. 279; 84 L. T. 26; 49 W. R. 277; 17 T. L. R. 213; 18 R. P. C. 177.

*Annotations*.—*As to (2) Reid. Edwards v. Picard*, [1909] 2 K. B. 903; *National Phonograph Co. of Australia v. Menck*, [1911] A. C. 336. *Generally, Reid. Barker v. Stickney*, [1918] 2 K. B. 356.

**Securities over rates, tolls, etc.—Whether within Mortmain & Charitable Uses Acts.**—*See CHARITIES*, Vol. VIII., pp. 269, 270, Nos. 325–351.

**C. Chattels partly Corporeal and partly Incorporeal.**

19. **Annuities.**—T. devised all his real estate to S. for life, with remainder to the children of S., in tail, with remainders over, & bequeathed personal estate on corresponding trusts; & he directed his trustees to sell a specific freehold estate, & to invest the proceeds in the purchase of lands in certain counties, or in govt. securities, to be settled & assured to & for the like uses & trusts as his real & personal estate were settled, devised & limited:—*Held*: the govt. annuities vested absolutely in the child of S. as personal estate.—*RICH v. WHITFIELD* (1866), L. R. 2 Eq. 583; 14 W. R. 907.

**Whether within Mortmain & Charitable Uses Acts.**—*See CHARITIES*, Vol. VIII., p. 270, Nos. 353–355.

**Bills of exchange.**—*See BILLS OF EXCHANGE*, Vol. VI., p. 205, No. 1258.

**Debentures.—Whether within Mortmain & Charitable Uses Acts.**—*See CHARITIES*, Vol. VIII., pp. 272, 273, Nos. 384–391.

**Proceeds of sale.—Of real estate.—Whether within Mortmain & Charitable Uses Acts.**—*See CHARITIES*, Vol. VIII., pp. 266, 267, Nos. 280–292.

20. — **Of growing crops.**—The proceeds of the sale of growing industrial crops are personality savouring of the realty.—*SYMONDS v. MARINE SOCIETY* (1860), 2 Giff. 325; 29 L. J. Ch. 623; 2 L. T. 726; 25 J. P. 180; 6 Jur. N. S. 910; 8 W. R. 728; 66 E. R. 136.

21. — **Of advowson.**—Testator directed his trustees to sell an advowson & apply the proceeds in paying debts, legacies, etc., & if such proceeds should be insufficient, to cut timber to a specified amount; & in the event of there being still a deficiency, to sell his real estate. The trustees sold the advowson & cut the timber much beyond the amount specified, considering, under advice, as the law then stood, that the personality was secondarily liable. There being no residuary clause in the will, upon the death of the last tenant for life, a suit was instituted, wherein it was decided that the personal estate was liable to recoup what had been improperly taken from the real; & a question thereupon arose whether the amount directed to be so paid back was personality or realty, the heir-at-law of testator, & his devisees & legatees, being all dead & represented by devolution of interest:—*Held*: the proceeds, both of the advowson & of the timber, were personal & not real estate.—*BOWRA v. RHODES* (1862), 31 L. J. Ch. 676; 6 L. T. 560; 10 W. R. 456.

22. — **Of timber.**—*BOWRA v. RHODES*, No. 21, ante.

— *See AGRICULTURE*, Vol. II., p. 103, Nos. 833–837, 841.

**Compulsory purchase.**—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 249, Nos. 1504–1514.

23. **Shares.—In canal company.—When so declared by local statute.**—Where a co. is formed by Act of Parliament for the purchase of lands to make a canal, & the Act declares that the shares "shall be deemed personal estate & shall be transmissible as such":—*Held*: though the profits arose out of land, the shares were personal property, passing as such to the assignees on the bkpcy. of a proprietor.—*Re DILWORTH, Ex p. LANCASTER CANAL NAVIGATION CO.* (1832), 1 Deac. & Ch. 411; Mont. & B. 94, L. C.

*Annotations*.—*Apld. Bradley v. Holdsworth* (1838), 1 Horn & H. 156. *Mentd. Re Lashmar, Ex p. Vallance* (1837), 6 L. J. Bcy. 53; *Baxter v. Brown* (1845), 7 Man. & G. 198; *Re Pearce, Ex p. Littledale* (1855), 6 De G. M. & G. 714; *Deering & McQuestion v. Hibernian Joint Stock Banking Co.* (1868), 16 W. R. 578.

**24. — In railway company.]** Declaration for goods & chattels sold & delivered. Plea, that the goods & chattels were shares in a joint-stock co., describing it so as to bring it within 7 & 8 Vict. c. 110, s. 2, & negating the exceptions, & alleging that no complete registration had been obtained. Replication, that it was a co. for the purpose of making & maintaining a certain railway to be called the Grand Union, under the powers of an Act of Parliament, & that the railway could not be carried into execution without the authority of Parliament. It then averred provisional registration according to the statute:—*Held*: railway shares were goods & chattels.—*LAWTON v. HICKMAN* (1846), 9 Q. B. 563; 4 Ry. & Can. Cas. 336; 16 L. J. Q. B. 20; 7 L. T. O. S. 430; 10 Jur. 543; 115 E. R. 1390.

*Annotations*:—*Reid*, *Muttyloll Seal v. Dent* (1853), 5 Moo. Ind. App. 328. *Mentd.* *Van Boven's Case* (1846), 9 Q. B. 689.

—.]—*See COMPANIES*, Vol. IX., pp. 224, 225, 349, Nos. 1433–1444, 2205–2211.

**Whether within Mortmain & Charitable Uses Acts.]—See CHARITIES, Vol. VIII., pp. 270–272, Nos. 356–376; *COMPANIES*, Vol. X., p. 1102, No. 7732.**

**25. Stock.]**—Stock & money in the funds are not goods & chattels, & do not pass by a grant of *bona et catalla felonum*.—*R. v. CAPPER* (1817), 5 Price, 217; 146 E. R. 587.

*Annotations*:—*Reid*, *Colonial Bank v. Whinnery* (1885), 30 Ch. D. 261. *Mentd.* *R. v. Dover Corpn.* (1835), 1 Cr. M. & R. 726.

**26. — In foreign funds.]**—Stock in foreign funds locally situate abroad, is personalty following the domicile of the owner, therefore a bequest of such stock by a party domiciled in England is liable to legacy duty.—*Re EWING'S ESTATE* (1830), 1 Cr. & J. 151; 1 Tyr. 91; 9 L. J. O. S. Ex. 37.

*Annotations*:—*Reid*, *A.-G. v. Hope* (1834), 2 Cl. & Fin. 84; *Re Coalco Estates* (1841), 7 M. & W. 390; *Thompson v. Advocate-General* (1845), 12 Cl. & Fin. 1; *R. v. Stamps & Taxes Commrs.* (1849), 18 L. J. Q. B. 201; *A.-G. v. Napier* (1851), 6 Exch. 217; *Re Trustee Relief Act, Re Wallop's Trusts* (1864), 10 L. T. 174. *Mentd.* *A.-G. v. Dimond* (1831), 1 Cr. & J. 350; *Re Bruce* (1832), 2 Cr. & J. 436; *A.-G. v. Jackson* (1831), 8 Bl. N. S. 15; *Tyler v. Bell* (1837), 2 My. & Cr. 89; *Hervy v. Fitzpatrick* (1854), Kay, 421; *A.-G. v. Giles* (1860), 5 H. & N. 255; *Blackwood v. It.* (1882), 8 App. Cas. 82; *Winans v. A.-G.* (1910) A. C. 27.

— **Whether within Mortmain & Charitable Uses Acts.]—See CHARITIES, Vol. VIII., p. 272, Nos. 378–383.**

## Part II.—Possession.

### SECT. 1.—IN GENERAL.

**27. Meaning of term.]**—(1) A mere parol gift of a chattel, unaccompanied by delivery of possession, passes no property therein.

(2) A wife, though living apart from her husband, cannot lawfully dispose by gift, even accompanied by actual delivery of possession, of chattels acquired by her during the coverture; but, in an action by the donee against a wrongdoer, for the conversion of chattels so given, it is not competent to deft. to set up the title of the husband.

(3) A., as exor. of B., seized & sold as the goods of his testator a watch & several articles of dress & jewellery which C., the niece of B.'s deceased housekeeper, claimed to be hers by gift, some of them from her aunt, & some from B. in whose house she had for many years lived with her aunt as a sort of adopted member of the family. The jury having found upon sufficient evidence that the articles in question had in fact been given to C. & were in her "possession" at the time of the conversion:—*Held*: C. was entitled to recover their value; & it was not competent to A., who was a mere wrongdoer to urge, that, as those articles which came to C. by gift from her aunt, the latter, having a husband living, who, however, made no claim to them, had no authority to dispose of them.

(4) "Possession" is a word of ambiguous meaning. In most instances, it is considered to import the manual custody of the chattel; though a man may also be said to be in possession of an article which he has not at the moment about his person (*ERLE, C.J.*).—*BOURNE v. FOSBROOKS* (1865), 18 C. B. N. S. 515; 5 New Rep. 374; 34 L. J. C. P. 164; 11 Jur. N. S. 202; 13 W. R. 497; 144 E. R. 545.

*Annotations*:—*As to* (1) *Reid*, *Cochrane v. Moore* (1890), 25 Q. B. D. 67. *As to* (3) *Reid*, *Fell v. Whitaker* (1871), 41 L. J. Q. B. 78.

**28. —.]—THE TUBANTIA**, No. 48, *post*.

**29. — Actual physical possession.]**—(1) The owner of household goods which had been

seized under a *fi. fa.* agreed verbally with an auctioneer that in consideration of his paying out the sheriff the auctioneer should hold possession of the goods, sell them by auction & pay over the balance, if any, to the owner. This agreement was reduced into writing & the sheriff was paid out, the man in possession remaining in possession for the auctioneer:—*Held*: since the written agreement did not constitute the auctioneer's title, & was not intended to & did not come into operation until possession had been actually transferred from the sheriff to the auctioneer, it was not an "assurance" or a "licence to take possession," or in any other respect a bill of sale within the Bills of Sale Acts, 1878 & 1882.

(2) I must say that I received a very candid answer from the Bar when I put the question, what was the difference in the nature of the possession between the possession by the sheriff & the possession by the man who held the property on the part of C.? It was . . . admitted that there was no difference at all in the character or quality of the possession. Then it comes to this, that the possession of the sheriff . . . in every case must be regarded as open to that question as to whether or not it is a physical possession or a formal possession . . . I understand what possession is (at least, I think so), & I never understood that the possession of the sheriff was other than physical & actual possession . . . I find that there was a man in the house for the purpose of preventing any other person interfering with . . . any of the property. . . . Therefore I should have thought that this possession was just as much a physical & actual possession as it is possible for any one man to have in articles which are distributed all over a house (*LORD HALSBURY, C.*).—*CHARLESWORTH v. MILLS*, [1892] A. C. 231; 61 L. J. Q. B. 830; 66 L. T. 690; 56 J. P. 628; 41 W. R. 129; 8 T. L. R. 484; 36 Sol. Jo. 411, H. L.; *revisg.* S. C. *sub nom.* *MILLS v. CHARLESWORTH* (1890), 25 Q. B. D. 421, C. A.

*Annotations*:—*As to* (1) *Reid*, *G. E. Ry. v. Lord's Trustee*, [1909] A. C. 109; *Dublin City Distillery v. Doherty*, [1914]

**Sect. 1.—In general. Sect. 2: Sub-sects. 1, 2, 3 & 4. Sects. 3 & 4.]**

A. C. 823; French v. Gething, [1922] 1. K. B. 236. *As to* (9) *Reid*. Grigg v. National Guardian Assoc., [1891] 3 Ch. 206; Ramsay v. Margrett, [1894] 2 Q. B. 18; Withers v. Berry (1895), 39 Sol. Jo. 559; Clapham v. Ives (1904), 91 L. T. 69; Dublin City Distillery v. Doherty, [1914] A. C. 823. *Generally*, *Reid*. Morris v. Delobel-Filip, [1899] 2 Ch. 352; *Re Lavey*, *Ex p. Trustee*, [1918-19] B. & C. R. 116.

— In contract for sale of goods.]—*See* SALE OF GOODS.

— In contract for sale of land.]—*See* SALE OF LAND.

— Within Distress Costs Act, 1817 (c. 93).]—*See* DISTRESS, Vol. XVIII., p. 356, Nos. 932, 933.

— Within Bills of Sale Acts.]—*See* BILLS OF SALE, Vol. VII., pp. 110-118, Nos. 649-685.

— For purpose of prosecution for larceny.]—*See* CRIMINAL LAW, Vol. XV., pp. 912-923, Nos. 10,032-10,045.

Possession of animals.]—*See* ANIMALS, Vol. II., p. 212, Nos. 79-83.

Possession of church property.]—*See, generally*, ECCLESIASTICAL LAW, Vol. XIX., pp. 457 *et seq.*

Possession of receivers.]—*See* RECEIVERS.

Constructive possession—Of executors.]—*See* EXECUTORS, Vol. XXIII., pp. 69, 70, Nos. 527-534.

— Amounting to lien.]—*See* LIEN, Vol. XXXII., pp. 218-221, Nos. 30-61.

**SECT. 2.—DIFFERENT KINDS OF POSSESSION.**

**SUB-SECT. 1.—POSSESSION OF OWNER.**

Prima facie right to possession.]—*See* Part III., Sect. 3, *post*.

30. Constructive possession.]—(1) Where deft. is the owner of a chattel & entitled to the possession of it, & pltf. wrongfully detains it from him after request, deft. has in law the possession, & pltf.'s wrongful detention against the request of deft. would be no possession, but the same violation of the right of property as the taking of the chattel out of the actual possession of the owner.

(2) The principles which apply to the retaking possession forcibly of property in land, wrongfully withheld from the owner, apply also to the reception of personal chattels.—*BLADES v. HIGGS* (1861), 10 C. B. N. S. 713; 30 L. J. C. P. 347; 4 L. T. 551; 25 J. P. 743; 7 Jur. N. S. 1289; 142 E. R. 634; *subsequent proceedings* (1865), 11 H. L. Cas. 621, H. L.

*Annotations*.—*As to* (1) *Reid*. Chambers v. Miller (1862), 13 C. B. N. S. 125; Hemmings v. Stoke Poges Golf Club, [1920] 1 K. B. 720. *Generally*, *Reid*. Musgrave v. Foster (1871), 24 L. T. 614.

— Of buyer.]—*See* SALE OF GOODS.

— Of administrator before grant.]—*See* EXECUTORS, Vol. XXIII., pp. 69, 70, Nos. 527-534.

— Of executor before probate.]—*See* EXECUTORS, Vol. XXIII., pp. 64, 65, Nos. 465-467.

Possession of co-owners.]—*See* Part. III., Sect. 4, *post*.

**SUB-SECT. 2.—POSSESSION OF BAILEE.**

*See, generally*, BAILMENT, Vol. III., pp. 53 *et seq.*

Possession of auctioneer.]—*See* AUCTION & AUCTIONEERS, Vol. III., pp. 45-47, Nos. 313-332.

Possession of factor.]—*See* AGENCY, Vol. I., pp. 334, 335, No. 490.

**PART II. SECT. 2, SUB-SECT. 1.**

30 I. Constructive possession.]—*Held*: the principle of constructive

possession of the whole by reason of possession of a part does not apply in the case of seals, in relation to mere

**SUB-SECT. 3.—POSSESSION OF TRESPASSER.**

*See* TRESPASS.

**SUB-SECT. 4.—POSSESSION OF FINDER.**

*See* BAILMENT, Vol. III., pp. 64-67, Nos. 75-95; CRIMINAL LAW, Vol. XV., pp. 877-881, Nos. 9631-9672.

Finder of treasure trove.]—*See* CONSTITUTIONAL LAW, Vol. XI., p. 588, Nos. 888, 889.

**SECT. 3.—ACQUISITION OF POSSESSION.**

31. Necessity for control.]—Pltf., while fishing for pilchards, had nearly encompassed the fish with a net; but deft., by rowing his boat to the opening, disturbed the fish & prevented the capture. Pltf. brought trespass; & issues being joined, (a) on pltf.'s possession of the fish; (b) on the fish being pltf.'s, in manner, etc.:—*Held*: he was not entitled to recover; no special custom of the fishery being proved.

Whatever interpretation may be put upon such terms as "custody" & "possession," the question will be whether any custody or possession has been obtained here. I think it is impossible to say that it had, until the party had actual power over the fish (LORD DENMAN, C.J.).—*YOUNG v. HICHENS* (1843), 6 Q. B. 606; 1 Dav. & Mer. 592; 2 L. T. O. S. 420; 115 E. R. 228; *subsequent proceedings* (1844), 6 Q. B. 612.

*Annotations*.—*Reid*. The Tubantia, [1924] P. 78. *Mentd.* Allen v. Flood, [1898] A. C. 1.

32. By delivery—Of key.]—Delivery necessary to donations *mortis causa*; & delivery of receipts for South Sea annuities not sufficient, though strong evidence of the intent.

It never was imagined on that statute [21 Jac. 1, c. 19] that delivery of a mere symbol in name of the thing would be sufficient to take it out of that statute; yet notwithstanding, delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing; & therefore the key is not a symbol, which would not do (LORD HARDWICKE, C.).—*WARD v. TURNER* (1752), 2 Ves. Sen. 431; Dick. 170; 28 E. R. 275.

*Annotations*.—*Ald.* Duffield v. Elwes (1827), 1 Bl. N. S. 497. *Consd.* Johnson v. Stear (1863), 33 L. J. C. P. 130; Moore v. Moore (1874), L. R. 18 Kq. 474; Dublin City Distillery v. Doherty, [1914] A. C. 823; Wrightson v. McArthur & Hutchisons, [1921] 2 K. B. 807. *Reid*. Bunn v. Markham (1816), 2 Marsh. 532; Walter v. Hodge (1818), 2 Swan. 92; Moore v. Darton (1851), 20 L. J. Ch. 626; Veal v. Veal (1859), 27 Beav. 303; *Re Harcourt*, Danby v. Tucker (1883), 31 W. R. 578; *Re Wasserberg*, Union of London & Smiths Bank v. Wasserberg, [1915] 1 Ch. 195; *Re Hawkins*, Watts v. Nash, [1924] 2 Ch. 47. *Mentd.* Tate v. Hilbert (1793), 4 Bro. C. C. 286; Hudson v. Spencer, [1910] 2 Ch. 285; *Re Swinburne*, Sutton v. Featherley, [1926] Ch. 38.

33. ———.]—Possession of a house by delivery of the keys.

By the contract immediate possession was to be given; & was given without doubt; though deft. says in his answer, he never took possession: but the keys being in his possession, it must be considered, that he was in possession. Without doubt by the delivery of the keys the possession was ready for him; & indeed, he had it (GRANT, M.R.).—*GUEST v. HOMFRAY* (1801), 5 Ves. 818; 31 E. R. 875.

34. ———.]—Under the terms of an unregistered bill of sale of goods, given to secure a

finders who were not killers.—*DOYLE v. BARTLETT* (1872), 5 Nfld. L. R. 445. —*NFLD.*

debt, the grantor was to be allowed to remain in possession of the goods until default in payment of the debt after demand. Default having been made, the grantee became entitled under the bill to take possession of the goods, & accordingly demanded them from the owner of a house in which the grantor had placed them, & threatened to take them by force. The grantor, however, remained in possession of the goods until she filed a petition for liquidation:—*Held*: (1) the fact that the grantee was entitled to & demanded possession did not take the goods out of the grantor's possession within Bills of Sale Act, 1854 (c. 36), & the trustee in liquidation was entitled to the goods as against the grantee; (2) if the grantor had bailed the goods with a bailee to hold on account of the grantor, the goods would still have been in the possession of the grantor within Bills of Sale Act, 1854 (c. 36), & would not have been taken out of the grantor's possession by the fact that the grantee was entitled to & demanded possession.

(3) The delivery of a key is an ordinary symbol used to notify a change in the possession of the premises to which the key gives the means of entrance. The possession of premises cannot be changed solely by the delivery of a key, but where the delivery of a key is accompanied by an act which may amount to a change in the possession of the premises, the delivery of the key is strong evidence that it was the intention of the parties that the possession of the premises to which the key gives the means of entrance should be changed (MELLISH, L.J.).—*ANCONA v. ROGERS* (1870), 1 Ex. D. 285; 46 L. J. Q. B. 121; 35 L. T. 115; 24 W. R. 1000, C. A.

*Annotations*:—*As to* (1) *Consd.*, *Lincoln Waggon & Engine Co. v. Mumford* (1879), 41 L. T. 655. *Generally*, *Mentd.*, *Re Henley, Ex p. Fletcher* (1877), 5 Ch. D. 809; *Ramsay v. Margrett*, [1894] 2 Q. B. 18.

—*See, further*, *BILLS OF SALE*, Vol. VII., pp. 20, 111–113, Nos. 93, 658, 662, 663, 665; *SUPP. II.*, *BILLS OF SALE*, p. 221, No. 93a; *SALE OF GOODS*.

35. — *Of symbol.*—*WARD v. TURNER*, No. 32, *ante*.

—*See, further*, *SALE OF GOODS*.

— *Of invoice or delivery order.*—*See* *BILLS OF SALE*, Vol. VII., pp. 19, 20, Nos. 87, 88; *SALE OF GOODS*.

36. *By taking—Wrongful taking.*—*MASON v. LICKBARROW*, No. 41, *post*.

—*See, generally*, *CRIMINAL LAW*, Vol. XV., pp. 865 *et seq.*

— *Lawful taking.*—*See* *EXECUTION*, Vol. XXI., pp. 415 *et seq.*; *DISTRESS*, Vol. XVIII., pp. 260 *et seq.*

37. *By agreement.*—*CHARLESWORTH v. MILLS*, No. 29, *ante*.

38. *By ownership of land on which chattels situated.*—The possessor of land is generally entitled, as against the finder, to chattels found on the land.

*Deft.*, while cleaning out, under *pltf's* orders, a pool of water on their land, found two rings. He declined to deliver them to *pltf's*, but failed to discover the real owner. In an action of detinue:—*Held*: *pltf's* were entitled to the rings.

The general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it & the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo* (LORD RUSSELL OF KILLOWEN, C.J.).—*SOUTH STAFFORD-*

*SHIRE WATER CO. v. SHARMAN*, [1896] 2 Q. B. 44; 65 L. J. Q. B. 460; 74 L. T. 761; 44 W. R. 653; 12 T. L. R. 402; 40 Sol. Jo. 532, D. C.

*Annotation*:—*Consd.*, *Johnson v. Pickering*, [1907] 2 K. B. 437.

39. —.]—A railway co. by a "ledger agreement," opened a credit account with a coal merchant for the carriage of his coal, the co. to have a continued lien upon the coal conveyed on their lines or being at any time on ground rented of the co. for all charges due to them, & to be at liberty to sell & dispose of any of the coal to satisfy the lien, with the right to close the account by giving one day's notice. By separate agreements the co. let to the merchant allotments within the railway yard for the purpose only of stacking & dealing with the coal. The co. had the keys of the yard gates & kept them locked at certain times. The payments being in arrear, the company closed the account, locked the gates, & detained the coal:—*Held*: the inference of fact from the circumstances was that both parties intended the co.'s right of detainer to be preserved & if necessary enforced against the coal while in the railway yard; the ledger agreement conferred no licence to take possession of personal chattels or charge or equity thereon & was not a bill of sale within the Bills of Sale Acts; & the trustee in the merchant's bkpcy. had no claim against the co. in respect of the detainer.

I think the railway co. were in possession of this coal. The whole object of the arrangement made between them & L. was that they should retain a lien & a physical control, secured by retaining the coal within their yard, of which they could lock the gates if L. was in arrear. . . . True, there was a demise to L. of an allotment in the yard whereon this coal was stacked. That entitled him to occupy the allotment. But did that occupation confer upon him the exclusive possession of everything he placed on the allotment? I cannot see why it should. An officer may be in possession of goods whether debtor has a lease or even the freehold of the house in which the goods are placed. I cannot perceive any necessary dependency between the occupation of a piece of land & the exclusive possession of chattels which lie on it. Nor, in my opinion, can it signify for this purpose whether the occupation of the land is under a demise or merely by licence (LORD LOREBURN, C.).—*GREAT EASTERN RY. CO. v. LORD'S TRUSTEE*, [1909] A. C. 109; 78 L. J. K. B. 160; 100 L. T. 130; 25 T. L. R. 176; 16 Mans. 1, H. L.; *reusg.* S. C. *sub nom.* *LORD'S TRUSTEE v. GREAT EASTERN RY. CO.*, [1908] 2 K. B. 54, C. A.

*Annotation*:—*Mentd.*, *Tilley v. Bowman*, [1910] 1 K. B. 745.

*By finding.*—*See* *BAILMENT*, Vol. III., pp. 64, 65, Nos. 75–82; *CRIMINAL LAW*, Vol. XV., pp. 877–879, Nos. 9631–9646.

*By passing to executor or administrator.*—*See* *EXECUTORS*, Vol. XXIII., pp. 64, 67, Nos. 465, 466, 502.

#### SECT. 4.—RIGHTS ANNEXED TO POSSESSION.

40. *Prima facie* evidence of title.]—*C. v. M.* (1520), Y. B. 12, Hen. 8, fo. 9, pl. 2.

*Annotations*:—*Consd.*, *Sutton v. Moody* (1897), 1 Ld. Raym. 250. *Refd.*, *Barrington's Case* (1610), 8 Co. Rep. 136 b; *Blades v. Higgs* (1865), 30 C. B. N. S. 214. *Mentd.*, *Paul v. Summerhayes* (1878), 39 L. T. 574.

41. —.]—Possession of goods is *prima facie* evidence of title; but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of



**Sect. 4.—Rights annexed to possession. Sect. 5. Part III. Sects. 1 & 2: Sub-sect. 1.]**

things in the custody of a servant, carrier, or a factor. Mere possession without a just title gives no property, & the person to whom such possession is transferred by delivery must take his hazard of the title of his author (LORD LOUGHBOROUGH).—*MASON v. LICKBARROW* (1790), 1 Hy. Bl. 357; 126 E. R. 209, Ex. Ch.; *on appeal, sub nom. LICKBARROW v. MASON* (1793), 4 Bro. Parl. Cas. 57, H. L.

**Annotations:—***Reid. Salomons v. Nissen* (1788), 2 Term Rep. 674; *Coxe v. Harden* (1803), 4 East, 211; *Newsom v. Thornton* (1805), 6 East, 17; *Christy v. Row* (1808), 1 Taunt. 300; *Patten v. Thompson* (1816), 5 M. & S. 350; *Bloxam v. Sanders* (1825), 4 B. & C. 941; *Giles v. Grover* (1832), 0 Bing. 128; *Re Westsynthius* (1833), 2 Nov. & M. K. B. 644; *Gurney v. Bohrend* (1854), 3 E. & B. 622; *Griffiths v. Porry* (1859), 1 E. & E. 680; *The Tigress* (1863), Brown, & Lush, 38; *The Figlia Maggiore* (1868), L. R. 2 A. & E. 106; *The Freedom* (1871), L. R. 3 P. C. 594; *Leask v. Scott* (1877), 3 Q. B. D. 376; *Glyn Mills v. East & West India Dock Co.* (1882), 7 App. Cas. 591; *Sewell v. Burdick* (1884), 10 App. Cas. 74; *Rimmer v. Webster*, [1902] 2 Ch. 163; *Commonwealth Trust v. Akotey*, [1926] A. C. 72. **Mentd.** *Slubey v. Heyward* (1795), 2 Hy. Bl. 504; *Walley v. Montgomery* (1803), 3 East, 585; *Martini v. Coles* (1813), 1 M. & S. 140; *Gibson v. Carruthers* (1841), 8 M. & W. 321; *Thompson v. Dornay* (1845), 14 M. & W. 403; *Grant v. Norway* (1851), 10 C. B. 685; *Re North British Australasian Co. & Joint Stock Co.'s Acts, 1856 & 1857, Ex p. Swan* (1859), 7 C. B. N. S. 400; *Taylor v. Groat Indian Peninsular Ry.* (1859), 28 L. J. Ch. 285; *Swan v. North British Australasian Co.* (1863), 2 H. & C. 175; *The Marie Joseph* (1866), Brown, & Lush, 449; *Rodger v. Comptoir d'Escompte de Paris* (1869), L. R. 2 P. C. 393; *Chartered Bank of India, Australasia, & China v. Henderson* (1874), L. R. 5 P. C. 501; *Goodwin v. Roberts* (1875), L. R. 10 Exch. 337; *Arnold v. Cheque Bank, Same v. City Bank* (1876), 1 C. P. D. 578; *Re Cook, Ex p. Rosevear China Clay Co.* (1879), 11 Ch. D. 560; *Re Knight, Ex p. Golding Davis* (1880), 42 L. T. 270; *Cassabogio v. Gibb* (1883), 11 Q. B. D. 797; *Nähmaschinen Fabrik (late Frister & Rossmann) Act v. Pickford, Lee & Harris* (1888), 4 T. L. R. 617; *Bank of England v. Vagliano*, [1891] A. C. 107; *Nash v. De Freville*, [1900] 2 Q. B. 72; *Farquharson v. King*, [1901] A. C. 325; *Booth S.S. Co. v. Cargo Fleet Iron Co.*, [1916] 2 K. B. 570; *London Joint Stock Bank v. Macmillan & Arthur*, [1918] A. C. 777; *McDonald v. Nash*, [1924] A. C. 625; *Jones v. Waring & Gillow*, [1926] A. C. 670.

**42. — Against wrongdoer.**—I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, & that one who takes them from him, having no title in himself, is a wrongdoer, & cannot defend himself by showing that there was title in some third person; for against a wrongdoer possession is a title. . . . The presumption of law is that the person who has possession has the property (LORD CAMPBELL, C.J.).—*JEFFRIES v. GREAT WESTERN RY. CO.* (1856), 5 E. & B. 802; 25 L. J. Q. B. 107; 26 L. T. O. S. 214; 2 Jur. N. S. 230; 119 E. R. 680; *sub nom. JEFFRIES v. SOUTH WESTERN RY. CO.*, 4 W. R. 201.

**Annotations:—***Consd. Freshney v. Wells* (1857), 26 L. J. Ex. 129; *The Winkfield*, [1902] P. 42; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197. **Refd.** *Baggallay v. Davey* (1857), 39 L. T. O. S. 211; *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 405.

**43. — ———.**—*BOURNE v. FOSBROOKE*, No. 27, ante.

**44. — ———.**—Where there is in pltf. a right of possession, coupled with a title to goods, though the title may be liable to be defeated by the claim of a third person, yet if the third person has not intervened, a wrongdoer cannot set up the *jus tertii* as an answer to an action against him by pltf.—*BARKER v. FURLONG*, [1891] 2 Ch.

172; 60 L. J. Ch. 368; 64 L. T. 411; 39 W. R. 621; 7 T. L. R. 406.

**Annotations:—***Refd. Re Magnus, Ex p. Salaman* (1910), 80 L. J. K. B. 71. **Mentd.** *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495.

**45. — ———.**—In an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.

The position, that possession is good against a wrongdoer & that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law, & really concludes this case against resps. As I shall show presently, a long series of authorities establishes this in actions of trover & trespass at the suit of a possessor; & the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of deft. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor & bailee, & must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights & obligations as between him & the bailor (COLLINS, M.R.).—*THE WINKFIELD*, [1902] P. 42; 71 L. J. P. 21; 85 L. T. 668; 50 W. R. 246; 18 T. L. R. 178; 46 Sol. Jo. 163; 9 Asp. M. L. C. 259, C. A.

**Annotations:—***Consd. Glenwood Lumber Co. v. Phillips* [1904] A. C. 405; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197. **Refd.** *Playwood Collieries Co. v. Partridge, Jones* (1912), 81 L. J. K. B. 723; *The Rosalind* (1920), 90 L. J. P. 126; *The Joannis Vatis*, [1922] P. 92; *The Zelo*, [1922] P. 8. **Mentd.** *Elliott Steam Tug Co. v. Shipping Controller*, [1922] 1 K. B. 127; *G.N. Ry. v. L. E. P. Transport & Depository*, [1922] 2 K. B. 742; *Mersey Docks & Harbour Board v. Hay*, [1923] A. C. 345.

**46. — ———.**—It is a well established principle in English law that possession is good against a wrongdoer, & the latter cannot set up a *jus tertii* unless he claims under it (LORD DAVEY).—*GLENWOOD LUMBER CO., LTD. v. PHILLIPS*, [1904] A. C. 405; 73 L. J. P. C. 62; 90 L. T. 741; *sub nom. GLENWOOD LUMBER CO., LTD. v. BISHOP*, 20 T. L. R. 531, P. C.

**Annotations:—***Refd. Clarkson & Forgie v. Wishart & Myers*, [1913] A. C. 828; *McPherson v. Tomskaming Lumber Co.*, [1913] A. C. 145; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197.

**47. — ———.**—*EASTERN CONSTRUCTION CO., LTD. v. NATIONAL TRUST CO., LTD. & SCHMIDT*, [1914] A. C. 197; 83 L. J. P. C. 122; 110 L. T. 321, P. C.

**48. — ———.**—In 1922 pltf. fitted out an expedition to save cargo from the wreck of a Dutch steamship which had sunk in 1916 in the North Sea in over one hundred feet of water. Pltf. worked at the scene of the wreck whenever the weather & tides permitted during the summer of 1922 & from Apr. to July, 1923. During that time they had succeeded in cutting a hole into No. 4 hold, had buoyed the wreck, & had extracted some portions of cargo of little value at a cost of over £40,000. In July, 1923, the defts., British subjects & partners in a rival salvage co., arrived on the scene in a British registered ship, & by sending down their own divers & interfering with pltf.' diving operations, tried to secure possession

**PART II. SECT. 4.**

**42 i. *Prima facie* evidence of title — Against wrongdoer.**—*GILMOUR v. BUCK* (1874), 24 C. P. 137.—CAN.

**42 ii. — ———.**—*McDONALD v. LANE* (1883), 7 S. C. R. 462.—CAN.

**42 iii. — ———.**—The actual possession of goods, or such use & control as the nature of the subject admits of, is *prima facie* evidence of ownership to found an action for damages.—*GAUDRY v. CANADIAN PACIFIC RY. CO.* (1896), 11 Man. L. R. 69.—CAN.

**42 iv. — ———.**—Where a person

who has been in possession of property for several years without title is dispossessed by another, who also has no title, the former is entitled to be restored to possession.—*BODHA GANDERI v. ASHLOKE SINGH* (1926), 1 L. R. 5 Pat. 765.—IND.



of the wreck & cargo, & either prevent further work on the part of plffs. or establish themselves with the plffs. in concurrent occupation:—*Held*: plffs. were sufficiently in occupation of the wreck to exclude third parties from interfering with the property.

I have also taken this to be a true proposition in English law; a thing taken by a person of his own notion & for himself & subject in his hands or under his control to the uses of which it is capable, is in that person's possession (DUKE, P.).—*THE TUBANTIA*, [1924] P. 78; 93 L. J. P. 148; 131 L. T. 570; 40 T. L. R. 335; 16 Asp. M. L. C. 346; 18 Lloyd, L. R. 158.

49. — *Against all the world—Owner of land containing fossilised boat.*—*ELWES v. BRIGG GAS Co.*, No. 10, *ante*.

— *Against mortgagee.*—*See* MORTGAGE, Vol. XXXV., pp. 406-410, Nos. 1474-1497.

50. — *Presumption of lawful acquisition.*—Plff., as lord of the manor of Great Tey, which he acquired by purchase in 1923, brought the present action of detinue to recover possession of certain ancient ct. rolls of that manor, which were of mere historical interest & which before his purchase plff. had seen advertised for sale by deft., who, having purchased them in 1902, from P., a waste paper dealer, had commenced advertising them for sale ten years before the commencement of the present action:—*Held*: in the absence of evidence to the contrary, it must be presumed that P. acquired the rolls lawfully in the ordinary course of his business from either the lord or the steward of the manor.—*BEAUMONT v. JEFFERY*, [1925] Ch. 1; 93 L. J. Ch. 532; 132 L. T. 246; 40 T. L. R. 796; 68 Sol. Jo. 867.

*Right of action for trespass.*—*See* TRESPASS.

*Right of action for trover.*—*See* BAILMENT, Vol. III., pp. 112, 113, Nos. 360-364, 367; TROVER.

*Right of action for negligence.*—*See* BAILMENT, Vol. III., p. 113, No. 365.

*Rights of finder.*—*See* BAILMENT, Vol. III., pp. 64-67, Nos. 75-95.

*Rights of mortgagee.*—*See* MORTGAGE, Vol. XXXV., pp. 399-401, 409, Nos. 1409-1424, 1493.

*Damages for deprivation of use.*—*See* DAMAGES, Vol. XVII., pp. 86, 87, Nos. 53-58.

## SECT. 5.—LOSS OF POSSESSION.

51. *By agreement—Without physical change of possession.*—*CHARLESWORTH v. MILLS*, No. 29, *ante*.

52. *By production under subpoena.*—Upon the hearing by a magistrate of an application for the extradition of a fugitive criminal upon a charge of theft committed in France, certain articles were produced under a *subpoena duces tecum* by a witness who had purchased them from accused person in England, & were identified as part of the property stolen. The magistrate, having committed accused to prison to await a warrant from the Secretary of State for his extradition, orally directed a constable in ct. to take charge of the property so produced & identified in order that it might be produced at the trial in France. The purchaser applied under Justices Protection Act, 1848 (c. 44), p. 5, for an order directing the magistrate to order the property to be delivered up to him:—*Held*: assuming the ct. had jurisdiction to make the order, the purchaser's possessory title, if any, to the goods had been lawfully divested by reason of their passing out of his possession under the *subpoena duces tecum* & he was therefore not entitled to the relief asked.—*R. v. LUSHINGTON, Ex p. OTTO*, [1894] 1 Q. B. 420; 70 L. T. 412; 58 J. P. 282; 42 W. R. 411; 17 Cox, C. C. 754; 10 R. 418; *sub nom. Re EBSTEIN, Ex p. OTTO*, 10 T. L. R. 57, D. C.

*By abandonment.*—*See* CRIMINAL LAW, Vol. XV., pp. 904, 905, Nos. 9927-9930.

— *Of ship.*—*See* INSURANCE, Vol. XXIX., pp. 287-290, Nos. 2338-2354; SHIPPING.

*By delivery.*—*See, generally*, Sect. 3, *ante*.

— *To servant.*—*See* CRIMINAL LAW, Vol. XV., pp. 800-804, Nos. 9769-9822.

*By distress.*—*See, generally*, DISTRESS, Vol. XVIII., pp. 260 *et seq.*

*By execution.*—*See, generally*, EXECUTION, Vol. XXI., pp. 415 *et seq.*

*By lien.*—*See, generally*, LIEN, Vol. XXXII., pp. 215 *et seq.*

*By trespass.*—*See, generally*, TRESPASS.

## Part III.—Ownership.

### SECT. 1.—PERSONAL CAPACITY.

*Aliens.*—*See* ALIENS, Vol. II., pp. 132-134, 147-154, Nos. 83-96, 200-249.

*Charities.*—*See* CHARITIES, Vol. VIII., pp. 265-278, Nos. 273-501.

*Corporation.*—*See* CORPORATIONS, Vol. XIII., pp. 372-373, Nos. 1037-1045.

*Ecclesiastical persons & corporations.*—*See* ECCLESIASTICAL LAW, Vol. XIX., pp. 457 *et seq.*

*Infants.*—*See* INFANTS & CHILDREN, Vol. XXVIII., pp. 186, 187, Nos. 441-449.

*Married women.*—*See* HUSBAND & WIFE, Vol. XXVII., pp. 83-100, Nos. 653-792.

### SECT. 2.—ACQUISITION OF OWNERSHIP.

#### SUB-SECT. 1.—BY TAKING ORIGINAL POSSESSION.

53. *General rule.*—*C. v. M.* (1520), Y. B. 12 Hen. 8, fo. 9, pl. 2.

*Annotations.*—*Reid, Sutton v. Moody* (1696), 1 Ld. Raym. 250; *Blades v. Higgs* (1865), 12 L. T. 615. *Mentd.* *Barrington's Case* (1810), 8 Co. Rep. 136 b; *Godge v. Minne* (1813), 2 Bulst. 60; *Athill v. Corbet* (1818), Cro. Jac. 463; *Millen v. Fandrye* (1826), Poph. 161; *Paul v. Summerhayes* (1878), 4 Q. B. D. 9.

54. *No natural ownership—Where right in another.*—There can be no occupancy natural of anything wherein another than the occupant hath right.

PART III. SECT. 2, SUB-SECT. 1.  
b. *Timber.*—Plff. cut timber on Crown land without licence. Before the timber was taken away, deft. obtained a licence from the Crown to

cut timber on the same land, & afterwards took possession of the timber & hauled it away:—*Held*: under R. S., c. 133, s. 6, the right to the timber vested in deft.—*LEIGHTON v.*

BOHAN (1866), 11 N. B. R. (6 All.) 440.—CAN.

c. —.]—*MACPHERSON v. FREDERICTON BOOM CO.* (1869), 12 N. B. R. (1 Han.) 337.—CAN.

**Sect. 2.—Acquisition of ownership: Sub-sects. 1, 2, 3, 4, 5, 6 & 7.]**

A claim without actual possession cannot make a man a natural occupant (VAUGHAN, C.J.).—**HOLDEN v. SMALLBROOKE** (1867), Vaugh. 187; 124 B. R. 1030.

**Annotations:—***Mentd.* Doe d. Lampriere v. Martin (1777), 2 Wm. Bl. 1148; *Zouch d. Forse v. Forse* (1808), 3 Smith, K. B. 191; *Fowke v. Berington*, [1914] 2 Ch. 308.

**55. Necessity for actual possession.]—****HOLDEN v. SMALLBROOKE**, No. 54, *ante*.

**Animals feræ naturæ.]—***See* ANIMALS, Vol. II., pp. 205–212, Nos. 17–83; **FISHERIES**, Vol. XXV., pp. 31, 59, Nos. 289–296, 500–506; **GAME**, Vol. XXV., pp. 350, 351, Nos. 21–29.

**Copyright.]—***See* COPYRIGHT, Vol. XIII., pp. 182–188, 200, Nos. 182–235, 355–360.

**Patents & inventions.]—***See, generally*, PATENTS.

**SUB-SECT. 2.—BY SUCCESSION TO TITLE OF PREVIOUS OWNER.**

**By gift.]—***See, generally*, GIFTS, Vol. XXV., pp. 501 *et seq.*

**On intestacy.]—***See, generally*, DESCENT, Vol. XVIII., pp. 17–28, Nos. 161–283.

**Under will.]—***See* WILLS.

**By purchase.]—***See* SALE OF GOODS.

**Of goods seized in execution.]—***See* EXECUTION, Vol. XXI., pp. 515–518, Nos. 915–939.

**In market overt.]—***See* MARKETS, Vol. XXXIII., pp. 560–563, Nos. 428–478.

**Right of corporations to succeed.]—***See* CORPORATIONS, Vol. XIII., pp. 372, 373, Nos. 1037–1045.

**Rights of executors or administrators before probate or grant of administration.]—***See* EXECUTORS, Vol. XXIII., pp. 59–61, 62–67, Nos. 394–406, 417–470, 484–509.

**Property situated abroad.]—***See* CONFLICT OF LAWS, Vol. XI., pp. 365 *et seq.*; **EXECUTORS**, Vol. XXIII., p. 85, Nos. 724, 725.

**SUB-SECT. 3.—BY CHANGE OF POSSESSION.**

**56. Taking in execution.]—**Where a sheriff seized bank notes & money under a *fi. fa.* & immediately thereupon appropriated them to an execution under another *fi. fa.* against the first execution creditor:—**Held**: Judgments Act, 1838 (c. 110), s. 12, did not justify such appropriation, & the first execution creditor had a right to have the proceeds of the levy paid over to him.

The meaning of Judgments Act, 1838 (c. 110), s. 12, is, that money, bank notes, bills, etc., taken in execution by the sheriff, are to be placed on the same footing as goods, & the proceeds of goods taken in execution, & to be subject to the same rights & liabilities. . . . Goods taken in execution do not, by the act of seizure, become the property of the execution creditor, although it is the duty of the sheriff to pay over the proceeds to him; & so in the case of money, bank notes, etc., seized, the sheriff is only bound to pay over the proceeds of the levy, although he may, if he pleases, pay over the very money, bank notes, etc., seized (*per* OUR.).—**COLLINGRIDGE v. PAXTON** (1851), 11 C. B. 683; 2 L. M. & P. 654; 21 L. J. C. P. 39; 18 L. T. O. S. 140; 16 Jur. 18; 138 E. R. 643.

—*See, generally*, [EXECUTION, Vol. XXI., pp. 415 *et seq.*

**57. Wrongful taking.]—**Goods were obtained from defts. by A. by false pretences, & were after-

wards sold by him to pltf., from whose possession they were subsequently retaken & removed by defts.; & in trover against defts., for such seizure & conversion, pltf. recovered a verdict for £145, the value of the goods. At the time the action was brought & tried, pltf. was aware that A. was in custody awaiting his trial for the above offence, & A. was, in fact, tried & convicted thereof on the day after pltf. had recovered the aforesaid verdict. Upon a rule for a new trial, on the ground that the jury should have been directed to take into consideration the probability of A.'s conviction for false pretences, & that the damages were excessive:—**Held**: by the effect & operation of 7 & 8 Geo. 4, c. 29, s. 57, upon the conviction of A. there was relation back to the time of the fraud committed by him upon defts., & that the goods remained the property of defts. from the first, the property therein never having been out of them, & what they did was simply to retake possession of their own property; & the ct. made the rule for a new trial absolute, subject to pltf.'s assenting to a stay of proceedings upon payment of the costs of the action & of the rule, with 40s. damages.—**NICKLING v. HEAPS** (1870), 21 L. T. 754.

**Annotations:—***Obtd.* Lindsay v. Cundy (1876), 1 Q. B. D. 348; *Moyce v. Newington* (1878), 27 W. R. 319; *Vilmont v. Bentley* (1886), 18 Q. B. D. 322.

**58. —.]—**Under Larceny Act, 1861 (c. 96), s. 100, which provides that if any person guilty of a misdemeanour in obtaining goods, such as obtaining goods by false pretences, shall be indicted by the owner of the property & convicted, in such case the property shall be restored to the owner or his representative, & the ct. before whom any person shall be tried for any such misdemeanour shall have power to award writs of restitution for the property, or to order the restitution thereof in a summary manner; when a contract for the sale of goods has been induced by false pretences, & the owner of the goods has prosecuted the fraudulent buyer to conviction, the property in the goods reverts in the owner on & at the date of the conviction, & he can then recover them from the person in whose possession they are, even though that person had before the conviction bought them in market overt, or otherwise, without notice of the fraud.

It is not necessary as a condition precedent to the recovery of the goods that an order of restitution should have been obtained.

If the goods were not sold in market overt the statute was not wanted, for a thief has no property in stolen goods (LORD ESHER, M.R.).—**VILMONT v. BENTLEY** (1886), 18 Q. B. D. 322; 56 L. J. Q. B. 128; 56 L. T. 318; 51 J. P. 436; 35 W. R. 238; 3 T. L. R. 185, C. A.; *affd. sub nom.* BENTLEY v. VILMONT, 12 App. Cas. 471, H. L.

**Annotations:—***Reid.* Payne v. Wilson, [1895] 1 Q. B. 653.

*Mentd.* R. v. George (1901), 65 J. P. 729.

**Finding.]—***See* BAILMENT, Vol. III., pp. 66, 67, Nos. 93–95.

**Revesting of stolen property.]—***See* MARKETS & FAIRS, Vol. XXXIII., p. 563, Nos. 482–487.

**Bills of exchange & other negotiable instruments.]—***See, generally*, BILLS OF EXCHANGE, Vol. VI., pp. 9 *et seq.*

**59. Money.]—**Pltf. presented, on behalf of his employer, a cheque at defts.' banking-house. Defts.' cashier counted out the amount in notes, gold & silver, & placed it on the counter. Pltf. took it & counted it, & was in the act of counting it a second time, when the cashier, having discovered that the drawer's account was overdrawn, demanded the money back, & upon pltf.'s refusal, detained him & took it from him by force:—**Held**: the property in the notes & money had passed from

the bankers to the bearer of the cheque, & the payment was complete & could not be revoked.—**CHAMBERS v. MILLER** (1802), 13 C. B. N. S. 125; 1 New Rep. 95; 32 L. J. C. P. 30; 7 L. T. 850; 9 Jur. N. S. 626; 11 W. R. 236; 143 E. R. 50.

**Annotations**:—**Mentl. R. v. Prince** (1868), 19 L. T. 364; **Pollard v. Bank of England** (1871), L. R. 6 Q. B. 623; **Deutsche Bank (London Agency) v. Beiro** (1895), 73 L. T. 669; **Soc. des Hôtels le Touquet Paris-Plage v. Cummings**, [1922] 1 K. B. 451; **Barclay v. Malcolm** (1925), 133 L. T. 512; **Jones v. Waring & Gillois**, [1925] 2 K. B. 612.

—[.]—**See MONEY AND MONEY-LENDING**, Vol. XXXV., pp. 167, 168, Nos. 2–10.

#### SUB-SECT. 4.—BY ACCESSION.

**60. Where species changed.**—**ANON.** (1490), Y. B. 5 Hen. 7, fo. 15, pl. 0.

**Annotation**:—**Reid. Hartop v. Hoare** (1743), 1 Wils. 8.

**61.** —[.]—**ANON.** (1560), Moore, K. B. 19; 72 P. R. 411.

**62.** — **Chalk changed into lime.**—(1) A. having taken possession of land belonging to B., dug chalk from the soil & converted it into lime. B. recovered judgment in ejectment, & upon execution of the writ of possession turned A.'s servants off the premises, refusing, at the same time, to allow them to remove the lime remaining on the premises. Upon trover for the lime:—**Held**: these facts did not necessarily amount to a conversion.

(2) **Seemle**: by the change of the chalk into lime the property in it vested in A.—**THOROGOOD v. ROBINSON** (1845), 6 Q. B. 769; 14 L. J. Q. B. 87; 4 L. T. O. S. 292; 115 E. R. 290.

**63. Goods laden on ship.**—The ownership of goods laden on board a general ship, is, *prima facie*, in the party who was possessed of the ship at the time that the goods were received on board.—**BRANCKER v. MOLYNEUX** (1841), 3 Man. & G. 84; **Drinkwater**, 229; 3 Scott, N. R. 332; 10 L. J. C. P. 310; 5 Jur. 773; 133 E. R. 1067; *subsequent proceedings* (1842), 4 Man. & G. 220.

**64. Bricks built into house.**—(1) If I employ a builder to build me a house, & he does so with bricks which are not his, I apprehend that they become mine, & that their former owner cannot recover them or their value from me (**LINDLEY, L.J.**).

(2) If bricks or timber belonging to A. be wrongfully taken by B. & built by him into a house belonging to C., A. cannot recover them against C., though their identity is clear, & the reason is given that the nature of the material is changed & that it has become real property (**KAY, L.J.**).—**GOUGH v. WOOD & Co.**, [1894] 1 Q. B. 713; 63 L. J. Q. B. 564; 70 L. T. 207; 42 W. R. 409; 10 T. L. R. 318; 9 R. 509, C. A.

**Annotations**:—**Generally, Reid. Hobson v. Gorringe**, [1897] 1 Ch. 182; **Reynolds v. Ashby**, [1904] A. C. 466. **Mentl. Huddersfield Banking Co. v. Lister**, [1895] 2 Ch. 273; **Thomas v. Jennings** (1896), 66 L. J. Q. B. 5; *Re Samuel*

**Allen**, [1907] 1 Ch. 575; **Ellis v. Glover & Hobson**, [1908] 1 K. B. 388; *Re Morrison, Jones & Taylor, Cookes v. Morrison, Jones & Taylor*, [1914] 1 Ch. 50; *Re Rogerstone Brick & Stone Co., Southall v. Wescomb*, [1915] 1 Ch. 110.

**Young of animals.**—**See ANIMALS**, Vol. II., pp. 212, 213, Nos. 84–90.

#### SUB-SECT. 5.—BY CONFUSION.

**65. General rule.**—If a man holding the property of another in his hands allows it to be so mixed up with his own property that he cannot separate the two, the whole belongs to the other party.—**PRICE v. GROOM** (1848), 11 L. T. O. S. 475, N. P.; *subsequent proceedings*, 2 Exch. 542.

**66.** —[.]—**LONSDALE v. MITCHELL** (1858), 30 L. T. O. S. 273.

**67. To what chattels doctrine applicable.**—The doctrine of confusion of property does not apply to distinct chattels like chairs & tables, but to commodities such as corn, wine, oil, & the like, of which there can be a commingling of substance (**BRAMWELL, B.**).—**SMITH v. TORR** (1862), 3 F. & F. 505, N. P.

**Gratuitous quasi-bailment.**—**See BAILMENT**, Vol. III., pp. 70–72, Nos. 120–132.

**Trust property.**—**See TRUSTS & TRUSTEES**.

#### SUB-SECT. 6.—BY STATUTE.

**On bankruptcy.**—**See BANKRUPTCY**, Vol. V., pp. 630 *et seq.*

**On execution.**—**See EXECUTION**, Vol. XXI., pp. 415 *et seq.*

**Forfeiture of smuggled goods.**—**See REVENUE**.

#### SUB-SECT. 7.—BY ROYAL PREROGATIVE.

**See, generally, CONSTITUTIONAL LAW**, Vol. XI., pp. 581–584, Nos. 830–856.

**Animals.**—**See ANIMALS**, Vol. II., pp. 206, 207, Nos. 25, 30.

**Bona vacantia.**—**See CONSTITUTIONAL LAW**, Vol. XI., p. 587, No. 884; **DESCENT**, Vol. XVIII., pp. 32–35, Nos. 317–350.

**Copyright.**—**See COPYRIGHT**, Vol. XIII., pp. 198, 199, Nos. 330–343.

**Estrays.**—**See CONSTITUTIONAL LAW**, Vol. XI., p. 589, Nos. 894–900; **COPYHOLDS**, Vol. XIII., pp. 21–23, Nos. 136–170.

**Fisheries & royal fish.**—**See CONSTITUTIONAL LAW**, Vol. XI., p. 589, Nos. 901–905.

**Taxes & customs.**—**See REVENUE**.

**Treasure trove.**—**See CONSTITUTIONAL LAW**, Vol. XI., p. 588, Nos. 888, 889.

**Waits.**—**See CONSTITUTIONAL LAW**, Vol. XI.,

#### PART III. SECT. 2, SUB-SECT. 4.

**60 1. Where species changed.**—A. purchased *bona fide* from B. oil which B. had no right to sell, as it belonged to C. A. paid for the oil & obtained delivery. With the oil & other materials A. manufactured lard, which was sold in the ordinary course of business to customers. In an action by C. against A. for delivery of the oil or payment of its value:—**Held**: defender, by creating in the process of manufacture a new species which could not be again resolved into its original elements, became, under the doctrine of specification, proprietor of the substance manufactured, & was bound to pay pursuer a sum representing the

value of the oil.—**INTERNATIONAL BANKING CORP. v. FERGUSON, SHAW & SONS**, [1910] S. C. 182.—**SCOT.**

**d. Skins made into coat.**—J. owned eighteen beaver skins. Her husband wrongfully & without her knowledge obtained possession of them, & had them made into a coat, supplying four more skins, & paying for the work. He then gave the coat to M. The coat was replevied by J.:—**Held**: the title to her furs was still in J., & she was under the law of accession justified in claiming with them against M., the materials added to them by the wrongdoer, & the increased value given to them by the labour expended.—**JONES v. DE MER-**

**CHANT** (1916), 34 W. L. R. 739; 10 W. W. R. 841.—**CAN.**

**e. Tailings deposited in lake.**—Tailings from ore reduction deposited by deft. co. & its predecessors in title in a lake, the bed of which belonged to pltf. co. were so deposited without any bargain or understanding between the parties save such as might be inferred from a request upon one side for permission to dump the tailings in the lake, & the granting of this permission on the other:—**Held**: the tailings when so deposited became the property of pltf. co.—**DOMINION REDUCTION CO. v. PETERSON LAKE SILVER COBALT MINING CO. (Ont.)**, (1919), 50 S. C. R. 646; 50 D. L. R. 52.—**CAN.**

**Sect. 2.—Acquisition of ownership: Sub-sect. 7. Sects. 3 & 4: Sub-sect. 1, A.]**

pp. 588, 589, Nos. 800–893; *COPYHOLDS*, Vol. XIII., p. 21, Nos. 133, 135.

**Wreck.**—See *CONSTITUTIONAL LAW*, Vol. XI., p. 588, Nos. 885–887; *COPYHOLDS*, Vol. XIII., pp. 23–25, Nos. 171–192; *ADMIRALTY*, Vol. I., pp. 153–155, Nos. 614–629.

**SECT. 3.—RIGHTS ANNEXED TO OWNERSHIP.**

**68. Right to possession—Prima facie right.**—While the right of property in a chattel is admitted to be in one person, the right of possession of that chattel cannot be absolutely & adversely in another.

—*CLERK v. ADAM* (1832), 1 Cl. & Fin. 242; 6 E. R. 908, H. L.

**69.** ———.]—Any asportation of a chattel for the use of deft., or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of a chattel has in it, who is entitled to the use of it at all times & in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of any chattel, & refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, & the use which at all times, & in all places, I am entitled to make of it; & consequently amounts to an act of conversion (*ALDERSON, B.*).—*FOULDES v. WILLOUGHBY* (1841), 8 M. & W. 540; 1 Dowl. N. S. 86; 10 L. J. Ex. 364; 5 Jur. 534; 151 E. R. 1153.

**Annotations.**—*Distd. Needham v. Rawbone* (1844), 9 Jur. 274. *Consd. Crouch v. G. N. Ry.* (1856), 11 Exch. 742. *Apld. Burroughes v. Bayne* (1860), 5 H. & N. 296. *Distd. Jengland v. Cowley* (1873), L. R. 8 Exch. 126; *Hill v. Bott* (1874), 22 W. R. 414. *Refd. Edmonson v. Nuttall* (1864), 17 C. B. N. S. 280; *Hilbery v. Hatton* (1864), 3 New Rep. 671; *Hollins v. Fowler* (1875), L. R. 7 H. L. 757; *Mentd. Morrill v. N. E. Ry.* (1876), 34 L. T. 94.

**70.** ———.]—(1) To an action of debt deft. pleaded: (a) The seizure by plff., as a distress for rent, of certain goods of sufficient value to satisfy rent & costs due from deft., with the costs of sale, etc.; that plff. kept the goods nearly two years without selling them, & then, by agreement with deft., kept them absolutely upon the terms of discharging deft. from the debt due; (b) a wrongful seizure of deft.'s goods by plff., the goods being alleged to be of greater value than the debt due from deft. to plff., & an agreement that the parties should be quit of all claims upon each other, & that plff. should keep the goods; (c) a similar plea with the additional term, that deft. should give up possession of certain premises. Plff. replied, traversing, that the goods were of the value assigned in the several pleas. On special demurrer:—*Held*: the replications were bad.

(2) He says they were wrongfully seized. He might, therefore, retake them (*COLTMAN, J.*).

(3) As the seizure was wrongful, he has still the property in them (*WILDE, C.J.*).

(4) If one seizes the horse of another wrongfully, the other may still sell the horse. The right of possession follows the right of property (*MAULE, J.*).

—*JONES v. SAWKINS* (1847), 5 C. B. 142; 5 Dow. & L. 353; 17 L. J. C. P. 92; 10 L. T. O. S. 133; 136 E. R. 828.

**71.** ———.]—*BLADES v. HIGGS*, No. 30, *ante*.

**72.** ——— *As between husband & wife.*—A wife, who had separate estate, agreed to purchase from her husband some furniture & other personal

chattels belonging to him, which were in the house in which she lived with him. She stipulated that a receipt for the purchase-money should be given to her, & instructed her solr. to draw the receipt. After the purchase-money had been paid to the husband he signed a receipt which the wife's solr. had prepared. This document acknowledged the receipt from the wife of the agreed sum, as the purchase-money "for all my furniture, plate, etc., which I hereby acknowledge are now absolutely her property." There was no formal delivery of the goods by the husband to the wife, but they remained as they had previously been, in the house in which the husband & the wife were living together. She subsequently sent part of the goods to her own bankers, & the remainder were afterwards taken in execution by judgment creditor of the husband. In an interpleader issue between the wife & execution creditor:—*Held*: (1) the receipt, notwithstanding the words at the end of it, did not form part of the transaction passing the property in the goods to the wife, but the property had passed to her by the prior & independent bargain, & consequently the receipt did not require registration under the Bills of Sale Act, 1878 (c. 31), & the wife was entitled to the goods as against execution creditor; (2) the wife had a sufficient possession of the goods to take the case out of the Act, for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife who had the legal title.—*RAMSAY v. MARGRETT*, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 788; 10 T. L. R. 355; 1 Mans. 184; 9 R. 407, C. A.

**Annotations.**—*As to* (1) *Consd. Withers v. Berry* (1895), 39 Sol. Jo. 559; *Re Lavey, Ex p. Trustee*, [1918–19] B. & C. 11. 116. *Reid. Re Satterthwaite, Ex p. Trustee* (1899), 2 Mans. 52; *Clapham v. Ives* (1901), 91 L. T. 69; *Re Bels, Ex p. Clough*, [1901] 73 L. J. K. B. 929. *As to* (2) *Consd. Re A. Sprus, Ex p. Salaman* (1910), 80 L. J. K. B. 77. *Apld. French v. Gething*, [1922] 1 K. B. 236. *Reid. Rogers, Knapton v. Martin* (1910), 103 L. T. 527. *Generally, Mentd. Canvey Island Comrs. v. Preedy*, [1922] 1 Ch. 179.

**73.** ———.]—By a post-nuptial deed in May, 1914, a husband gave his wife certain household furniture in the house in which the husband & wife lived together. The furniture remained in the house, which continued to be occupied by the husband & wife. The deed was not registered under Bills of Sale Act, 1878 (c. 31). Execution creditors under a judgment recovered in 1920 against the husband levied execution at the house. The wife claimed the furniture. In an interpleader issue between the wife & execution creditors:—*Held*: the furniture was not in the possession or apparent possession of the husband within Bills of Sale Act, 1878 (c. 31), s. 8; nor in his order & disposition or reputed ownership within Married Women's Property Act, 1882 (c. 75), s. 10.

*Qu.*: whether the foregoing provision of s. 10 of the Married Women's Property Act, 1882 (c. 75), applies only when a husband & wife are living together in premises where the husband carries on business.—*FRENCH v. GETTING*, [1922] 1 K. B. 236; 91 L. J. K. B. 276; 126 L. T. 394; 38 T. L. R. 77; 66 Sol. Jo. 140; [1922] B. & C. R. 30, C. A.

— **Purchaser of goods.**—See *SALE OF GOODS*.

— **Grantee of bill of sale.**—See *BILLS OF SALE*, Vol. VII., pp. 135–152, Nos. 765–823.

**74. Right to retake—Goods wrongfully in possession of another.**—*C. v. M.* (1520), Y. B. 12 Hen. 8, fo. 9, pl. 2.

**Annotations.**—*Consd. Gedge v. Minne* (1613), 2 Balst. 60; *fully in possession of another.*—The owner of personal property in the wrongful possession of another has always been held entitled to peacefully retake it, using no more force than is necessary.—*McMULLIN v. CAMPBELL*,

**PART III. SECT. 3.**

**741. Right to retake—Goods wrong-**

*fully in possession of another.*—The owner of personal property in the wrongful possession of another has

always been held entitled to peacefully retake it, using no more force than is necessary.—*McMULLIN v. CAMPBELL*,

*Sutton v. Moody* (1697), 12 Mod. Rep. 145; *Blades v. Higgs* (1865), 12 L. T. 615; *Paul v. Summerhayes* (1878), 4 Q. B. D. 9. **Refd.** *Barrington's Case* (1610), 8 Co. Rep. 136 b. **Mentd.** *Atbill v. Corbet* (1618), Cro. Jac. 463; *Dawtrie v. Dec* (1620), Palm. 46; *Millon v. Fandrye* (1626), Poph. 161; *Sury v. Pigot* (1626), Poph. 166; *Vaspor v. Edwards* (1701), 12 Mod. Rep. 658.

75. ———.]—Where goods are wrongfully taken from the possession of another, the owner may justify the retaking them whosoever he finds them.—**CHAPMAN v. THUMBLETHORP** (1594), Cro. Eliz. 329; 78 E. R. 579.

76. ———.]—If A. take B.'s goods & place them on his own land, B. may enter to retake them; & a plea alleging these facts, is a good justification in trespass for the entry.—**PATRICK v. COLEHICK** (1838), 3 M. & W. 483; 1 Horn & H. 125; 7 L. J. Ex. 135; 2 Jur. 377; 150 E. R. 1235.

**Annotations:**—**Apld.** *Burridge v. Nicholls* (1861), 6 H. & N. 383. **Consd.** *Jays Furnishing Co. v. Brand*, [1914] 2 K. B. 132. **Refd.** *Cornish v. Stubbs* (1870), 39 L. J. C. P. 202. **Mentd.** *Wood v. Leadbitter* (1846), 13 M. & W. 838; *Austin v. Dowling* (1870), L. R. 5 C. P. 531.

77. ———.]—**JONES v. SAWKINS**, No. 70, ante.

78. ———.] (1) Judgment for plff. in an action of detinue held not to change the property in the detained chattel until satisfaction of the value found by the judgment; even though satisfaction was prevented by the bkpy. of deft.

(2) Plff. was entitled to apply to the Ct. of Bkpy. for an order upon the trustee to deliver up the chattel to him.

Under these circumstances we must consider it established that the property in the mare remained in plff. D. That being so, he had a right to obtain possession of his property either by taking it peaceably or by means of proper legal process (*JESSELL, M.R.*).—**RE WARE, Ex p. DRAKE** (1877), 5 Ch. D. 866; 46 L. J. Bey. 105; 36 L. T. 677; 25 W. R. 641, C.

**Annotations:**—As to (1) **Refd.** *Bradley & Cohn v. Ramsay* (1912), 106 Q. T. 771. As to (2) **Refd.** *Eberle's Hotels & Restaurant Co. v. Jones* (1887), 18 Q. B. D. 459.

—See CRIMINAL LAW, Vol. XV., p. 331, Nos. 9115, 9116.

—**Goods wrongfully distrained.**—See DISTRESS, Vol. XVIII., pp. 260, 308, 309, 321, 366, 367, 448, Nos. 2, 440, 586, 1014, 1052, 1053, 1056, 1848-1851.

—**Right to defend possession.**—See, generally, CRIMINAL LAW, Vol. XV., pp. 829, 830, 831, Nos. 9095-9114; TRESPASS.

—**Right of action for trover.**—See TROVER.

—**Right to restitution—Of stolen property.**—See CRIMINAL LAW, Vol. XV., pp. 617-622, Nos. 6461-6514; MARKETS & FAIRS, Vol. XXXIII., p. 563, Nos. 482-487.

—**Of property wrongfully taken in execution.**—See EXECUTION, Vol. XXI., p. 469, Nos. 494-505.

—**Against unlawful process.**—See CRIMINAL LAW, Vol. XV., p. 832, Nos. 9139, 9140.

#### SECT. 4.—CO-OWNERSHIP.

##### SUB-SECT. 1.—JOINT TENANCY.

###### A. In General.

See, generally, REAL PROPERTY.

79. How arising—Investment of moneys in

**joint names.**—Two sisters carried on business as farmers. They had a joint account at their bankers, & an establishment & purse in common. They invested part of their money in the purchase of consols in their joint names, & they had a balance due to them in their banking account, besides a sum due to them from their bankers on deposit notes:—**Held:** on the death of one, the two sisters were joint tenants of the consols, & tenants in common of the balance & of the deposit notes.—**BONE v. POLLARD** (1857), 24 Beav. 283; 53 E. R. 307.

**Annotations:**—**Refd.** *Re Rowe, Jacobs v. Hind* (1889), 60 L. T. 596. **Mentd.** *Dumpler v. Dumpler* (1862), 6 L. T. 315; *Hepworth v. Hepworth* (1870), L. R. 11 Eq. 10.

80. ———.]—**By tenant in common.**—Testator gave all the residue of his personal estate equally between his two daughters M. & S., & appointed them his exctrices. M. & S. transferred some stock standing in testator's name into their joint names, there being no necessity for making any such transfer for the purpose of administering the estate; & afterwards, out of the interest on property which they took as tenants in common under their father's will, they purchased some other stock in their joint names. M. & S. lived together, & their house was maintained at their joint expense:—**Held:** M. & S. were joint tenants in equity of both sums of stock.—**Re HUGHES'S TRUSTS** (1871), 24 L. T. 415; 19 W. R. 468.

81. ———.]—**In equal shares.**—**ROBINSON v. PRESTON**, No. 97, post.

82. ———.]—The marriage of a woman having a joint estate in freeholds or leaseholds does not operate as a severance of her joint tenancy; nor does the granting of a lease by the husband & the other joint tenant, reserving the rent to the lessors jointly, necessarily effect a severance of the wife's joint tenancy.

It seems to me that in the present case the general rule applies, & that there is nothing in the special facts disclosed by the special case to show either that a tenancy in common was created in the property, or that the joint tenancy has been severed (*STIRLING, J.*).—**PALMER v. RICH**, [1897] 1 Ch. 134; 66 L. J. Ch. 69; 75 L. T. 484; 45 W. R. 205; 41 Sol. Jo. 111.

—**Life insurance policy for benefit of wife & children.**—See HUSBAND & WIFE, Vol. XXVII., p. 150, Nos. 1214-1216.

—**Gift to husband & wife.**—See HUSBAND & WIFE, Vol. XXVII., pp. 91, 92, Nos. 708-711.

—**Partnership.**—See PARTNERSHIP, Vol. XXXVI., pp. 429 et seq.

—**Under trust.**—See TRUSTS.

—**Under will.**—See WILLS.

—**Rights of joint tenants.**—See, generally, EQUITY, Vol. XX., pp. 242, 243, Nos. 87-93.

—**Partners.**—See, generally, PARTNERSHIP, Vol. XXXVI., p. 310 et seq.

—**To grant & take leases.**—See LANDLORD & TENANT, Vol. XXX., pp. 430, 431, Nos. 900-918.

—**To account.**—See PARTNERSHIP, Vol. XXXVI., pp. 453, 466-481, Nos. 1180, 1294-1449.

—**To sue one another.**—See PARTNERSHIP, Vol. XXXVI., pp. 458 et seq.

—**To sue third parties—In particular actions.**—See TITLES passim.

(1921), 54 N. S. R. 164; 56 D. L. R. 728.—**CAN.**

1. **Right to restitution.**—If the ct. can trace money or property, however obtained from the true owner, into any other shape, it will intervene to secure it for the true owner, by holding it to be his in equity, or by

giving him a lien on it.—**MERCHANTS' EXPRESS CO. v. MORTON** (1868), 15 Gr. 274.—**CAN.**

PART III. SECT. 4, SUB-SECT. 1. —A. g. How arising—Direction to change deposit account into joint names.]—Six months before her death, & when

laid up in hospital with bronchitis, A. wrote to a bank, "Arrange my money in B.'s name so she can draw it."—**Held:** such order did not constitute B. a joint owner of the money on deposit, but was only given for the convenience of A.—**EVERLEY v. DUNKLEY** (1912), 23 O. W. R. 415; 4

**Sect. 4.—Co-ownership: Sub-sect. 1, B. & C.; sub-sect. 2.]**

**B. Survivorship.**

**83. Right of survivorship—Joint tenancy of reversionary interest.]**—A woman, joint tenant of a reversionary interest in a legacy of £2,000 stock, married; & after the marriage the husband became bkpt., & then the wife died, leaving the tenant for life of the fund surviving:—*Held*: by the death of the wife, the other joint tenants of the fund became entitled to her interest therein by survivorship; that was the elder title to that of the husband, which also accrued after the death of the wife; & upon the death of the tenant for life, the other joint tenants, & not the assignees of the husband, were entitled to what had been the wife's share of the fund.—*Re BARTON'S WILL TRUSTS* (1852), 10 Ilarc, 12; 19 L. T. O. S. 362; 10 Jur. 631; 68 E. R. 818.

*Annotations*:—*Apld. Re Butler's Trusts*, *Hughes v. Anderson* (1888), 38 Ch. D. 286. *Refd. Baillie v. Treharne* (1881), 17 Ch. D. 388. *Mentd. Re Bellamy, Elder v. Pearson* (1883), 25 Ch. D. 620.

**84. — Stock bought in joint names.]**—Where stock in the public funds is purchased in the joint names of two persons, the survivor is, *at law*, absolutely entitled to it.—*CROSSFIELD v. SUCH* (1853), 8 Exch. 825; 1 C. L. R. 668; 22 L. J. Ex. 325; 21 L. T. O. S. 187; 1 W. R. 470; 155 E. R. 1587.

*Annotation*:—*Refd. Law Guarantee & Trust Soc. v. Bank of England* (1890), 24 Q. B. D. 406.

**85. — — —.]**—In 1806, S. B. in the names of herself, C. H., & H. B., purchased a sum of 4 per cent. annuities, subsequently reduced to 3 per cent., the dividends of which were received by S. B. till her death in 1821, & by C. H. till his death in 1838. In consequence of no dividends having been received since 1838, the stock had been transferred into the names of the consrs. for reducing the National Debt. On a petition presented by H. B., showing that he was the survivor of the three persons, the ct. ordered the stock to be retransferred, & the dividends paid to him, but subject to the payment of the costs of the petition.—*Ex p. BOUTS* (1859), 28 L. J. Ch. 648; 34 L. T. O. S. 27; 5 Jur. N. S. 951; 7 W. R. 512.

**Leaseholds.]**—*See LANDLORD & TENANT*, Vol. XXX., p. 430, No. 901; Vol. XXXI., p. 420, Nos. 5659-5666.

**Husband & wife.]**—*See HUSBAND & WIFE*, Vol. XXVII., pp. 163-165, Nos. 1324-1330.

**Partners.]**—*See PARTNERSHIP*, Vol. XXXVI., pp. 433-437.

**C. Severance of Joint Tenancy.**

**86. May be by letter or parol.]**—A joint tenancy in personality may be severed by a letter, or

other assent by parol.—*GOULD v. KEMP* (1832), 1 L. J. Ch. 176; *affd.* (1834), 2 My. & K. 304, L. C. *Annotations*:—*Refd. Re Wilks, Child v. Bulmer*, [1891] 3 Ch. 69; *In the Estate of Heys, Walker v. Gaskill*, [1914] P. 192.

**87. What amounts to—Pledge of mortgage debt by one joint tenant.]**—Two exors. being entitled as joint tenants to a mtge. debt part of the residue of testator's estate, one of them pledges the mtge. deed to A., as an indemnity against future liability:—*Held*: this was a severance of the joint tenancy of the exors. in this debt.—*WATKINSON v. HUDSON* (1826), 4 L. J. O. S. Ch. 213.

**88. — Transfer of stock into name of one joint tenant.]**—The mere transfer of stock into the names of one of two joint tenants is no severance of the joint tenancy.—*HAVARD v. PRICE, WEST v. PRICE* (1844), 2 L. T. O. S. 495, L. C.

**89. — Marriage.]**—The settlement made on the marriage of A. contained a covenant by her & her intended husband to assign to the trustees any personal estate which should, during the coverture, vest in her or in her husband in her right. At this time she was entitled, as joint tenant, with her sister, to certain personal property expectant on the death of B. B. died during the coverture:—*Held*: the joint tenancy was severed by the marriage, & also by the covenant to assign.—*BAILLIE v. TREHARNE* (1881), 17 Ch. D. 388; 50 L. J. Ch. 295; 44 L. T. 247; 29 W. R. 729.

*Annotations*:—*Overd. Re Butler's Trusts, Hughes v. Anderson* (1888), 38 Ch. D. 286. *Refd. Re Hewitt, Hewitt v. Ballott*, [1894] 1 Ch. 362.

**90. — — —.]**—*PALMER v. RICH*, No. 82, *ante*.

**91. — — — Chose in action not reduced into possession.]**—Marriage does not operate as a severance of the wife's joint tenancy in a chose in action which has not been reduced into possession by the husband.—*Re BUTLER'S TRUSTS, HUGHES v. ANDERSON* (1888), 38 Ch. D. 286; 57 L. J. Ch. 643; 59 L. T. 386; 36 W. R. 817, C. A.

*Annotation*:—*Refd. Palmer v. Rich*, [1897] 1 Ch. 134.

**92. — Covenant to assign in marriage settlement.]**—*BAILLIE v. TREHARNE*, No. 80, *ante*.

**93. — Granting of lease—By husband & other joint tenant.]**—*PALMER v. RICH*, No. 82, *ante*.

**94. — Mutual wills by husband & wife—Agreement not to revoke.]**—A husband & wife, whose property consisted almost entirely of leaseholds, which they held as joint tenants, made in 1907 two identical wills, each in favour of the other, with certain similar provisions in favour of defts. to take effect upon the death of the survivor. These wills were made in pursuance

O. W. N. 406; 27 O. L. R. 414; 8 D. L. R. 839.—CAN.

**h. — — —.]**—*BELYEA v. DIOCESAN SYNOD OF FREDERICTON* (1912), 10 E. L. R. 548.—CAN.

**PART III. SECT. 4, SUB-SECT. 1.—B.**

**k. Right of survivorship—Deposit-account in joint names.]**—A sum of money was deposited in a bank, for which a receipt was given in the following words: "Received from P. & H. to be drawn by either of them, or the survivor \$1,400, for which we are accountable, with interest, on receiving fifteen days' notice." On P.'s death:—*Held*: the right to receive the money vested in H., & P.'s administrators could not recover it from the bank.—*CONDON v. BANK OF BRITISH NORTH AMERICA* (1870), N. B. Dig. 376.—CAN.

**l. — — —.]**—*PAYNE v. MARSHALL* (1889), 18 O. R. 488.—CAN.

**m. — — —.]**—Where a husband deposited money with a savings co. & caused an account to be opened in his name & his wife's jointly "to be drawn by either or in the event of the death of either to be drawn by the survivor," & it appeared by her evidence uncontradicted, that moneys of hers went into the account & that both drew from it indiscriminately:—*Held*: she, as survivor, entitled to the whole fund.—*Re RYAN* (1900), 32 O. R. 224.—CAN.

**n. — — —.]**—A testator during his lifetime signed the following document: "This is to certify that I transfer this money in my name, J. & M., in our savings bank account number 27 in your bank to the joint credit of myself, the sole survivor, & my daughter, M. to be drawn by either of us":—*Held*: the daughter M. became entitled to the money so deposited

absolutely in her own right on the death of her father.—*SCHWENT v. ROETTER* (1910), 16 O. W. R. 5; 21 O. L. R. 112.—CAN.

**o. — — —.]**—*Re REIP* (1921), 64 D. L. R. 598; 50 O. L. R. 595.—CAN.

**p. — — —.]**—*TALBOT v. CODY* (1874), 10 I. R. Eq. 138.—IR.

**q. — — —.]**—*Re CONDRIE, COLOHAN v. CONDRIE*, [1914] 1 I. R. 89.—IR.

**r. — — —.]**—Where moneys are deposited in a bank in the joint names of two depositors, & nothing more is said when the deposits are made, the liability as between the depositors & the bank is to the two jointly, & the right to sue in respect of it inures to the surviving creditor of it.—*DOWNES v. BANK OF NEW ZEALAND* (1895), 13 N. Z. L. R. 723.—N.Z.

of an agreement that they were to be irrevocable. The husband died in 1911, neither his will nor that of his wife having at that time been revoked. In 1912 the wife executed a codicil, & in Jan. 1913, she executed a will. In May, 1913, the wife died. Pltfs., who were the exors. of the will of 1913, claimed probate of that will in solemn form, & defts., who were legatees under the wife's will of 1907, asked the ct. to pronounce in favour of that will & alternatively claimed a declaration that pltfs. were trustees for defts. of the benefits given to defts. by the wife's will of 1907:—*Held*: (1) the agreement together with the execution of the two wills of 1907 severed the joint tenancy & created a tenancy in common; (2) as a will was in its nature & essence revocable the wife's will of 1907 did not become irrevocable on the death of her husband, & therefore the ct. must pronounce in favour of the will of 1913; (3) even if there was a contract giving rise to a trust in favour of defts. inasmuch as the Probate Div. should as a rule only construe testamentary documents so far as it was necessary to decide whether they should be admitted to probate, the ct. ought not to make a declaration of any trusts, but ought to leave defts. to pursue their remedies in the Ch. Div.—*In the Estate of HEYS, WALKER v. GASKILL*, [1914] P. 192; 83 L. J. P. 152; 111 L. T. 941; 30 T. L. R. 637; 59 Sol. Jo. 45.

— **Mortgage.**—*See* MORTGAGE, Vol. XXXV., p. 275, Nos. 310, 311.

95. **Joint tenancy in income—Severed as to each instalment—At time when payable—Without actual payment.**—A joint tenancy in income is severed as to each instalment as it becomes payable without actual payment.—*WALMSLEY v. FOXHALL* (1870), 40 L. J. Ch. 28.

#### SUB-SECT. 2.—TENANCY IN COMMON.

*See, generally*, REAL PROPERTY.

96. **How arising—Investment of moneys in joint names—In unequal shares.**—*ROBINSON v. PRESTON*, No. 97, *post*.

97. — **Rents of real estates held as tenants in common.**—(1) Where stock has been purchased, in the joint names of two, out of money standing to their joint account in the bank, it is not necessarily to be considered in equity as held in joint tenancy, but the origin of the money & the acts & intentions of the parties may be looked to, & a conclusion in favour of a tenancy in common drawn from the circumstances.

(2) The distinction taken in equity between a purchase by two advancing equal shares of the purchase-money in their joint names, & a mtge. to them under the same circumstances, the first being considered to create a joint tenancy, & the other a tenancy in common, disapproved of.

Two sisters being tenants in common of real estates had money arising from the rents standing to their joint account in the bank. Part of the money was from time to time invested in the purchase of stock in the joint names, & part on mtge., the mtged. premises being conveyed to them as tenants in common. Each sister, by will, affected to dispose of her share of the stock:—*Held*: they were entitled to the stock as tenants in common, & not as joint tenants.

(3) The law is settled as to the investment of moneys in the names of two or more persons in the purchase of property. If invested in unequal shares, the purchasers remain tenants in common of the purchased property; if in equal shares, & the matter on the face of it purports to be a joint

tenancy, then it is considered by this ct. to be a joint tenancy & no equity is supposed to intervene by which it can be reduced to a tenancy in common (*PAGE-WOOD, V.-C.*).—*ROBINSON v. PRESTON* (1858), 4 K. & J. 505; 27 L. J. Ch. 395; 31 L. T. O. S. 366; 4 Jur. N. S. 186; 70 E. R. 211.

*Annotations*:—*As to* (3) *Consd. Re Hughes' Trusts* (1871), 24 L. T. 415. *Appl. Palmer v. Rich.* [1897] 1 Ch. 134. *Reid. Re Rowe, Jacobs v. Hind* (1889), 61 L. T. 581.

98. — **Transfer of stock into joint names—Where parties entitled as tenants in common.**—(1) Under a will, A., B., C. & D. became entitled to a sum of stock as tenants in common. C., the sole exor., transferred it into the joint names of C. & D. Afterwards, by the deaths of A. & B., C. & D. became equally entitled to the shares of A. & B.:—*Held*: C. & D. were tenants in common of the whole fund.

(2) Under a will, C. & D. were entitled equally to a sum of stock. C., the exor., with the concurrence of D., transferred it into the joint names of C. & D.:—*Held*: they thereby became joint tenants.—*JAMES v. GODWIN* (1802), 31 Beav. 25; 54 E. R. 1046.

99. — **Corporation & Individual.**—A transfer of stock into the joint names of a corpn. & an individual creates a tenancy in common, & not a joint tenancy, & therefore, by virtue of sections 1 & 22 of the National Debt Act, 1870 (c. 71), ss. 1 & 22, the Bank of England is under no obligation to register such transfer.

In the case of real estate an assignment of property to an individual & a corpn. would not create a joint tenancy, but a tenancy in common. From *Coke upon Littleton*, 190a, *Williams' Saunders*, Vol. II., Part 2, p. 318, note 4, *Blackstone's Commentaries*, & the other ancient text writers which were cited, it no doubt appears that an attempt to create a joint tenancy in a corpn. & an individual must fail, for two reasons. In the first place the grantees take in different capacities. The grant to the corpn. is a grant to the corpn. & its successors; the grant to an individual is a grant to the individual & his heirs; & those two estates cannot be blended in the manner necessary for the creation of a joint tenancy (*MATHEW, J.*).—*LAW GUARANTEE & TRUST SOCIETY v. BANK OF ENGLAND (GOVERNOR & CO.)* (1890), 24 Q. B. D. 406; 62 L. T. 496; 54 J. P. 582; 38 W. R. 493; 6 T. L. R. 205.

*Annotations*:—*Mentd. In the Goods of Martin* (1904), 90 L. T. 264; *Re Thompson's Settlt. Trusts*, *Thompson v. Alexander*, [1905] 1 Ch. 229.

100. — **Severance of joint tenancy.**—*In the Estate of HEYS, WALKER v. GASKILL*, No. 94, *ante*.

— **Payment to joint mortgagees.**—*See* MORTGAGE, Vol. XXXV., p. 275, No. 312.

101. **Rights of tenants in common—To sue one another.**—(1) One tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it, as to render it impossible that pltf. should ever take & use it.

(2) The conversion of a chattel by a tenant in common to its general & profitable application, though it change the form of the substance, is not such a destruction of the subject-matter, as to prevent pltf. from taking & using it in its altered state; therefore it creates no right of action.—*FENNINGS v. GRENVILLE (LORD)* (1808), 1 Taunt. 241; 127 E. R. 825.

*Annotations*:—*As to* (2) *Reid. Jacobs v. Seward* (1872), L. R. 5 H. L. 464. *Generally, Mentd. Hogarth v. Jackson* (1827), 2 C. & P. 595.

102. — — — **One of two tenants in common of a chattel is not liable in trover at the**



**Sect. 4.—Co-ownership: Sub-sect. 2. Sect. 5. Part IV. Sects. 1 & 2: Sub-sect. 1, A. (a) i. & ii., (b) & (c).]**

suit of his co-tenant, for the mere sale of the chattel; though he may be, for such a disposition as amounts to a destruction of it.

Deft., an officer of the Palace Ct., seized, under a *fi. fa.* against A., partnership effects of A. & B., & sold them to various purchasers, who carried them away. In trover at the suit of the assignees of B., who had become bkpt.:—*Held*: the seizure & sale, under the circumstances, did not amount to a conversion: but, in the absence of any evidence to show in what proportions the partners were interested in the partnership property, the assignees of B. were entitled to a moiety of the proceeds of the sale.—*MAYHEW v. HERRICK* (1849), 7 C. B. 220; 18 L. J. C. P. 179; 13 Jur. 1078; 137 E. R. 92.

*Annotations*:—*Consd. Fraser v. Kershaw* (1856), 2 K. & J. 496. *Refd. Tancred v. Allgood* (1859), 28 L. J. Ex. 362; *Jacobs v. Seward* (1872), L. R. 5 H. L. 464.

103. ————]—*FRASER v. KERSHAW* (1856), 2 K. & J. 496; 25 L. J. Ch. 445; 2 Jur. N. S. 880; 4 W. R. 431; 69 E. R. 878.

104. ————]—Where one tenant in common does not destroy the thing in common, but merely takes it out of the possession of the

other & carries it away, no action lies against him by the other tenant in common.—*JONES v. BROWN* (1856), 25 L. J. Ex. 345; 27 L. T. O. S. 203; 4 W. R. 680.

*Annotation*:—*Refd. Nyburg v. Handelaar* (1892), 8 T. L. R. 395.

105. ———— **To sue third party.]**—A. was the owner of a personal chattel. He parted with a half share in it to B., A. to have possession until the chattel was sold. A. subsequently entrusted the chattel to B. for the purpose of taking it to an auctioneer for sale. B. did not take the chattel to an auctioneer, but lodged it with C. as security for his debt:—*Held*: A. had a special property in the chattel which entitled him to possession of it as against C.—*NYBERG v. LIANDELAAR*, [1892] 2 Q. B. 202; 61 L. J. Q. B. 709; 87 L. T. 361; 56 J. P. 694; 40 W. R. 545; 8 T. L. R. 549; 36 Sol. Jo. 485, C. A.

— **To grant & take leases.]**—*See LANDLORD & TENANT*, Vol. XXX., pp. 431, 432, Nos. 919-930.

— **To account.]**—*See EQUITY*, Vol. XX., p. 269, Nos. 202, 293.

## SECT. 5.—LOSS OF OWNERSHIP

*See Part IV., post.*

# Part IV.—Alienation.

## SECT. 1.—IN GENERAL.

106. **Property must vest in another.]**—A man cannot relinquish his property in goods, unless they be vested in another.—*HAYNES'S CASE* (1613), 12 Co. Rep. 113; 77 E. R. 1389.

**Choses in action.]**—*See CHOSES IN ACTION*, Vol. VIII., pp. 424 *et seq.*

## SECT. 2.—HOW PROPERTY ALIENATED.

### SUB-SECT. 1.—INTER VIVOS.

#### A. Voluntary Alienation.

##### (a) By Delivery.

##### i. In General.

107. **General rule—Property passes by delivery.]**—*CLARK'S CASE* (1589), 2 Leon. 30, 89; 74 E. R. 333, 382.

*Annotation*:—*Refd. Ryal v. Rolfe* (1749), 1 Atk. 165.

108. **Necessity for delivery—Chattel remaining at request of owner.]**—A carriage finished & paid for before the bkpcy. of the maker, but suffered to remain on his premises at the request of the owner, on account of his being abroad, cannot be taken by the assignees as in the order or disposition of bkpt., although such bkpt. put it in his front shop, & actually sell it to another. In such case, an actual delivery of the carriage at the house of the person for whom it was made, is not necessary to constitute him the owner.—*BARTRAM v. PAYNE* (1827), 3 C. & P. 175, N. P.

109. ———— **Scrip certificates.]**—A contract to deliver shares in a joint stock co. does not require the actual delivery of scrip certificates, which are the mere *indicia* of property; but the party contracting to deliver the shares sufficiently performs his engagement when he places the other in the

position of being the legal owner of them.—*HUNT v. GUNN* (1862), 13 C. B. N. S. 226; 1 New Rep. 28; 7 L. T. 277; 143 E. R. 90.

110. ———— **Chattel capable of delivery—Where gift by parol.]**—*COCHRANE v. MOORE*, No. 120, *post*.

— **Chattels not readily transferred.]**—*See Sub-sect. 1, A. (a) ii., post.*

— *See No. 27, ante.*

111. **What amounts to delivery.]**—There can be no complete delivery of goods until they are placed under the dominion & control of the person who is to receive them (WILLES, J.).—*MEYERSTEIN v. BARBER* (1806), L. R. 2 C. P. 38; 30 L. J. C. P. 48; 15 L. T. 355; 12 Jur. N. S. 1020; 15 W. R. 173; 2 Mar. L. C. 420; *on appeal* (1867), L. R. 2 C. P. 661, Ex. Ch.; *sub nom. BARBER v. MEYERSTEIN* (1870), L. R. 4 H. L. 317, H. L.

*Annotations*:—*Refd. Mors-le-Blanch v. Wilson* (1873), L. R. 8 C. P. 227; *Glyn, Mills v. East & West India Dock Co.* (1882), 7 App. Cas. 591; *Sewell v. Burdick* (1884), 10 App. Cas. 74; *Hilton v. Tucker* (1888), 39 Ch. D. 669; *Mills v. Charlesworth* (1890), 25 Q. B. D. 421; *Morris v. Delobel Filpo* (1892), 66 L. T. 320; *Furness, Withy v. White*, [1894] 1 Q. B. 483; *Dublin City Distillery v. Doherty*, [1914] A. C. 823. *Mentd. The John Bellamy* (1870), L. R. 3 A. & E. 129.

— **Constructive delivery.]**—*See Sub-sect. 1, A. (a) ii., post.*

112. **Delivery to use of another.]**—A delivery of goods to A. to the use of B. upon a precedent consideration, vests the property of the goods in B.—*ATKINS v. BERWICK* (1719), 11 Mod. Rep. 295; 1 Stra. 165; 10 Mod. Rep. 431; 88 E. R. 1049; *sub nom. ATKINS v. BERWICK, Fortes*, Rep. 353.

*Annotations*:—*Consd. Salte v. Field* (1793), 5 Term Rep. 211; *Hutchings v. Nunes* (1863), 1 Moo. P. C. C. N. S. 243. *Refd. Alderson v. Temple* (1768), 1 Wm. Bl. 680; *Harman v. Fishar* (1774), 1 Cowp. 117; *Smith v. Field* (1793), 5 Term Rep. 402; *Barnes v. Freeland* (1794), 6 Term Rep. 80; *Neate v. Ball* (1801), 2 East, 117; *Richardson v. Goss* (1802), 2 Bos. & P. 119; *Bartram v. Farebrother* (1828), 4 Bing. 579; *James v. Griffin* (1837),

## PART IV. SECT. 1.

**t. Who may challenge.]**—Deft. dis-

puting the *bona fides* of a transfer of personal property to plff., must prove himself to be a judgment creditor

or an officer acting under legal process.—*MCGILFRAY v. GIBBONS* (1853), 2 N. S. R. (James) 152.—*CAN.*



2 M. & W. 623; *Sadler v. Belcher* (1843), 2 Mood & R. 489; *Van Casteel v. Booker* (1848), 2 Exch. 691; *Heinekey v. Earle* (1857), 8 E. & B. 410. *Mentd.* *Tooke v. Hollingsworth* (1793), 5 Term Rep. 215; *Mills v. Ball* (1801), 2 Bos. & P. 457; *Lyon v. Holt* (1839), 5 M. & W. 250; *Cook v. Lister* (1863), 13 C. B. N. S. 543.

**113. Delivery of part—Halver of bank-notes.**—*Pltf.*, having entered into a contract for a partnership with W., & having agreed with W. to discharge a debt due from him to *deft.*, sent the halves of two bank-notes in a letter to *deft.* *Deft.* wrote, that on receipt of the second halves he would send a stamped acknowledgment. The arrangement with W. afterwards went off, & *pltf.* required *deft.* to return the half notes:—*Held*: the property in the half notes had not passed to *deft.*, & therefore *pltf.* was entitled to recover them.—*SMITH v. MUNDY* (1860), 3 E. & B. 22; 20 L. J. Q. B. 172; 2 L. T. 373; 6 Jur. N. S. 977; 8 W. R. 561; 121 E. R. 352.

— **On sale of goods.**—*See* SALE OF GOODS.

**114. Delivery of ship.**—Certain shipbuilders in America built several ships, mortgaged them there, sent them to England for sale, sold them there, & paid the mtgees. in America. The mtges. were duly registered in America; but notice of the mtge. having been indorsed on the certificate of registry in one case, & having impeded the sale, it was agreed that no such notice should be indorsed in future. Another ship was accordingly sent over & sold; the shipbuilders received the purchase-money, & failed, leaving the mtgee. unpaid. The mtgee. filed his bill to establish his claim against the purchaser:—*Held*: the rights to the ship acquired under American law must be recognised; but the purchase, having taken place in this country, must be governed by English law; a ship is not like an ordinary chattel, which passes by delivery, & there is no market overt for ships; the purchaser of a foreign ship is bound to make inquiries as to the title.—*HOOPER v. GUMM, MACLELLAN v. GUMM* (1867), 2 Ch. App. 282; 36 L. J. Ch. 605; 16 L. T. 107; 15 W. R. 464; 2 Mar. L. C. 481, L. C. & L. J. *Annotation*:—*Mentd.* *Alcock v. Smith*, [1892] 1 Ch. 238.

**Delivery of negotiable instruments.**—*See, generally*, *BILLS OF EXCHANGE*, Vol. VI., pp. 76 *et seq.*

**Delivery of pledge.**—*See* PAWNS & PLEDGES, pp. 4-7, *ante*.

**Alienation by way of gift—Inter vivos.**—*See* GIFTS, Vol. XXV., pp. 506-510, Nos. 27-66.

— **Mortis causâ.**—*See* GIFTS, Vol. XXV., pp. 550-555, Nos. 357-390.

**Alienation by way of sale.**—*See* SALE OF GOODS.

**Delivery obtained by fraud.**—*See* CRIMINAL LAW, Vol. XV., pp. 873-875, Nos. 9587-9614.

## ii. Constructive Delivery.

**115. Delivery of key—Goods in house.**—*BOWKER v. WILLIAMSON* (1889), 5 T. L. R. 382.

—*See* *BILLS OF SALE*, Vol. VII., pp. 20, 111-113, Nos. 93, 658, 662, 663, 665, Supp. II., p. 221, No. 93a; *GIFTS*, Vol. XXV., pp. 509, 510, Nos. 60-64; *SALE OF GOODS*.

**Delivery of symbol.**—*See* GIFTS, Vol. XXV., p. 510, No. 65; *SALE OF GOODS*.

**Delivery of documents of title.**—*See* GIFTS, Vol. XXV., p. 510, No. 65.

— **Bill of lading.**—*See* SHIPPING.

— **Invoice or delivery order.**—*See* *BILLS OF SALE*, Vol. VII., pp. 19, 20, Nos. 87, 88; *SALE OF GOODS*.

**Change in character of possession—On sale.**—*See* *SALE OF GOODS*.

**Attornment.**—*See* *SALE OF GOODS*.

**Estoppel.**—*See* *SALE OF GOODS*.

## (b) By Deed.

**116. Whether delivery necessary.**—*ANON.* (1467), Y. B. 7 Edw. 4, fo. 20 B. pl. 21.

*Annotations*:—*Consd.* *Cochrane v. Moore* (1890), 25 Q. B. D. 57. *Reid.* *Anon.* (1563), Dal. 46.

**117.** —*It is a general rule in the transfer of chattels, that the possession must accompany & follow the deed. Therefore, where the conveyance is absolute, the possession must be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in possession till the condition be performed.*—*EDWARDS v. HARBEN* (1788), 2 Term Rep. 587; 100 E. R. 315.

*Annotations*:—*Distd.* *Joseph v. Ingram* (1817), 1 Moore, C. P. 189. *Consd.* *Armstrong v. Baldoek* (1818), Gow. 33; *Steward v. Lombe* (1820), 1 Br. & Bing. 506. *Apd.* *Reid.* *C. Crapthorne* (1825), 3 L. J. O. S. Ch. 223; *Reed v. Willmet* (1831), 7 Bing. 577. *Consd.* *Martindale v. Booth* (1832), 3 B. & Ad. 498. *Reid.* *Mantou v. Moore* (1796), 7 Term Rep. 67; *Steel v. Brown* (1808), 1 Taint. 381; *Lewis v. Rogers* (1834), 1 Cr. M. & R. 48; *Lindon v. Sharp* (1843), 6 Man. & G. 895; *Ward v. Audland* (1847), 16 M. & W. 862.

**118.** —*See* *COCHRANE v. MOORE*, No. 120, *post*.

**119.** —*Goods were taken under a fi. fa. as the goods of W., & on an issue directed to try whether the goods were the property of J., it was proved that the goods, prior to 1836, belonged to M. when they were distrained for rent, & the sum for which they were distrained paid in the name of W., with the money of *pltf.* In 1837, M. became bkpt., & *pltf.* paid £128 to the official assignee for M.'s interest in the goods. Early in 1839 M. took the benefit of the Insolvent Debtors' Act, but his assignee never claimed the goods. In Nov. 1839, W. executed an assignment of the goods to *pltf.*, & in Mar. 1840, the goods were seized under a *fi. fa.* against W. The goods always had remained in the possession of M. as the ostensible owner of them, & W. never was in possession of them:—*Held*: on these facts J. had made out his property in the goods, & as W. had never been in the possession of the goods, & never could have gained false credit by them, there was nothing from which the jury ought to infer that the assignment was fraudulent; the fact, that the assignment was kept at M.'s house was immaterial, & it was also immaterial that no possession of the goods had been delivered by W. to *pltf.*, as the right to them would pass by the execution of the deed.—*BURLING v. PATERSON* (1840), 9 C. & P. 570, N. P.*

**Alienation by way of bill of sale.**—*See, generally*, *BILLS OF SALE*, Vol. VII., pp. 3 *et seq.*

**Alienation by way of mortgage.**—*See, generally*, *MORTGAGE*, Vol. XXXV., pp. 239 *et seq.*

**Interpretation of deed.**—*See* *DEEDS*, Vol. XVII., pp. 376, 377, Nos. 1854-1864.

## (c) By Sale or Exchange.

*See, generally*, *SALE OF GOODS*.

## PART IV. SECT. 2, SUB-SECT. 1.—

### A. (a) ii.

**a. Change in character of possession.**—Where possession is changed it need not be given personally to the creditor, purchaser or mtgee.; it may equally be given to a trustee or bailee for him, & the debtor may increase

the claim of such bailee or may charge the goods with further sums in favour of other persons.—*McMASTER v. GARLAND* (1880), 31 C. P. 320.—*CAN.*

**b.** —*A person who already has the lawful possession of a thing may effect delivery merely by virtue*

of his own intention, express or implied, to hold the thing in future as agent for another, but the *dominium* does not pass if the possessor intends to perfect the transfer by a physical delivery of the thing.—*MILLS & SORE v. BENJAMIN BROTHERS' TRUSTEES* (1876), Buch. 115.—*S. AF.*

**Sect. 2.—How property alienated: Sub-sect. 1, A. (c), & B.; sub-sect. 2. Sects. 3 & 4.]**

**120. General rule.]**—(1) A gift of a chattel capable of delivery, made *per verba de praesenti* by a donor to a donee, & assented to by the donee, whose assent is communicated to the donor, does not pass the property in the chattel without delivery.

(2) This review of the authoritative leads us to conclude that according to the old law no gift or grant of a chattel was effectual to pass it whether by parol or by deed, & whether with or without consideration unless accompanied by delivery: that on that law two exceptions have been grafted, one in the case of deeds, & the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery (FRY, L.J.).

(3) In my opinion, it always was the law of England that an owner of a chattel could transfer his ownership thereof to another person by way of exchange or barter, or by way of bargain & sale for a consideration, or by way of & as a mere gift, or by will (LORD ESHER, M.R.).

(4) The proposition before this ct. on a question of gift or not is, that the one gave & the other accepted. The transaction described in the proposition is a transaction begun & completed at once. It is a transaction consisting of two contemporaneous acts which at once complete the transaction, so that there is nothing more to be done by either party (LORD ESHER, M.R.).—*COCHRANE v. MOORE* (1890), 25 (3) B. D. 57; 59 L. J. Q. B. 377; 63 L. T. 153; 54 J. P. 804; 38 W. R. 588; 6 T. L. R. 290, C. A.

*Annotations:—As to (1) Exfld. Kilpin v. Ratley*, [1892] 1 Q. B. 582. *Consd. Rawlinson v. Mori* (1905), 93 L. T. 555; *Vallier v. Wright & Bull* (1917), 33 T. L. R. 366. *Exfld. Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149. *Refd. Re Wasserberg, Union of London & Smiths Bank v. Wasserberg*, [1915] 1 Ch. 195. *As to (2) Refd. Re Alderson, Alderson v. Peel* (1891), 64 L. T. 645. *Generally, Refd. Re Patrick, Bills v. Tatham* (1890), 60 L. J. Ch. 111. *Mentd. Darlow v. Bland*, [1897] 1 Q. B. 125.

**121. Whether delivery necessary—Intention that property pass before delivery.]**—*COCHRANE v. MOORE*, No. 120, *ante*.

**Exchange of land.]—See REAL PROPERTY.**

#### B. Involuntary Alienation.

**122. By seizure under execution.]**—*AYER v. ADEN* (1605), Yelv. 44; *Cas. Pract. K. B.* 210; 80 E. R. 32; *sub nom. AYRE v. ADEN*, Cro. Jac. 73; *sub nom. ADYN v. AYRE*, Moore, K. B. 757.

*Annotations:—Refd. Mildmay v. Smith* (1872), 2 Saund. 343; *Langdon v. Wallis* (1898), 1 Lut. 582; *Clerk v. Withers* (1704), 2 Ld. Raym. 1072; *Wilcox & Litchey v. Pokinhorn* (1728), 1 Barn. K. B. 81; *Jeanes v. Wilkins* (1749), 1 Ves. Sen. 195.

—*See, generally, EXECUTION*, Vol. XXI., pp. 415 *et seq.*

**123. By judgment—For seizure of goods forfeited.]**—After judgment upon an information for a seizure of goods forfeited, the property of such goods is divested from the right owner.—*MARTIN v. WILSFORD* (1894), Carth. 323; 90 E. R. 790.

*Annotation:—Apld. Scott v. Shearman* (1774), 2 Wm. Bl. 977.

**124. ———.]**—Condemnation of goods in the Exchequer is so conclusive, & so alters their property, that trespass will not lie against the officer who seized them, to try the point of forfeiture again.—*SCOTT v. SHEARMAN* (1775), 2 Wm. Bl. 977; 96 E. R. 575.

*Annotations:—Distd. Henshaw v. Plesance* (1777), 2 Wm. Bl. 1174. *Refd. De Mora v. Coucha* (1885), 29 Ch. D. 268. *Mentd. Wood v. Chessall* (1778), 2 Wm. Bl. 1254.

—*See JUDGMENTS*, Vol. XXX., p. 160, No. 810.

—**For trover or detinue.]—See EXECUTION**, Vol. XXI., p. 584, Nos. 1613–1618; **TROVER**.

—**Foreign judgment.]—See, generally, CONFLICT OF LAWS**, Vol. XI., pp. 444 *et seq.*

**125. By seizure under distress—Wrongful seizure.]**—*JONES v. SAWKINS*, No. 70, *ante*.

—*See, generally, DISTRESS*, Vol. XVIII., pp. 260 *et seq.*

**126. By affixing to real property.]**—*GOUGH v. WOOD & Co.*, No. 64, *ante*.

**127. ———.]**—The title to chattels may clearly be lost by being affixed to real property by a person who is not the owner of the chattels (LORD LINDLEY).—*REYNOLDS v. ASHBY & SON*, [1904] A. C. 466; 73 L. J. K. B. 946; 91 L. T. 607; 53 W. R. 129; 20 T. L. R. 766, H. L.

*Annotations:—Refd. Re Allen*, [1907] 1 Ch. 575; *Crossley v. Lee*, [1908] 1 K. B. 86; *Ellis v. Glover & Hobson*, [1908] 1 K. B. 388; *Becker v. Riebold* (1913), 30 T. L. R. 142; *Horwich v. Symond* (1914), 110 L. T. 1016; *Re Morrison, Jones & Taylor, Cookes v. Morrison, Jones & Taylor*, [1914] 1 Ch. 50; *Re Rogerstone Brick & Stone Co., Southall v. Wescombe*, [1919] 1 Ch. 110. *Mentd. Lyon v. London, City & Midland Bank* (1903), 72 L. J. K. B. 465; *Hamer v. London, City & Midland Bank*, (1918), 87 L. J. K. B. 973.

—*See, generally, REAL PROPERTY*.

**On bankruptcy.]—See, generally, BANKRUPTCY**, Vol. V., pp. 630 *et seq.*

**By accession.]—See Part III., Sect. 2, sub-sect. 4, *ante*.**

**By confusion.]—See Part III., Sect. 3, sub-sect. 5, *ante*.**

**By conversion.]—See, generally, EQUITY**, Vol. XX., pp. 335–402, Nos. 772–1410.

#### SUB-SECT. 2.—AT DEATH.

**On intestacy.]—See DESCENT**, Vol. XVIII., pp. 17–35, Nos. 161–350.

**By will.]—See WILLS.**

**Interest of personal representative.]—See EXECUTORS**, Vol. XXIII., pp. 284–307, Nos. 3503–3719.

**Property situated abroad.]—See CONFLICT OF LAWS**, Vol. XI., pp. 365–387, Nos. 453–638.

#### SECT. 3.—ALIENATION OF FUTURE ACQUIRED PROPERTY.

**128. Right to assign at law.]**—Grant of gift of that I have not actually but potentially.

A parson may grant all the tithewool that he shall have in such a year; yet perhaps he shall have none; but a man cannot grant all the wool, that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially (*per cur.*).—*GRANTHAM v. HAWLEY* (1615), Hob. 132; 80 E. R. 281.

*Annotations:—Apld. Robinson v. Macdonnell* (1816), 5 M. & S. 228. *Consd. Fetch v. Tutin* (1846), 15 L. J. Ex. 280. *Refd. Musket v. Hill* (1839), 5 Bing. N. C. 694; *Gale v. Burnell* (1845), 7 Q. B. 859; *Lunn v. Thornton* (1845), 1 C. B. 379.

**129. ———.]**—An assignment of the freight, earnings, & profits of a ship, does not extend to profits not in existence, actual or potential, at the time of the assignment; therefore, where C. assigned by deed to S. the freight, earnings, & profits of the ship W., which ship afterwards, in a voyage to the South Seas, obtained a quantity of oil, the produce of whales taken in the said voyage:—*Held*: this oil did not pass to S. by the assignment; for the assignor had no property, actual or potential, in the oil, at the time of assignment, & the voyage was not then contem-

plated.—*ROBINSON v. MACDONNELL* (1816), 5 M. & S. 228; 105 E. R. 1034.

*Annotations*.—*Consd.* *Leslie v. Guthrie* (1835), 1 Bing. N. C. 697. *Reid.* *Curtis v. Anber* (1820), 1 Jac. & W. 528; *Metcalfe v. York* (Archbp.) (1836), 1 My. & Cr. 547; *Holroyd v. Marshall* (1862), 10 H. L. Cas. 191. *Mentd.* *Monkhouse v. Hay* (1820), 8 Price, 256; *Kirkley v. Hodgson* (1823), 1 B. & C. 588; *Duck v. Braddyl* (1824), M'Cle. 217; *Doe d. Kettle v. Lewis* (1830), 10 B. & C. 673; *Parry v. Deere* (1836), 2 Har. & W. 395; *Morris v. Dolobbel-Filpo*, [1892] 2 Ch. 352.

—By bill of sale.—*See* *BILLS OF SALE*, Vol. VII., pp. 118–125, 148, Nos. 686–706, 800, 810.

—By settlement.—*See* *SETTLEMENTS*.

—By marriage settlement.—*See* *HUSBAND & WIFE*, Vol. XXVII., pp. 86–88, Nos. 671–678.

—Choses in action.—*See* *CHOSSES IN ACTION*, Vol. VIII., pp. 426 *et seq.*; *EQUITY*, Vol. XX., p. 333, No. 767.

—Debts due to bankrupt.—*See* *BANKRUPTCY*, Vol. V., pp. 695–697, Nos. 6122–6129.

—Future earnings of ship.—*See* *SHIPPING*.

—Contingent interests of married woman.—*See* *HUSBAND & WIFE*, Vol. XXVII., pp. 85, 86, 88, Nos. 660–670, 679–681.

—Right to assign in equity.—*See* *EQUITY*, Vol. XX., pp. 333, 334, Nos. 768–771.

130. Effect of assignment.—Property vests on acquisition.—An assignment for value of future property actually binds the property itself directly it is acquired, automatically on the happening of the event, & without any further act on the part of the assignor, & does not merely rest in, & amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, & which he had previously sold & been paid for (*SWINFEN LADY, L.J.*).—*Re* *LIND, INDUSTRIALS FINANCE SYNDICATE, LTD. v. LIND*, [1915] 2 Ch. 345; 84 L. J. Ch. 884; 113 L. T. 956; 59 Sol. Jo. 651; [1915] 11 B. R. 204, C. A.

*Annotations*.—*Consd.* *Re Dent, Ex p. Trustee*, [1923] 1 Ch. 113. *Reid.* *Performing Right Soc. v. London Theatre of Varieties*, [1924] A. C. 1.

—*See* *EQUITY*, Vol. XX., pp. 252–254, Nos. 159, 161, 171–175.

#### SECT. 4.—RESTRAINT ON ALIENATION.

131. General rule.—A condition, inconsistent with the gift, is void; therefore, upon a bequest to A. for life, & at his decease, to his heirs, exors., etc.; but if he attempts to dispose of the principal, over, he takes the absolute interest; & the condition being inconsistent with it, is void.—*BRADLEY v. PEIXOTO* (1797), 3 Ves. 324; 30 E. R. 1034.

*Annotations*.—*Distd.* *Marks v. Churchill* (1844), 9 Jur. 155. *Consd.* *Hatton v. May* (1876), 3 Ch. D. 148. *Reid.* *Britton v. Twining* (1817), 3 Mer. 176; *Green v. Harvey* (1842), 1 Harc. 428; *Byng v. Straford* (1843), 5 Beav. 558; *Borton v. Borton* (1849), 16 Sim. 559; *Re Dugdale, Dugdale v. Dugdale* (1888), 38 Ch. D. 176. *Mentd.* *Shaw v. Ford* (1877), 7 Ch. D. 669.

132. —*See* —The law of this country says that all property shall be alienable; but there has been one exception to that general law, for restraint on anticipation or alienation was allowed in the case of a married woman (*JESSEL, M.R.*).—*Re RIDLEY, BUCKTON v. HAY* (1879), 11 Ch. D. 645; 48 L. J. Ch. 563; 41 L. T. 336; 43 J. P. 588; 27 W. R. 527.

*Annotations*.—*Consd.* *Herbert v. Webster* (1880), 15 Ch. D. 610. *Fold.* *Re Errington, Bawtree v. Errington*, [1887] W. N. 23; *Re Femeley's Trusts*, [1902] 1 Ch. 543. *Consd.* *Re Game, Game v. Tennent*, [1907] 1 Ch. 276.

133. —*See* —It is clearly settled that a gift over upon an attempt to alien an absolute interest

previously given it as void as a condition (*KAY, J.*).—*Re* *DUGDALE, DUGDALE v. DUGDALE* (1888), 38 Ch. D. 176; 57 L. J. Ch. 634; 58 L. T. 581; 36 W. R. 462.

*Annotations*.—*Reid.* *Re Greenwood, Sutcliffe v. Gledhill* (1901), 70 L. J. Ch. 326. *Mentd.* *Re Aganoor's Trusts* (1895), 13 R. 677.

134. Application of rule.—To gift for life.—Property cannot be given for life any more than absolutely without the power of alienation being incident to the gift; & although a life interest be expressed to be given, it may be well determined by an apt limitation over.—*ROCHFORD v. HACKMAN* (1852), 9 Hare, 475; 21 L. J. Ch. 511; 19 L. T. O. S. 5; 16 Jur. 212; 68 E. R. 597.

*Annotations*.—*Consd.* *Re Stultz* (1853), 22 L. J. Ch. 917. *Fold.* *Pearson v. Dolman* (1866), L. R. 3 Eq. 315. *Consd.* *Hurst v. Hurst* (1882), 21 Ch. D. 278; *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30. *Reid.* *Harc v. Burges* (1857), 4 K. & J. 45; *Joel v. Mills* (1857), 3 K. & J. 458; *Re Catt's Trusts* (1864), 2 Hem. & M. 46; *Craven v. Brady* (1869), 4 Ch. App. 296; *Re Stone's Estate* (1869), 18 W. R. 222; *Re Amherst's Trusts* (1872), L. R. 13 Eq. 464; *Re Machu* (1882), 21 Ch. D. 838; *Re Dugdale, Dugdale v. Dugdale* (1888), 38 Ch. D. 176; *Re Moore, Trafford v. Maconochie* (1888), 39 Ch. D. 116; *Adams v. Adams*, [1892] 1 Ch. 369; *Re Carow, Carow v. Carow*, [1896] 1 Ch. 527; *Re Riggs, Ex p. Lovell*, [1901] 2 K. B. 16; *Wynn v. Conway Corp.*, [1914] 2 Ch. 705.

135. —To equitable limitation.—Trust estate.—By an instrument in the form of a settlement but proved as a will, real & personal estate was given to trustees upon trust for the sole use & benefit of resp., son of the settlor, his heirs, exors., & administrators, to be assigned & transferred to him as soon as conveniently might be after the settlor's death, subject to a proviso that if resp. should die unmarried & without issue his share should go over, & also that the property assigned in trust for resp. was to be held by the trustees upon the express condition that he should not during his life have power to mortgage, sell, alien, charge, or incumber any part of the property, & in that event the trustees should stand possessed of such property in trust for other persons.—*Held*: resp. took an absolute interest in fee simple under the instrument, & the condition of forfeiture in case of charge or alienation was therefore void as repugnant; & accordingly he could be ordered to secure to his divorced wife an annual sum for maintenance by a charge on his interest under the instrument.

With regard to the legal estate it was hardly contended that such a proviso as this would not be bad as being inconsistent with the estate already given to resp. But it was suggested that in the case of trust estates that rule does not apply. I cannot follow that. It is very true that in the case of married women a restraint on anticipation has been allowed, but that restraint cannot be introduced in the case of an equitable limitation in favour of a man (*COTTON, L.J.*).—*CORBETT v. CORBETT* (1888), 14 P. D. 7; 58 L. J. P. 17; 60 L. T. 74; 37 W. R. 114, C. A.

136. Instrument restraining alienation.—Construed strictly.—It must be borne in mind that the cts. have always leaned against a restraint on alienation, & for this very obvious reason, that to give property to a person involves giving him a power to alienate it, & an instrument which, while giving property, takes away that incident to it must always be construed strictly (*FRY, L.J.*).—*STODDON v. LEE*, [1891] 1 Q. B. 661; 60 L. J. Q. B. 669; 64 L. T. 494; 55 J. P. 533; 39 W. R. 467, C. A.

*Annotations*.—*Mentd.* *Pellon v. Harrison*, [1891] 2 Q. B. 422; *Hood-Barrs v. Cathcart*, [1894] 2 Q. B. 559; *Re Lumley, Ex p. Hood-Barrs*, [1896] 2 Ch. 609; *Re Wheeler's Settlement, Trusts, Briggs v. Ryan*, [1899] 2 Ch. 717; *Paquin v. Beauclerk*, [1906] A. C. 148; *Johnson v. Clark*, [1908] 1 Ch. 303; *Re Fieldwick, Johnson v. Adamson*, [1909] 1 Ch. 1.

*Sect. 4.—Restraint of alienation. Part V.]*

**When alienation may be restrained—In gifts.]—**  
*See GIFTS, Vol. XXV., pp. 502, 524, 526, Nos. 11,*  
*12, 166, 182, 183.*

— **In settlements.]—***See SETTLEMENTS.*

— **In wills.]—***See WILLS.*

— **Married women.]—***See HUSBAND & WIFE,*  
*Vol. XXVII., pp. 101–132, Nos. 793–1082.*

**Effect of restraint on bankruptcy.]—***See BANK-*  
*RUPTCY, Vol. V., pp. 653–669, Nos. 5839–5936.*

## Part V.—Creation of Successive Interests.

**By powers.]—***See POWERS, pp. 380 et seq., post.*

**By settlements.]—***See SETTLEMENTS.*

**By trusts.]—***See TRUSTS & TRUSTEES.*

**By wills.]—***See WILLS.*

**Application of rule against perpetuities.]—***See*  
*PERPETUITIES, pp. 52 et seq., ante.*

**In leaseholds.]—***See LANDLORD & TENANT, Vol.*  
*XXX., p. 465, Nos. 1208–1278.*

## PERSONAL REPRESENTATIVES.

*See EXECUTORS AND ADMINISTRATORS.*

## PERSONATION.

*See CRIMINAL LAW AND PROCEDURE.*

## PETITION OF RIGHT.

*See CROWN PRACTICE.*

## PHYSICIANS.

*See MEDICINE AND PHARMACY.*

## PICTURES AND PHOTOGRAPHS.

*See* COPYRIGHT AND LITERARY PROPERTY.

## PIER.

*See* SHIPPING AND NAVIGATION ; WATERS AND WATERCOURSES.

## PILOT AND PILOTAGE.

*See* SHIPPING AND NAVIGATION.

## PIN-MONEY.

*See* HUSBAND AND WIFE.

## PIRACY.

*See* CRIMINAL LAW AND PROCEDURE.

## PISTOLS.

*See* REVENUE ; SALE OF GOODS ; TRADE AND TRADE UNIONS.

## PLAINTS.

*See* COUNTY COURTS.

## PLATE.

*See* CRIMINAL LAW AND PROCEDURE ; TRADE MARKS, TRADE NAMES, AND DESIGNS ; WILLS.

## PLAY GROUNDS.

*See* OPEN SPACES AND RECREATION GROUNDS.

## PLAYS.

*See* COPYRIGHT AND LITERARY PROPERTY ; THEATRES AND OTHER PLACES OF ENTERTAINMENT.

## PLEADING.

Owing to the special character of the cases contained in this Title arrangements are being made for it to be dealt with at a later stage of the work.

## PLEDGE.

*See* AGENCY ; PAWNS AND PLEDGES ; STOCK EXCHANGE.

## PLENE ADMINISTRATIVIT.

*See* EXECUTORS AND ADMINISTRATORS.

## PLENIPOTENTIARIES.

*See* CONFLICT OF LAWS ; CONSTITUTIONAL LAW.

## POACHING.

*See* ANIMALS ; GAME.

## POISONS.

*See* AGRICULTURE ; ANIMALS ; CRIMINAL LAW AND PROCEDURE ; FISHERIES ; GAME ;  
MEDICINE AND PHARMACY.

# POLICE.

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*Bail* . . . . . See CRIMINAL LAW.  
*Constables, Protection of* „ PUBLIC AUTHORITIES.  
*County and Borough*  
*Councils* . . . . . „ LOCAL GOVERNMENT.  
*Criminal Law generally* „ CRIMINAL LAW.  
*Distress* . . . . . „ DISTRESS.

*Motor Cars* . . . . . See STREET AND AERIAL  
 TRAFFIC.  
*Police Courts* . . . . . „ MAGISTRATES.  
*Summary Jurisdiction,*  
*Courts of* . . . . . „ MAGISTRATES.

## Part I.—In General.

1. Constable an officer of the law.]—A constable is one of the most ancient officers in the realm for the conservation of the peace, & by his office he is a conservator of the peace; & if he sees any breaking of the peace, he may take & imprison him until he find surety by obligation to keep the peace; & if a man in fury be purposed to kill, maim, or beat another; the constable seeing it may arrest & imprison him until his rage be passed, for the conservation of the peace. If a man lays an infant which cannot help itself upon a dunghill, or openly in the field, so that the beasts or fowls may destroy it, the constable seeing it may commit the party so doing to prison; for what greater breach of the peace can there be than to put such an infant by such means in danger of its life (POPHAM, C.J.).—ANON. (1593), Poph. 12; 79 E. R. 1135.

*Annotation* :—*Reid*, R. v. Huggins (1730), 2 Ld. Raym. 1574.

2. —.]—Constables are the proper officers of justices of the peace.—*R. v. WYATT* (1705), 2 Ld. Raym. 1189; *Fortes*, Rep. 127; 1 Salk. 380; 92 E. R. 286; *sub nom.* R. v. WIAT, 11 Mod. Rep. 53.

*Annotations* :—*Reid*, R. v. Brain (1832), 3 B. & Ad. 614; *Miller v. Knox* (1838), 4 Bing. N. C. 374.

3. —.]—A high constable may be appointed, & a rate in the nature of a county rate levied, for a town corporate having an exclusive commission of the peace, though not a county of itself, by virtue of 13 Geo. 2, c. 18; though no such officer had been appointed, or such rate levied, before; the corpn. having defrayed the expenses out of their own funds.—*WEATHERHEAD v. DREWRY* (1809), 11 East, 168; 103 E. R. 968.

*Annotations* :—*Mentd.* R. v. Berwick-upon-Tweed JJ. (1828), 8 B. & C. 327; *Mercer v. Davis* (1830), 10 B. & C. 617; *Birmingham Grdns. v. Beaumont* (1859), 33 L. T. O. S. 318; *East Loos Corpn. v. Cornwall JJ.* (1862), 3 B. & S. 20.

*Quo warranto against chief constable*.]—See CROWN PRACTICE, Vol. XVI., p. 361, No. 1921.

*Whether constable a workman—Within Workmen's Compensation Acts*.]—See MASTER & SERVANT, Vol. XXXIV., p. 260, No. 2221.

*Parliamentary franchise*.]—See ELECTIONS, Vol. XX., p. 10, Part II., Sect. 1, sub-sect. 1, B. (m).

*Local Government franchise*.]—See ELECTIONS, Vol. XX., pp. 25, 26 Nos. 136, 137.

## Part II.—Police Forces.

### SECT. 1.—CITY OF LONDON POLICE.

See City of London Police Act, 1839 (c. xciv); Metropolitan Police Act, 1839 (c. 47); Parish Constables Act, 1842 (c. 109); Police Acts, 1890 (c. 45); 1919 (c. 46); Police Disabilities Removal Acts, 1887 (c. 9), 1893 (c. 6); Riot (Damages) Act, 1886 (c. 38); Police Pensions Act, 1921 (c. 31).

4. Police rate.—Under City of London Police Act, 1839 (c. xciv)—Whether new tax or assessment.]—The occupiers of certain hereditaments situate in the city of London & forming part of the area reclaimed from the river Thames under 7 Geo. 3, c. 37, were rated to so much of the general rate levied under the City of London (Union of Parishes) Act, 1907 (c. cxi), as represented the consolidated rate & the police rate, which was imposed by above Act :—*Held* : the exemption granted by 7 Geo. 3, c. 37, though limited by the context to local as distinguished from imperial taxes, extended to all local taxes & assessments, whether present or future, except so far as any Act imposing a new tax qualified or repealed the exemption.—ASSOCIATED NEWSPAPERS, LTD. v. CITY OF LONDON CORPN., [1916] 2 A. C. 429; 85 L. J. K. B.

1786; 115 L. T. 419; 80 J. P. 393; 32 T. L. R. 700; 60 Sol. Jo. 694; 14 L. G. R. 1027, H. L.

*Annotations* :—*Mentd.* *Bourne v. Keane*, [1919] A. C. 815; *Pole-Carew v. Craddock*, [1920] 3 K. B. 109; *Harper v. Hodges*, [1923] 2 K. B. 314; *Re Winget, Burn v. The Co.* [1924] 1 Ch. 350.

See, generally, RATES & RATING.

### SECT. 2.—METROPOLITAN POLICE

#### SUB-SECT. 1.—AREA.

See Metropolitan Police Acts, 1829 (c. 44); 1839 (c. 47); 1860 (c. 135); Trafalgar Square Act, 1844 (c. 60).

#### SUB-SECT. 2.—GOVERNMENT.

##### A. In General.

See Metropolitan Police Acts, 1829 (c. 44); 1850 (c. 2); 1860 (c. 135); 1884 (c. 17); 1909 (c. 40); Police Disabilities Removal Acts, 1887 (c. 9); 1893 (c. 6); Police Act, 1919 (c. 46).

### PART I.

a. Dismissal of police constable.—Power of Governor in Council.]—The Governor in Council has power to discharge or dismiss a member of the police force, although the certificate & report under the Police Regulation Statute, 1873, recommending such discharge, be invalid.—*GREEN v. R.* (1891), 17 V. L. R. 329.—AUS.

J.—VOL. XXXVII.

b. — Right of constable to be present at inquiry.]—*FOLEY v. RYDER*, [1906] 8 R. Q. 225.—AUS.

c. Right to protection.]—A constable *de facto*, while acting in the discharge of his duty, is entitled to the same measure of protection as if his title to the office he professes to fill were undisputed.—*R. v. GIBSON* (1896), 29 N. S. R. (17 R. & G.) 4.—CAN.

d. Grounds for recall.—Of city commissioner of police.—*Allegation of interference w. h. police prosecutions*.]—*Ex p. TOBIN* (N. B.) (1919), 31 Can. Crim. Cas. 68.—CAN.

e. Responsibility of police commissioner.—For acts of constable.]—*THOMSON v. MITCHELL* (1840), 7 Cl. & Fin. 564; 7 E. R. 1184.—SCOT.

*Sect. 2.—Metropolitan police: Sub-sect. 2, A., B. & C.; sub-sects. 3 & 4. Sect. 3.]*

5. **Metropolitan Police Acts — Whether Acts of "local & personal nature."**—The Metropolitan Police Acts are not local & personal within Limitations of Actions & Costs Act, 1842 (c. 97), s. 5; & therefore the times limited by the statutes respectively for the bringing of actions are not altered by that clause.—*BARNETT v. COX* (1840), 9 Q. B. 617; 2 New Mag. Cas. 16; 2 New Sess. Cas. 486; 16 L. J. M. C. 27; 8 L. T. O. S. 160; 11 J. P. 118; 115 E. R. 1410; *sub nom. BARRETT v. COX*, 11 Jur. 118.

*Annotations:—Consd. Moore v. Shepherd* (1854), 10 Exch. 424; *Shepherd v. Sharp* (1856), 1 H. & N. 115. *Reid. R. v. L. C. C.*, [1893] 2 Q. B. 454.

6. ———.]—An Act for the regulation of the police of London, wherever it may be classed by the printer [King's printer], is as much a local & personal Act as those for regulating the police of Manchester or Liverpool, or any other great town (*ALDERSON, B.*).—*MOORE v. SHEPHERD* (1854), 10 Exch. 424; 3 C. L. R. 54; 156 E. R. 502; *sub nom. SHARP v. SHEPHERD*, *MOORE v. SHEPHERD*, *on appeal*, *sub nom. SHEPHERD v. MOORE* (1856), 1 H. & N. 125, Ex. Ch.

*Annotations:—Mentd. Carr v. Royal Exchange Assoc.* (1862), 1 B. & S. 956; *R. v. L. C. C.*, [1893] 2 Q. B. 454.

**Powers of Secretary of State.**—*See Part IX., post.*

**Superannuation.**—*See Part VII., post.*

#### B. The Receiver.

*See Metropolitan Police Acts, 1829 (c. 44); 1839 (c. 47); 1880 (c. 22); 1887 (c. 45); Metropolitan Police Courts Acts, 1839 (c. 71); 1897 (c. 20); Metropolitan Police Magistrates Act, 1875 (c. 3); Metropolitan Police (Receiver) Acts, 1861 (c. 124); 1867 (c. 39); 1895 (c. 12); Riot (Damages) Act, 1880 (c. 38).*

7. **When fines & penalties payable to receiver.—By magistrates' clerks.**—By Metropolitan Police Act, 1829 (c. 44), s. 37, all sums adjudged by justices of peace to be paid for any offence against the Act are to be paid to the receiver of the Metropolitan police district, who, by Metropolitan Police Act, 1829 (c. 44), s. 10, is to apply all moneys applicable to the purposes of the Act to payment of salaries, etc., of the police force, & of all other charges & expenses in carrying the Act into execution. By Metropolitan Police Act, 1839 (c. 47), Metropolitan Police Courts Act, 1839 (c. 71), & Metropolitan Police Courts Act, 1840 (c. 84), certain penalties inflicted by magistrates within the Metropolitan police district are to be paid over to the receiver, who is directed to pay salaries, expenses, & charges attending the Metropolitan police cts., & in carrying the Acts into execution, & to apply the sums which he receives to the purposes of the Act; & the clerks of the magistrates within the district are to keep an account of such fines & penalties, to be rendered to the receiver quarterly; & the magistrates are to cause the amount to be paid to him. The clerks of the justices of a part of Surrey, within the Metropolitan police district, for which no police ct. had been established, claimed to deduct from the amount payable to the receiver the amount of their fees for summonses granted on the application of officers of the police force:—*Held*: the clerks were entitled to such fees; but they were not entitled to deduct them from the amount payable to the receiver, or in any way to recover them from him, the payment of such fees not falling under the description of carrying the Acts into

execution.—*WRAY v. CHAPMAN* (1850), 14 Q. B. 742; 4 New Mag. Cas. 55; 19 L. J. M. C. 155; 14 L. T. O. S. 439; 14 J. P. 95; 14 Jur. 687; 117 E. R. 280.

*Annotations:—Distd. Reddish v. Hitchinor* (1878), 48 L. J. M. C. 31. *Appl. George v. Thomas*, [1910] 2 K. B. 951.

8. ——— **Penalties under Gaming Houses Act, 1854 (c. 38).**—On a summary conviction, under the above Act before a Metropolitan police magistrate:—*Held*: the half of the penalty which was not paid to the informer was payable to the receiver of the Metropolitan police, & not to the overseer; & it made no difference that, under sect. 10 of same Act, there had been an appeal to the quarter sessions against the conviction, which had been there affirmed, & the clerk of the peace had included the half penalty in the estreat of fines & forfeitures imposed at the sessions.—*WRAY v. ELLIS* (1858), 1 E. & E. 276; 28 L. J. M. C. 45; 32 L. T. O. S. 157; 22 J. P. 800; 5 Jur. N. S. 624; 7 W. R. 91; 120 E. R. 913.

*Annotation:—Dtd. R. v. Titterton*, [1895] 2 Q. B. 61.

9. ——— **Penalties imposed by two justices in petty session.**—By Metropolitan Police Courts Act, 1840 (c. 84), s. 6, any two justices having jurisdiction within the Metropolitan police district shall have, while sitting together publicly in the petty sessions ct. or room, except in divisions assigned to the police courts, all the powers, privileges, & duties which any one magistrate of the police courts has by Metropolitan Police Act, 1839 (c. 47), & Metropolitan Police Courts Act, 1830 (c. 71):—*Held*: this did not make penalties, which were recovered before two justices sitting as above, penalties recovered before a police magistrate; & therefore the shares of such penalties unappropriated to the informer or party aggrieved did not go to the receiver of the Metropolitan police district.—*METROPOLITAN POLICE DISTRICT RECEIVER v. BELL* (1872), L. R. 7 Q. B. 433; 41 L. J. M. C. 153; 37 J. P. 55.

10. ——— **Penalties in respect of sale of food.**—An inspector of an authority who had appointed an analyst, having prosecuted to conviction before a Metropolitan police magistrate an offender under Margarine Act, 1887 (c. 29), the magistrate imposed a penalty, but made no direction as to its application:—*Held*: the application of the penalty was a part of the "proceedings" within the meaning of Margarine Act, 1887 (c. 29), s. 12, & the penalty, having been recovered on a prosecution instituted by an officer of the local authority, must be applied as directed by Sale of Food & Drugs Act, 1875 (c. 63), s. 20, Margarine Act, 1887 (c. 29), s. 11, notwithstanding; Sale of Food & Drugs Act, 1875 (c. 63), s. 26, abrogated Metropolitan Police Courts Act, 1839 (c. 71), s. 47, so far as it applied to penalties recovered on prosecutions instituted by such officers; & the penalty imposed in the present case was consequently payable to the inspector of the authority & not to the receiver of the Metropolitan police.—*R. v. TITTERTON*, [1895] 2 Q. B. 61; 64 L. J. M. C. 202; 73 B. T. 345; 11 T. L. R. 394; 18 Cox, C. C. 181; *sub nom. R. v. TITTERTON, Ex p. QUELCH*, 59 J. P. 327; 43 W. R. 603; 15 R. 418, D. C.

#### C. The Commissioners.

*See Metropolitan Police Acts, 1829 (c. 44); 1839 (c. 47); 1850 (c. 2); 1860 (c. 135); Metropolitan Streets Acts, 1867 (c. 134); 1885 (c. 18); Metropolitan Streets Act (Amendment) Act, 1867 (c. 5); London Hackney Carriages Acts, 1843 (c. 86); 1850 (c. 7); 1853 (c. 33); London Hackney Carriage (No. 2) Act, 1853 (c. 127);*

Metropolitan Public Carriage Act, 1869 (c. 115); Chimney Sweepers Act, 1875 (c. 70); Explosives Act, 1875 (c. 17); Licensing (Consolidation) Act, 1910 (c. 24); Metropolitan Market Act, 1857 (c. cxxxv); Public House Closing Act, 1864 (c. 64); Pedlars Act, 1871 (c. 96); Prevention of Crimes Act, 1871 (c. 112); Sunday Observation Prosecution Act, 1871 (c. 87); Thames Conservancy Act, 1894 (c. clxxxvii); Local Government Act, 1888 (c. 41); Police Act, 1919 (c. 46).

11. Indictment directed by Commissioners—Removed by *certiorari* by defendant—Commissioners entitled to costs on conviction.—If the Metropolitan Police Comrs., appointed under Metropolitan Police Act, 1829 (c. 44), s. 1, direct an indictment for assaulting one of the police constables in the execution of his duty, & deft. removes such indictment by *certiorari* & is convicted, the Comrs. are entitled to costs under 5 & 6 Will. & Mar. c. 11, s. 3, as justices of the peace & civil officers whom it concerned to prosecute.—*R. v. WALDEGRAVE (EARL)* (1841), 2 Q. B. 341; 1 Gal. & Dav. 615; 11 L. J. M. C. 19; 6 J. P. 3; 6 Jur. 502; 114 E. R. 134.

Annotations:—*Apld. R. v.* (1850), 15 Q. B. 1060. *Reid. R. v. Dobson* (1846), 10 Jur. 905.

12. Powers—Grant of occasional liquor license—Ball within Metropolitan police district.—Under Public House Closing Act, 1864 (c. 64), s. 5, a licensed victualler cannot expose for sale or sell excisable liquors at a public ball in the Metropolitan police district, between the hours of one & four in the morning, without obtaining an occasional license from the Comr. of police for the metropolis, although he may, with the consent of a justice of the peace, have obtained an occasional license from the Comrs. of Excise authorising him to do so, under Revenue Act, 1862 (c. 22), s. 13, & Revenue Act, 1863 (c. 33), s. 20.—*HANNANT v. FOULGER* (1867), L. R. 2 Q. B. 399; 8 B. & S. 425; 36 L. J. M. C. 119; 31 J. P. 628; 15 W. R. 787.

13. —Street advertisements.]—*FULTON v. KELLY* (1889), 5 T. L. R. 325.

—Hackney carriages.]—*See STREET & AERIAL TRAFFIC.*

—Special constables.]—*See Nos. 59, 60, 64, post.*

—Street trading.]—*See HIGHWAYS*, Vol. XXVI., pp. 423, 424, Nos. 1428–1434.

#### SUB-SECT. 3.—CONSTABLES.

*See Metropolitan Police Acts*, 1829 (c. 44); 1830 (c. 47); 1860 (c. 135); Parish Constables Act, 1842 (c. 109), s. 21; Police Acts, 1890 (c. 45); 1919 (c. 46).

14. Not parish constable.]—*GARLAND v. AHRBECK* (1888), 5 T. L. R. 91.

General powers, duties & privileges.]—*See Part IV., post.*

Legal proceedings by & against constables.]—*See Part V., post.*

#### SUB-SECT. 4.—METROPOLITAN POLICE FUND.

*See Metropolitan Police Acts*, 1829 (c. 44); 1839 (c. 47); 1857 (c. 64); 1912 (c. 4); Metropolitan Police (Receiver) Act, 1861 (c. 124); Metropolitan Police Courts Acts, 1839 (c. 71); 1897 (c. 29); 1898 (c. 31); Local Government Act, 1888 (c. 41); Police Acts, 1890 (c. 45); 1919 (c. 46); Dog Licences Act, 1867 (c. 5); Police Pensions Act, 1921 (c. 31).

Payment of fines or penalties to receiver.]—*See Nos. 7–10, ante.*

Superannuation.]—*See Part VII., post.*

#### SECT. 3.—COUNTY POLICE.

*See County Police Acts*, 1839 (c. 93); 1840 (c. 88); 1857 (c. 2); County & Borough Police Acts, 1856 (c. 69); 1859 (c. 32); Petty Sessions & Lock-up Houses Act, 1868 (c. 22); Local Government Act, 1888 (c. 41); County Rates Act, 1844 (c. 33); Police Acts, 1890 (c. 45); 1919 (c. 46); Police Pensions Act, 1921 (c. 31), sched. III.

15. Formation of districts—Power of quarter sessions—Single parish as separate district—Sufficiency of report to Secretary of State.]—Under County Police Act, 1840 (c. 88), s. 27, a single parish may be constituted a separate police district by itself.

It is no objection to an order of quarter sessions forming county police districts, which a ct. of law can entertain, that the report required by County Police Act, 1840 (c. 88), s. 27, to be sent from the sessions to the Secretary of State, does not contain sufficient materials.—*Ex p. KNOWLING* (1865), 6 B. & S. 195; 34 L. J. M. C. 68; 11 Jur. N. S. 443; 29 J. P. Jo. 68; 122 E. R. 1168; *sub nom. Ex p. EAST STONEHOUSE (INHABITANTS)*, 11 L. T. 733.

16. —Power of standing joint committee.]—The control over the division of a county into police districts is, under Local Government Act, 1888 (c. 41), vested in the standing joint committee of the county.

The effect of this sect. [Local Government Act, 1888 (c. 41), s. 9 (1)] is to give the standing joint committee control over the division of the county into police districts. The payment of the county police is one thing; the distribution of the county police into districts is another (*HAWKINS, J.*).—*Re LOCAL GOVERNMENT ACT, 1888. Ex p. LEICESTERSHIRE COUNTY COUNCIL & STANDING JOINT COMMITTEE OF LEICESTERSHIRE COUNTY*, [1891] 1 Q. B. 53; 60 L. J. M. C. 45; 64 L. T. 25; 39 W. R. 160; 17 Cox, C. C. 205; *sub nom. Re POLICE DISTRICTS, Ex p. LEICESTERSHIRE COUNTY COUNCIL*, 55 J. P. 87; 7 T. L. R. 61, D. C.

17. Liability of county funds—Damages & costs against constable—Action for false imprisonment.]

—*STOPS v. NORTHAMPTONSHIRE JJ.* (1887), 4 T. L. R. 78, D. C.

—Cost of additional constables.]—*See Nos. 78, 79, post.*

18. Constables as inspectors of weights & measures—Validity of appointment by justices.]—Under 5 & 6 Will. 4, c. 63, the sessions have power to appoint inspectors of weights & measures; & for such appointment, they may, if they think fit, select inspectors & superintendents of rural police, acting under County Police Act, 1839 (c. 93); & therefore such appointment cannot be removed by *certiorari*, 5 & 6 Will. 4, c. 63, s. 36, taking away the *certiorari*.—*R. v. JARVIS* (1854), 3 E. & B. 640; 18 J. P. 601; 18 Jur. 1051; 118 E. R. 1282.

Control of county council & standing joint committee over police buildings.]—*See LOCAL GOVERNMENT*, Vol. XXXIII., p. 107, No. 719.

Powers & duties & privileges.]—*See Part IV., post.*

Legal proceedings by & against police.]—*See Part V., post.*

## SECT. 4.—BOROUGH POLICE.

See Municipal Corporation Act, 1882 (c. 50); County Police Acts, 1839 (c. 93); 1840 (c. 88); County Borough Police Acts, 1856 (c. 69); 1859 (c. 88); Local Government Act, 1888 (c. 41); Petty Sessions & Lock-up Houses Act, 1868 (c. 22); Town Police Clauses Act, 1847 (c. 89); Public Health Act, 1875 (c. 55); Police Acts, 1890 (c. 45); 1893 (c. 10); 1919 (c. 40); Police Disabilities Removal Acts, 1887 (c. 9); 1893 (c. 6); Police Pensions Act, 1921 (c. 31), sched. III.; Police, Factories, etc. (Miscellaneous Provisions) Act, 1916 (c. 31).

19. Liability of borough fund—[Extraordinary expenses incurred by high constable.]—*R. v. LEICESTER J.J.*, No. 65, *post*.

20. — Expenses incurred by constables.]—A *mandamus* will issue to a town council to pay the costs incurred by constables, & the fees of the clerk to justices acting under Municipal Corporations Act, 1835 (c. 76).—*R. v. GLOUCESTER CORPN.* (1844), 5 Q. B. 802; *Dav. & Mer.* 677; 13 L. J. Q. B. 233; 3 L. T. O. S. 54; 8 J. P. 855; 8 Jur. 573; 114 E. R. 1474.

*Annotation*:—*Reid. Reddish v. Hitchinor* (1878), 43 J. P. 41.

21. — Expenses incidental to trial of election petition.]—*R. v. TAMWORTH CORPN.* (1869), 33 J. P. Jo. 774.

22. — Costs of legal proceedings by or against police officer—[Indictment against borough constable.]—The town council has no power under Municipal Corporations Act, 1835 (c. 76), to order the expenses of an indictment against a borough constable to be paid out of the borough fund.

*Semble*: the watch committee might, under Municipal Corporations Act, 1835 (c. 76), s. 82, make such an order, subject to the approbation of the council.—*R. v. THOMPSON* (1844), 5 Q. B. 477; *Dav. & Mer.* 497; 2 L. T. O. S. 326; 8 J. P. Jo. 55; 114 E. R. 1329; *sub nom. R. v. STAMFORD CORPN.*, 13 L. J. Q. B. 177; 8 Jur. 558; *subsequent proceedings*, 3 L. T. O. S. 40, 79.

*Annotations*:—*Mentd. R. v. Sheffield Corpn.* (1871), L. R. 6 Q. B. 652; *R. v. Norwich Corpn.* (1882), 30 W. R. 752.

23. — Action for false imprisonment against officer.]—The chief constable of E. was sued for a malicious prosecution, he having by order of the borough magistrates laid an information against certain persons for conspiracy. The town council of E. directed the town clerk to defend the action, & subsequently directed payment of the costs of the action out of the borough fund or borough rates:—*Held*: the town council had no power to order payment of the chief constable's costs out of the borough funds under Municipal Corporations Act, 1835 (c. 76), s. 82.—*R. v. EXETER CORPN.* (1880), 6 Q. B. D. 135; 44 L. T. 101; 45 J. P. 158; 29 W. R. 441.

*Annotation*:—*Reid. R. v. Ramsgate Corpn.* (1889), 23 Q. B. D. 66.

—[See, also, LOCAL GOVERNMENT, Vol. XXXIII., pp. 83, 84, Nos. 536–539.

—[See, generally, LOCAL GOVERNMENT, Vol. XXXIII., pp. 80 *et seq.*

24. Suspension from duty—Power of justices as watch committee.]—A borough police constable sued the watch committee to recover his pay for a period during which he had been suspended by deft.'s from duty for an offence against discipline.

Defts. alleged that pltf. was properly suspended during that period, & was therefore not entitled to pay. Pltf. contended that defts. had no power to suspend him, because the power of suspension conferred upon them by Municipal Corporations Act, 1882 (c. 50), s. 191 (4), was impliedly repealed by Police Act, 1919 (c. 40), & the regulations made thereunder by the Secretary of State:—*Held*: there being nothing in Police Act, 1919 (c. 40), & the regulations thereunder which dealt in any way with suspension, the power conferred by Municipal Corporations Act, 1882 (c. 50), upon the watch committee or two justices was not impliedly repealed, & defts. had power to suspend & to stop pltf.'s pay during the period of suspension.—*WALLWORK v. FIELDING*, [1922] 2 K. B. 66; 91 L. J. K. B. 568; 127 L. T. 131; 86 J. P. 133; 38 T. L. R. 441; 66 Sol. Jo. 366; 20 L. G. R. 618, C. A.

25. — Cessation of right to claim payment—From date of suspension.]—*WALLWORK v. FIELDING*, No. 24, *ante*.

*Superannuation*.]—See No. 125, *post*.

Powers, duties & privileges.]—See Part IV., *post*.

Legal proceedings by & against police.]—See Part V., *post*.

## SECT. 5.—PARISH CONSTABLES.

See Parish Officers Act, 1793 (c. 55), s. 1; Parish Constables Act, 1842 (c. 109), ss. 1–5, 7, 8, 11, 14–17; Parish Constables Act, 1850 (c. 20), ss. 2, 4, 5, 7, 8; Parish Constables Act, 1872 (c. 92), ss. 1–3, 7–12.

26. Appointment—By justices.]—The justices of the peace may elect constables of particular parishes, although no constables had before been chosen for such parish, provided there be no leet for such purpose.—*HOMEBY'S (CONSTABLE) CASE* (1669), 1 Mod. Rep. 13; 86 E. R. 693; *sub nom. R. v. TERREY, ETC.*, 2 Keb. 557.

27. —[If there be a vill & no ct. leet held within it, the justices at sessions may appoint a constable, although no constable had ever been appointed there before.—*R. v. HEWSON* (1699), 12 Mod. Rep. 180; 88 E. R. 1247; *sub nom. CHORLEY VILLAGE CASE*, Holt, K. B. 153; 1 Salk. 175.

*Annotations*:—*Distd. R. v. Davis* (1735), Lee *temp. Hard.* 282. *Reid. R. v. Franchard* (1741), 2 Stra. 1145; *R. v. Weir* (1823), 1 B. & C. 288; *Gimbert v. Coyne* (1825), 3 Dow. & Ry. M. C. 323. *Mentd. Appellthwaite Town v. Hartsop & Batterdale Town* (1729), 1 Barn. K. B. 250.

28. — Compliance with statutory regulations.]—In the exercise of their jurisdiction over the appointment of constables conferred on the sessions by 13 & 14 Car. 2, c. 12, the statute must be strictly pursued.—*R. v. DAVIS* (1736), Lee *temp. Hard.* 282; 2 Stra. 1050; 95 E. R. 182.

29. — By trustees under local Act—Whether all trustees must appoint.]—(1) By an Act of Parliament for paving, lighting, & watching the streets of a parish, the rector, churchwardens, overseers of the poor, & vestrymen, were appointed trustees for putting the Act in execution. By a subsequent Act, the trustees appointed to put the first Act in execution, were appointed trustees for executing that Act, & the said trustees or any thirteen or more of them were authorised to elect

## PART II. SECT. 4.

1. Appointment of police—Validity of.]—*PINEO v. SHAW* (1868), 7 N. S. R. (1 G. & O.) 362.—*GAN.*

2. — Agreement as to fees—

*Validity of*.]—Pltf. appointed deft. chief of police of the town of S. at a named salary, but stipulated that he should act as county constable within the town only, & account for & pay over to pltf. all fees received by him from the county as a reward for ser-

VICES performed by him as a county constable:—*Held*: under 5 & 6 Edw. VI. c. 16, & 49 Geo. III. c. 126, the agreement to account for such fees was invalid.—*STRAFORD CORPN. v. WILSON* (1884), 8 O. R. 104.—*GAN.*

four constables for the parish annually:—*Held*: the presence of the rector at a vestry for the election of a constable was not necessary if thirteen other trustees were present.

(2) The trustees having so appointed the four constables for the year, might also, on the removal from the parish of one of the persons so appointed, elect another person in his stead; for that they were not *functi officio*, & were the proper persons to supply the vacancy.

(3) Indictment charged, that deft. being elected to the office of constable, had neglected & refused to take upon himself the execution of the office. The proof was, that he refused to take the oath of office:—*Held*: that was *prima facie* evidence of a refusal to take upon himself the execution of the office; the indictment sufficiently charged an offence, by alleging that deft. had wholly neglected & refused to take on himself the execution of the office, & it was not necessary to state that he had refused to be sworn.—*R. v. BRAIN* (1832), 3 B. & Ad. 814; 1 L. J. M. C. 53; 110 E. R. 224.

30. — Whether *functi officio* after appointment.]—*R. v. BRAIN*, No. 20, *ante*.

31. — Removal by certiorari.]—*Certiorari* will not lie to bring up a resolution of the vestry for the appointment of paid constables under 5 & 6 Vict. c. 109, s. 118, but it will lie to bring up the appointment itself made by the justices in petty sessions, where the proceedings in vestry have not been conducted in conformity to 53 Geo. 3, c. 69, amended by 59 Geo. 3, c. 85; a poll having been demanded & refused & the resolution being carried by a show of hands.—*Re HIPPERHOLME CUM BRIGHOUSE CONSTABLES* (1847), 5 Dow. & L. 79; 2 Saund. & C. 98; 11 J. P. Jo. 438; *sub nom. R. v. WEST RIDING OF YORKSHIRE JJ.*, 11 Jur. 713.

*Annotations*:—*Reld. R. v. Nicholson*, etc. Bolton JJ., R. v. Greenhalgh, etc. Bolton JJ., *Ex p. Hamber* (1890), 81 L. T. 257; *R. v. Woodhouse*, [1906] 2 K. B. 501.

32. — Preparation & return of lists by overseers—Mandamus to prepare & return.]—Under Parish Constables Act, 1842 (c. 109), ss. 2 & 3, where justices issue a precept to overseers requiring them to return a list of a competent number of men in their parish to serve as constables, & the overseers accordingly summon a vestry within the fourteen days after receiving the precept, prescribed in Parish Constables Act, 1842 (c. 109), s. 3, the vestry has no discretion, but must make out the list. Therefore, where such vestry, having met in obedience to the precept, had adjourned for a twelvemonth, & made no return, this ct., on motion made after the expiration of the fourteen days, issued a *mandamus* commanding the overseers to summon a vestry for the purpose of making out & returning a list. Although the affidavits in support of the rule disclosed no ground for considering the appointment of the parochial constables to be necessary, & although, in opposition to the rule, it was deposed that the inhabitants considered the appointment of parochial constables to be superfluous & uselessly expensive, a paid police having been appointed under County & Borough Police Act, 1856 (c. 69). Although it was also deposed that the parochial constables of the preceding year were ready to serve on.—*R. v. NORTH BIERLEY OVERSEERS* (1858), E. B. & E. 519; 27 L. J. M. C. 275; 31 L. T. O. S. 179; 23 J. P. 133; 4 Jur. N. S. 784; 120 E. R. 603; *sub nom. R. v. THORNTON OVERSEERS & WEST RIDING OF YORKSHIRE JJ.*, 6 W. R. 632.

33. — In addition to paid constable.]—*R. v. NORTH BIERLEY OVERSEERS*, No. 32, *ante*.

34. — Outgoing constables ready to continue service.]—*R. v. NORTH BIERLEY OVERSEERS*, No. 32, *ante*.

35. Acquisition of settlement by service as constable.]—*R. v. HOPE MANSELL (INHABITANTS)* (1783), Cald. Mag. Cas. 252.

*Annotation*:—*Consd. R. v. Booth* (1848), 12 Q. B. 884.

36. —]—Where by a local Act, justices had power to appoint constables for such time as they should think proper, & by a subsequent section, they were empowered to give such constable a salary, "provided such salary did not exceed the annual sum of £20":—*Held*: the office of constable under that Act, was not in its nature an annual office, & a party gained no settlement by serving the office, although he might have been appointed for a year.—*R. v. MIDDLEWICH (INHABITANTS)* (1835), 3 Ad. & El. 156; 1 Har. & W. 152; 4 Nev. & M. K. B. 682; 3 Nev. & M. M. C. 82; 4 L. J. M. C. 90; 111 E. R. 372.

37. Not annual office.]—*R. v. MIDDLEWICH (INHABITANTS)*, No. 36, *ante*.

38. Service by deputy.]—*R. v. HOPE MANSELL (INHABITANTS)* (1783), Cald. Mag. Cas. 252.

*Annotation*:—*Reld. R. v. Booth* (1848), 12 Q. B. 884.

39. —]—The office of constable may be served by deputy. The Crown may grant exemptions from serving officers of this sort, provided a sufficient number of persons be left to serve them.—*R. v. CLARKE* (1787), 1 Term Rep. 679; 99 E. R. 1317.

*Annotation*:—*Consd. R. v. Booth* (1848), 12 Q. B. 884.

40. — Deputy absconding.]—Where a person is appointed constable, & he procures a deputy to serve for him, who is sworn in at the leet & approved of by the inhabitants, if he absconds & does not serve, the principal is nevertheless discharged.—*UNDERHILL v. WITTS* (1799), 3 Esp. 56; 170 E. R. 536.

*Annotation*:—*Consd. R. v. Booth* (1848), 12 Q. B. 884.

41. — Whether deputy must be on overseer's list.]—Under Parish Constables Act, 1842 (c. 109), it is not necessary that a person, named as substitute for & by a person selected as constable from the vestry list of persons qualified & liable, or recommended, to serve, should himself be on the vestry list.—*R. v. BOOTH* (1848), 12 Q. B. 884; 3 New Sess. Cas. 303; 18 L. J. M. C. 25; 18 L. J. Q. B. 48; 12 L. T. O. S. 147; 13 Jur. 6; 116 E. R. 1102; *sub nom. Re BOOTH*, 12 J. P. 760.

42. Exemption from service.]—*R. v. CLARK* (1665), 1 Sid. 272; 82 E. R. 1101.

43. — Member of College of Physicians.]—*R. v. PORDICH* (1669), 1 Sid. 431; 82 E. R. 1199.

44. — Constable of manor.]—Constable of a manor, including a parish, but more extensive, is not exempt from serving this office by having a certificate of exemption under 10 & 11 Will. 3, c. 23.—*R. v. DARBISHIRE* (1701), 2 Burr. 1182; 97 E. R. 778.

*Annotation*:—*Distd. Mosely v. Stonehouse* (1806), 7 East, 174.

45. — Granted by Crown.]—*R. v. CLARK* (1665), 1 Sid. 272; 82 E. R. 1101.

46. — Member of Barbers Company.]—A member of the Barbers Company in the City of London, is not exempted, from serving the office of constable.—*R. v. CHAPPLE* (1811), 3 Camp. 91; 170 E. R. 1316, N. P.

47. — Non-resident carrying on trade.]—A person is not liable to serve the office of constable unless he be resident in the parish, & therefore a person occupying a house & paying all parish rates

**Sect. 5.—Parish constables. Sect. 6: Sub-sect. 1.]**

in respect of it, & carrying on the trade of a printer, frequenting the house daily on all working days, & sometimes remaining there during the night at work, but not sleeping in the house, is not liable to serve the office of constable in the parish where the house is situate.—*R. v. ADLARD* (1825), 4 B. & C. 772; 7 Dow. & Ry. K. B. 340; 3 Dow. & Ry. M. C. 416; 107 E. R. 1247.

*Annotations*:—*Consd. R. v. Booth* (1848), 12 Q. B. 884. *Mondt. Donne v. Martyr* (1828), 8 B. & C. 62; *R. v. Mainwaring* (1829), 10 B. & C. 66; *R. v. Wilson* (1840), 4 Jur. 1128; *R. v. Gavan Duffy* (1848), 4 Cox, C. C. 172.

48. — Appointment to more than one parish — Appointment in same year.]—(1) H. occupied a warehouse in Manchester, within the jurisdiction of the ct. leet, where he carried on his business, but did not reside; & he usually lodged & boarded in Manchester from Monday till Saturday. He had also premises in Haslingden, in which township he slept when not at Manchester; & he did suit & service to the ct. leet of Haslingden:—*Held*: H. was liable to be appointed a constable of the Manchester leet.

(2) In 1808 fines of £100 had been imposed, & submitted to, for refusing the office of constable in Manchester, the parties fined not claiming exemption; since that time the duties of the office had greatly increased, & the number of residents qualified to serve had diminished; & it was sworn that difficulty was expected in procuring persons to serve, unless considerable fines were imposed for refusing:—*Held*: under these circumstances, a fine of £300 on a person merely refusing to serve by reason of an alleged exemption, was excessive.—*R. v. MOSLEY* (1835), 3 Ad. & El. 488; 5 Nev. & M. K. B. 261; 3 Nev. & M. M. C. 257; 11 E. R. 499; *sub nom. R. v. MANCHESTER (LORD OF THE MANOR)*, 4 L. J. M. C. 106.

49. Refusal to accept office—Indictment for.]—The sessions cannot commit a person for refusing to take upon him the office of constable; but they may indict & fine, & commit for the non-payment of the fine.—*CRAWLEY'S CASE* (1640), Cro. Car. 567; 79 E. R. 1087.

50. — — —.]—*R. v. LONE* (1731), 2 Stra. 920; *Fitz. G. 192*; *Sess. Cas. K. B. 118*; 93 E. R. 942; *sub nom. R. v. LANE*, 2 Barn. K. B. 56.

*Annotation*:—*Mentd. Ouston v. Hebden* (1745), 1 Wills. 101.

51. — — — Sufficiency.]—*R. v. BRAIN*, No. 29, *ante*.

52. — — — Committal.]—*CRAWLEY'S CASE*, No. 49, *ante*.

53. — — — Fine—Committal for non-payment.]—*CRAWLEY'S CASE*, No. 49, *ante*.

54. — — —.]—*R. v. MOSLEY*, No. 48, *ante*.

55. Fees & allowances—Appeal to sessions by overseers—Appeal by one overseer.]—18 Geo. 3, c. 25, s. 5, gives an appeal to the sessions against the allowance by two justices of constable's accounts, in case the overseer or overseers shall find that the parish or township is aggrieved thereby; but the right of appeal cannot be exercised by one overseer without the consent of the majority. Therefore where a township had four overseers & four churchwardens, & seven were for allowing the constable's accounts, against the sense of the eighth & a majority of the lay-payers; & two justices afterwards allowed the

accounts:—*Held*: the single overseer could not appeal against the allowance in his own name, & this ct. refused a *mandamus* to the sessions to hear the appeal.—*R. v. MANCHESTER JJ.* (1822), 1 Dow. & Ry. K. B. 454; 1 Dow. & Ry. M. C. 117.

56. — Fees for warrants.]—*R. v. CHELMSFORD (CHURCHWARDENS)*, No. 104, *post*.

**SECT. 6.—SPECIAL CONSTABLES; ADDITIONAL POLICE.****SUB-SECT. 1.—SPECIAL CONSTABLES.**

*See* Special Constables Act, 1831 (c. 41); 1923 (c. 11); Municipal Corporation Act, 1832 (c. 50); Police Act, 1890 (c. 45); Universities Act, 1825 (c. 97); County Police Act, 1840 (c. 88).

57. Appointment—Power to appoint yearly—In addition to appointment in emergency.]—The borough of M. which was incorporated by charter in Oct. 1838, & has a separate commission of the peace & grant of quarter sessions, is situate locally within the M. division, one of several into which the County Palatine of Lancaster is divided & in & for each of which, including the M. division, petty sessions are held. An order was made at special sessions for the borough under Special Constables Act, 1831 (c. 41), s. 13, requiring the county treasurer to pay for the services of special constables called out & appointed by justices of the borough under the same Act for the staves, etc. On *mandamus* to pay, & return thereto:—*Held*: no answer that the constables were called out within the M. division & the order was not made by justices for the division. 5 & 6 Will. 4, c. 76, s. 83, empowering borough justices to appoint special constables once a year & to pay them out of the borough fund does not supersede the general authority given to justices of any town, etc., by Special Constables Act, 1831 (c. 41), s. 1, to appoint special constables on information that a riot may be apprehended. A borough newly incorporated under 5 & 6 Will. 4, c. 76, is, in respect of its liabilities under sects. 114, 117, a town "contributory to the public rate for" the "county" within Special Constables Act, 1831 (c. 41), s. 13; & its justices therefore may order the county treasurer to pay the recompense, & costs of the staves, etc., of special constables appointed by them under the latter Act.—*R. v. HULTON* (1849), 13 Q. B. 592; 4 New Mag. Cas. 43; 19 L. J. M. C. 32; 14 L. T. O. S. 437; 14 J. P. 159; 13 Jur. 1093; 116 E. R. 1389.

58. — Duration.]—A special constable duly appointed under Special Constables Act, 1831 (c. 41), s. 9, is appointed for an indefinite time, & remains a constable till his services are either determined or suspended; & being so appointed under that statute, he has all the authority of an ordinary constable until his services are either suspended or determined.—*R. v. PORTER & THOMAS* (1841), 9 C. & P. 778.

59. — By Metropolitan Commissioners—Appointment requested for particular purpose—Validity of appointment for general purposes.]—Under Metropolitan Police Act, 1839 (c. 47), s. 8, the appointment of a constable is an appointment of the person to act as a constable for all purposes, although the application to the Comrs. mentions a particular purpose only, as, for instance, the necessity for an additional constable to execute distress warrants, to recover the amount due for

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*h. Appointment—When necessary—State of emergency existing.*]—*NANDA KISHORE SINGH v. R.* (1908), 1 L. R. 35 Cal. 484.—*IND.*

parish rates. The necessity for such appointment is entirely a matter upon which the Comrs. are to exercise their own judgment.—*ALLEN v. PREECE* (1854), 10 Exch. 443; 24 L. J. Ex. 9; 10 J. P. 22; 3 W. R. 12; 156 E. R. 510.

60. — & regulation—Power of Metropolitan Commissioners.]—By Special Constables Act, 1914 (c. 61), s. 1 (1), "His Majesty may, by order in Council, make regulations with respect to the appointment & position of special constables appointed during the present war under the Special Constables Act, 1831 (c. 41) . . . & may, by those regulations, provide (*inter alia*) . . . (c) for the application to special constables to which the regulations apply of any of the provisions of the Police Acts, 1839, to 1910 . . . subject to such modifications as may be specified in the regulations. . . ." By Police Act, 1839 (c. 93), s. 6, the chief constable may at his pleasure dismiss all or any of the other constables to be appointed for the county.

Regulations known as "The Special Constables Order, 1914, were made under the Act. By regulation 6 the chief officer of police may at his pleasure dismiss any special constable:—*Held*: the regulation was not *ultra vires*, inasmuch as upon the true construction of the word "position" in Special Constables Act, 1914 (c. 61), s. 1 (1), viewed in the light of the power of dismissal by the chief constable contained in Police Act, 1839 (c. 93), s. 6, which is applied with the necessary modifications by clause (c), it was the intention of the Legislature to confer the power to make regulations not only with respect to the position of special constables while they hold that office, but also with respect to the determination of the office; therefore, the Comr. of Metropolitan police, who is by the schedule to the order the "chief officer of police" for the Metropolitan police district, has the power to dismiss a Metropolitan special constable.

Even without the aid of clause (c) the words in Special Constables Act, 1914 (c. 61), s. 1 (1), conferring power to make regulations with regard to the "appointment & position" of special constables would in their natural meaning include a power to make regulations with respect to the termination of the office of a special constable (*LUSH, J.*).—*METROPOLITAN POLICE COMR. v. HANCOCK*, [1916] 1 K. B. 190; 85 L. J. K. B. 339; 114 L. T. 67; 80 J. P. 144; 32 T. L. R. 95; 14 L. G. R. 604, D. C.

61. Refusal to serve—Indictment.]—If persons duly called upon by the magistrates to serve as special constables refuse to do so, the magistrates ought to cause them to be indicted.—*R. v. VINCENT, EDWARDS, DRINKWATER & TOWNSEND* (1839), 9 C. & P. 91.

*Annotations*:—*Mentd.* *O'Kelly v. Harvey* (1882), 15 Cox, C. C. 435; *R. v. O'Connell* (1844), 5 State Tr. N. S. 1.

62. Powers—Same as ordinary constable—Until services suspended or determined.]—*R. v. PORTER & THOMAS*, No. 58, *ante*.

63. Dismissal—Power of Metropolitan Commissioner—Metropolitan special constable.]—*METROPOLITAN POLICE COMR. v. HANCOCK*, No. 60, *ante*.

64. — Action for wrongful dismissal.]—The effect of s. 6 of the Special Constables Order, 1914, made under Special Constables Act, 1914 (c. 61), s. 1 (1), is that no action will lie against a chief constable for alleged wrongful dismissal of a special constable.—*PORTCH v. KERSLAKE* (1917), 84 T. L. R. 77.

65. Expenses of maintenance—Liability of county funds—"Extraordinary expenses" of

borough high constable.]—Where the high constable of a borough, by the direction of the justices, employed & paid a number of special constables to suppress riots at an election, & the ordinary constables were also constantly employed by him during the same period in endeavouring to keep the peace, for which service he made them a compensation:—*Held*: the justices were warranted in considering the moneys so expended as "extraordinary expenses incurred by the high constable in case of riot," within Constables Expenses Act, 1801 (c. 78), s. 2, & in making an order upon the treasurer to reimburse him those expenses.—*R. v. LEICESTER JJ.* (1827), 7 B. & C. 6; 9 Dow. & Ry. K. B. 772; 4 Dow. & Ry. M. C. 518; 5 L. J. O. S. M. C. 95; 108 E. R. 627.

*Annotations*:—*Mentd.* *Gwynne v. Burnell* (1835), 2 Scott. 16; *Cole v. Green* (1843), 6 Man. & G. 872; *Catterall v. Sweetman* (1847), 1 Rob. Eccl. 304; *Bowman v. Blyth* (1857), 27 L. J. M. C. 21; *L. v. Workson Board of Health* (1894), 10 L. T. 297; *Montreal Street Ry. v. Normandin*, [1917] A. C. 170.

66. — Appointment by borough justices.]—*R. v. HULTON*, No. 57, *ante*.

67. — Order for payment—Made at special sessions of justices of petty sessional division.]—Under the Act [Special Constables Act, 1831 (c. 41)] for amending the laws relating to the appointment of special constables, which, by sect. 13, enables the justices of the peace, acting for the division or limits within which such special constables shall have been called out to serve, at a special session to be held for that purpose, to order, the expenses of such special constables, if the justices so ordering are justices for any county, riding or division having a separate commission of the peace, to be paid by the county treasurer out of the public money then in his hands, the order for payment may be made by justices at a special session in & for a petty sessional division, & need not be made at a special session of justices acting for the whole county, riding, or division within which special constables are appointed.—*R. v. MARYLEBONE JJ.* (1868), 37 L. J. M. C. 181.

68. — — — — —.]—By Special Constables Act, 1831 (c. 41), s. 1, if it shall be made to appear to two justices of any county, riding, or division having a separate commission of the peace, that a tumult or riot is apprehended within any parish or place within the division or limits for which the justices usually act, they are empowered to appoint special constables. By Special Constables Act, 1831 (c. 41), s. 13, the justices acting for the division or limits within which the special constables have been called out, at a special session to be held for the purpose, are empowered to order the payment of the expenses of such constables, the order to be made on the treasurer of the county of which they are justices. Constables having been appointed & called out for the parish of M., within the M. petty sessional division of a county:—*Held*: an order for the expenses was rightly made at a special session of the justices usually acting in the petty sessional division, & need not be made at a special session of the whole body of justices for the county.—*R. v. HAMILTON* (1868), L. R. 3 Q. B. 718; *sub nom. R. v. MIDDLESEX JJ.*, 18 L. T. 680; 32 J. P. 661; 16 W. R. 1168.

69. — — — — —.]—By Special Constables Act, 1831 (c. 41), s. 1, justices are empowered to appoint special constables in the manner therein provided. By Special Constables Act, 1831 (c. 41), s. 13, justices are empowered to order "at a special session to be held for that purpose" allowances to such special constables



**Sect. 6.—Special constables; additional police: Sub-sects. 1 & 2. Part III.]**

for their trouble, etc.; such order to be made on the treasurer of the county. Special constables were appointed by justices for the county of C., but their appointment was not made in the manner pointed out by the Act. They acted, & an order on the county treasurer was made for payment for their trouble, etc., by justices then sitting for the purpose of auditing the accounts of the expenses of special constables after the business of an ordinary petty session had been concluded. No notice for the holding of any special session had been given. The order was general in form, being a mere direction to pay, & it did not recite any of the facts which gave the justices jurisdiction to make it. The treasurer paid the amount, & the payment was afterwards allowed at quarter sessions:—*Held*: although the appointment of the special constables was not regular, & assuming that the order for their payment was originally invalid, because not made at a special session held for the purpose, yet the ct., in the exercise of its discretion, would not grant a *certiorari* to bring up the order, as the proceedings were completely finished & no benefit could arise from re-opening them.

*Semble*: such an order [for payment of expenses of special constables] is in the nature of a direction to the officer of the justices, & need not show on the face of it that the justices signing it had jurisdiction to make it.—*R. v. NEWBOROUGH (LORD)* (1869), L. R. 4 Q. B. 585; 10 B. & S. 586; 38 L. J. M. C. 129; 17 W. L. 861; *sub nom.* *R. v. CARNARVONSHIRE J.J.*, 20 L. T. 818.

*Annotations*.—*Appld.* *R. v. Surrey J.J.* (1870), L. R. 5 Q. B. 466. *Refd.* *R. v. Johnson* (1905), 74 L. J. K. B. 585.

70. ——— **Necessity for showing jurisdiction to make.**—*R. v. NEWBOROUGH (LORD)*, No. 69, *ante*.

71. ——— **Certiorari to quash.**—*R. v. NEWBOROUGH (LORD)*, No. 69, *ant.*

72. ——— **Liability of borough fund.**—*R. v. TAMWORTH CORPN.* (1869), 33 J. P. Jo. 774.

73. ——— **Expenses of ordinary citizens not allowed—Riot.**—It is said that, because the magistrates have power to call on the soldiers, as citizens, to keep the peace, therefore the county funds are liable for the maintenance of the soldiers while so engaged. There is an utter absence of authority for that proposition. There was no authority cited to show that the magistrates are bound to maintain the troops, nor is it shown that persons other than soldiers have ever been in any way reimbursed by the magistrates under such circumstances, unless in the case of special constables, which is specially provided for. On the other hand, there is something on which an argument by analogy in favour of the opposite view may be founded. The Act of 2 Hen. 5, stat. 1, c. 8, after providing for the suppression of riots by the justices, & the sheriff, or undersheriff of the county, "with the power of the said county," contains this clause: "Provided always that the said justices, & other officers aforesaid, shall exercise their offices aforesaid at the King's cost in going & continuing in doing their said offices, by payment thereof to be made by the sheriff of the same county for the time being by indentures betwixt the sheriff & the said justices & other officers aforesaid, to be made of the payment aforesaid, whereof the said sheriff upon his account in the Exchequer may have due allowance." It is true that at that time there was no standing

army; but the same services would be rendered as were rendered by the troops in the present case, & the Crown would bear the cost, not the county.

Both on authority such as there seems to be, & on considerations of convenience. . . I have come to the conclusion that there is no power to charge the expenses here in question on the county funds, & therefore that the order *nisi* for a *mandamus* ought to be discharged (*DARLING, J.*).

—*R. v. GLAMORGANSHIRE COUNTY COUNCIL, Ex p. MILLER*, [1899] 2 Q. B. 26; 63 J. P. 470; 15 T. L. R. 342; 43 Sol. Jo. 457, D. C.; *affd.*, [1899] 2 Q. B. 536, C. A.

*Annotation*.—*Refd.* *Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee*, *Powell Duffryn Steam Coal Co. v. Same*, [1916] 1 K. B. 471.

74. ——— **Order for payment—Notice to party liable to pay.**—An order was made by justices, which, after reciting that a special constable had been appointed pursuant to Special Constables Act, 1831 (c. 41), & that the appointment was occasioned by the behaviour & by reasonable apprehension of the behaviour of the persons employed on deft.'s works, ordered defts., in pursuance of 1 & 2 Vict. c. 80, to pay to the special constable the sum of £3 9s. for his services as special constable. Defts. had no notice either of the appointment of the special constable or of the order for payment by them until after the same was made:—*Held*: the making of the order for the payment of the expenses of the special constable was a judicial proceeding, & defts. were entitled to notice before the order was made.—*R. v. CHESHIRE LINES COMMITTEE* (1873), L. R. 8 Q. B. 344; 42 J. L. M. C. 100; 28 L. T. 808; 37 J. P. 806; 21 W. R. 846.

**Duty of magistrates in case of riots.**—*See MAGISTRATES*, Vol. XXXIII., p. 306, No. 234.

**Assistance of special constable in seizure of goods fraudulently removed.**—*See DISTRESS*, Vol. XVIII., p. 364, No. 1013.

**SUB-SECT. 2.—CONSTABLES EMPLOYED BY PUBLIC COMPANIES.**

75. **Right of company to employ constables.**—The employment of policemen by a co. to protect their property is an act within the scope of the incorporation of the co.—*EDWARDS v. MIDLAND RY. CO.* (1880), 6 Q. B. D. 287; 50 L. J. Q. B. 281; 43 L. T. 694; 45 J. P. 374; 29 W. R. 609.

*Annotations*.—*Consd.* *Lambert v. G. E. Ry.*, [1909] 2 K. B. 776. *Mentd.* *Kent v. Courage*, *Croft v. Courage* (1890), 55 J. P. 264; *Flood v. Jackson*, [1895] 2 Q. B. 21; *Cornford v. Carlton Bank*, [1899] 1 Q. B. 392; *Pratt v. British Medical Assocn.*, [1919] 1 K. B. 244.

76. ——— **Railway companies.**—The employment of special constables by railway cos. is a thing which has been recognised by Parliament for pretty nearly eighty years, & at any rate for more than seventy years, & the fact that it is within the scope or within the duties of railway cos. to employ police constables, whether in plain clothes or not makes no difference, has been decided by authority which is now beyond doubt (*COZENS-HARDY, M.R.*).—*LAMBERT v. GREAT EASTERN RY. CO.*, [1909] 2 K. B. 776; 79 L. J. K. B. 32; 101 L. T. 408; 73 J. P. 445; 25 T. L. R. 784; 53 Sol. Jo. 732; 22 Cox. C. O. 165, C. A.

**Liability of companies for acts of constables.**—*See MASTER & SERVANT*, Vol. XXXIV., pp. 135, 136, Nos. 1046, 1052-1054.

**Liability of individual constables.**—*See TRESPASS.*



## Part III.—Consolidation and Mutual Assistance of Police Forces.

See County Police Act, 1840 (c. 88); County & Borough Police Act, 1856 (c. 69); Police Acts, 1890 (c. 45); 1919 (c. 46).

**77. Consolidation of forces — Borough with commission of peace but no quarter sessions—Costs of prosecution before borough justices—Whether chargeable to county.**—A borough having a population of over ten thousand had a separate commission of the peace & justices' clerk, but not a separate ct. of quarter sessions. The borough paid the justices' clerk by salary, & the clerk's fees received from prosecutions went to the borough fund, & the borough had the right of appointing its own police, but by arrangement, the county provided the borough with police, for which an agreed sum was paid to the county. Questions having arisen between the borough & the county as to the right to receive fines imposed by the borough justices when those fines were not appropriated by the statutes creating the offences, & as to the liability to bear the costs of prosecutions instituted by the police before the borough bench when those costs were not received in the proceedings, & it having been conceded that the county was entitled to receive the unappropriated fines & penalties:—*Held*: the costs of prosecutions undertaken by the police before the borough justices, in cases in which such costs are not remitted & are not recovered from debt. to the proceedings, fall upon the borough fund, & are not chargeable to the county fund, although the unappropriated fines go to the county fund.—*GEORGE v. THOMAS*, [1910] 2 K. B. 951; 80 L. J. K. B. 7; 103 L. T. 456; 74 J. P. 398; 8 L. G. R. 849.

**78. Mutual assistance of forces — Expenses of maintenance of additional constables—Between county & borough.**—A borough which maintains a separate police force is entitled to be paid by the county council, under Local Government Act, 1888 (c. 41), s. 24 (2) (j), one-half of the cost of the pay & clothing of extra police temporarily added from another police force under Police Act, 1890 (c. 45), s. 25, & paid for by agreement under that Act.—*R. v. WEST RIDING OF YORKSHIRE COUNTY COUNCIL*, [1895] 1 Q. B. 805; 64 L. J. M. C. 145; 72 L. T. 520; 59 J. P. 340; 43 W. R. 386; 11 T. L. R. 311; 18 Cox, C. C. 141; 14 R. 391, C. A.

*Annotation*:—*Reid*, *Glamorgan Coal Co. v. Glamorganshire Standing Joint Committee*, *Powell Duffryn Steam Coal Co. v. Same*, [1915] 1 K. B. 471.

**79. — Assistance not authorised by standing joint committee.**—Riots occurred in connection with strikes of workmen at pl'ts.' coal mines. The police force of the county being unable to cope with the disturbances, the chief constable,

with the authority of the magistrates of the petty sessional division, telegraphed for the military to be sent down, but the Home Secretary instead sent some metropolitan police. The chief constable also made agreements under Police Act, 1890 (c. 45), s. 25, with the police authorities of other counties & boroughs for the supply of extra police. These agreements contained provisions for the housing & feeding by the aided authority of the imported police. *Pl'tfs.*, at the request of the chief constable, provided housing accommodation & meals for a number of the police so brought into the county & for the metropolitan police. The standing joint committee, who were the police authority for the county, expressly repudiated liability in respect of the metropolitan police on the ground that their assistance had not been requested. In an action by *pl'tfs.* against the standing joint committee & the county council to recover the expenses so incurred by them for housing & feeding the imported police:—*Held*: (1) *defts.* were liable for the expenses of housing & feeding the police other than the metropolitan police, the evidence showing either that the chief constable had antecedent authority from the standing joint committee to make the necessary contracts under Police Act, 1890 (c. 45), s. 25, for bringing them in & for housing & feeding them, or that the standing joint committee had ratified his acts; (2) *defts.* were not liable in respect of the metropolitan police, the standing joint committee not having asked for their assistance & having repudiated all liability in respect of them; (3) the standing joint committee had power to enter into the contracts so as to bind themselves, & they were therefore rightly sued upon them, the county council being properly joined as parties to the action as they were the persons who would have to pay the amount found due & against whom an order for payment might be necessary.—*GLAMORGAN COAL CO. v. GLAMORGANSHIRE STANDING JOINT COMMITTEE*, *POWELL DUFFRYN STEAM COAL CO. v. SAME*, [1916] 2 K. B. 206; 85 L. J. K. B. 1193; 114 L. T. 717; 80 J. P. 289; 32 T. L. R. 293; 14 L. G. R. 419, C. A.

*Annotation*:—*As to* (1) *Const.* *Glasbrook v. Glamorgan County Council*, [1925] A. C. 270.

**80. — Power of standing joint committee to contract—Council council as party to action for expenses.**—*GLAMORGAN COAL CO. v. GLAMORGANSHIRE STANDING JOINT COMMITTEE*, *POWELL DUFFRYN STEAM COAL CO. v. SAME*, No. 79, *ante*.

**81. — Special protection requested.**—*GLASBROOK BROTHERS, LTD. v. GLAMORGAN COUNTY COUNCIL*, No. 82, *post*.

## Part IV.—Duties, Powers, and Privileges of Constables.

### SECT. 1.—DUTIES.

#### SUB-SECT. 1.—IN GENERAL.

See Statute of Winchester, 1285 (c. 6); County Police Act, 1839 (c. 93); Metropolitan Police Act, 1839 (c. 47); City of London Police Act, 1839 (c. xciv); County & Borough Police Acts, 1850 (c. 32); 1919 (c. 84); Town Police Clauses Act, 1847 (c. 89); Summary Jurisdiction Act, 1848 (c. 43); Police Act, 1919 (c. 46).

**82. Duty to provide sufficient protection without payment—Agreement for payment for special protection.]—**Although the police authority are bound to provide sufficient protection to life & property without payment, if in particular circumstances, at the request of an individual, they provide a special form of protection outside the scope of their public duty they may demand payment for it.

On the occasion of a strike a colliery manager applied for police protection for his colliery & insisted that it could only be efficiently protected by billeting a police force on the colliery premises. The police superintendent was prepared to provide what in his opinion was adequate protection by means of a mobile force, but refused to billet police officers at the colliery except on the terms of the manager agreeing to pay for the force so provided at a specified rate:—*Held*: there was nothing illegal in the agreement, nor was it void for want of consideration.—*GLASBROOK BROTHERS, LTD. v. GLAMORGAN COUNTY COUNCIL*, [1925] A. C. 270; 94 L. J. K. B. 272; 132 L. T. 611; 89 J. P. 29; 41 T. L. R. 213; 69 Sol. Jo. 212; 23 L. G. R. 61, H. L.; *affg.* S. C. *sub nom.* *GLAMORGAN COUNTY COUNCIL v. GLASBROOK BROTHERS*, [1924] 1 K. B. 879, C. A.

#### SUB-SECT. 2.—OFFENCES RELATING TO OBSTRUCTION OF CONSTABLES IN PERFORMANCE OF DUTIES.

**Restricting or obstructing constable.]—**See CRIMINAL LAW, Vol. XV., pp. 707-711, Nos. 7658-7685.

**Whether death of constable amounts to murder or manslaughter.]—**See CRIMINAL LAW, Vol. XV., pp. 784-786, Nos. 8436-8448, 8459-8476.

**Assault on constable.]—**See CRIMINAL LAW, Vol. XV., pp. 822, 823, 828, 831, 832, Nos. 8978, 8985-8988, 9080, 9121, 9127, 9140.

#### SUB-SECT. 3.—RIGHT TO REWARDS FOR APPREHENSION OF WRONGDOERS.

**83. Whether police entitled to reward—Police acting on information from others.]—**An advertisement respecting a robbery of bank notes, promised "that whoever would give information by which the same might be traced, should on conviction of the parties, receive a reward of £20:—*Held*: the word "information" meant the first information; &, therefore, though *pltf.* had given sufficient information he was not entitled to recover, as it

was not given until after other sufficient information had been received.—*LANCASTER v. WALSH* (1838), 4 M. & W. 16; 1 Horn & H. 258; 7 L. J. Ex. 209; 3 J. P. 511; 150 E. R. 1324.

*Annotations*:—*Consd.* *Lockhart v. Barnard* (1845), 14 M. & W. 674; *Thatcher v. England* (1846), 3 C. B. 254; *Bent v. Wakefield Bank* (1878), 4 C. P. D. 1.

**84. ———.]—***Deft.*, who had been robbed of jewellery, published an advertisement, headed "£30 reward," describing the articles stolen, & concluding thus:—"The above sum will be paid by the adjutant of the 41st regiment, on recovery of the property, & conviction of the offender, or in proportion to the amount recovered." A., a solicitor, on June 10, informed his sergeant that B. had admitted to him that he was the party who had committed the robbery, & the sergeant gave information at the police station. On June 14, *pltf.*, a police constable, learning from C. that B. was to be met with at a certain place, went there & apprehended him. *Pltf.* by his activity & perseverance, afterwards succeeded in tracing & recovering nearly the whole of the property, & in procuring evidence to convict B.:—*Held*: *pltf.* was not, but A. was the party entitled to the reward.—*THATCHER v. ENGLAND* (1846), 3 C. B. 254; 15 L. J. C. P. 241; 7 L. T. O. S. 321; 10 Jur. 597; 136 E. R. 102.

*Annotations*:—*Consd.* *Bent v. Wakefield Bank* (1878), 4 C. P. D. 1. *Refd.* *Neville v. Kelly* (1862), 12 C. B. N. S. 740.

**85. ———.]—***Ordinary duty of constable to give information.]—**Deft.* sued for the reward promised by advertisement to any person who would give such information as would lead to the conviction of those concerned in a burglary in his (*deft.*'s) house, pleaded, that *pltf.* was policeman of the district where the house was, & therefore that it was his duty to give the information without reward:—*Held*: the information might have been supplied under such circumstances as that *pltf.* had done more than his ordinary duty required, & therefore he was entitled to judgment.—*ENGLAND v. DAVIDSON* (1840), 11 Ad. & El. 856; 3 Per. & Dav. 594; 9 L. J. Q. B. 287; 4 Jur. 1032; 113 E. R. 640.

*Annotation*:—*Expld.* *Bent v. Wakefield Bank* (1878), 4 C. P. D. 1.

**86. ———.]—***Voluntary confession by prisoner.]—**Defts.*, by public advertisement, offered a reward of £20 to any person who would give such information as should lead to the apprehension & conviction of the party or parties who had broken into, robbed, & set fire to their premises. B., whom *pltf.* had taken into custody on suspicion of being concerned in the offence, offered to make certain disclosures if furnished with something to eat & drink. *Pltf.* communicated this offer to a sub-inspector of police, who took B. to a public-house, & gave him refreshment, whereupon B. made a voluntary confession, which resulted in his conviction & transportation for the crime in question:—*Held*: *pltf.* was entitled to the reward.—*SMITH v. MOORE* (1845), 1 C. B. 438; 5 L. T. O. S. 38; 9 J. P. 376; 9 Jur. 352; 135 E. R. 610

*Annotations*:—*Distd.* *Tarner v. Walker* (1866), 6 B. & S. 871; *Bent v. Wakefield Bank* (1878), 4 C. P. D. 1. *Refd.* *Neville v. Kelly* (1862), 32 L. J. C. P. 118.

**PART IV. SECT. 1, SUB-SECT. 1.**  
k. *Officer in charge of police station—Who is.]—*Where an officer in charge of a police station has gone on

duty to a place outside his local jurisdiction the police officer next in rank deputed to act for him, even though he is absent from the station, so long as he is within the jurisdiction is an

officer in charge of a police station.—*ASSAN ALLAR MARAI KAYAR v. MASITAMANI NADAR* (1919), 1 L. R. 42 Mad. 446.—*IND.*

87. ———.]—G., having been guilty of forgery, absconded. Defts. published a handbill offering a reward of £200 "to any person or persons giving such information to A., superintendent of police, Dewsbury, or to H., superintendent of police, Wakefield, as will lead to the apprehension of the said G." On Nov. 30, 1877, a person presented himself at the police office, Exeter, & asked for the chief constable (pltf.). On seeing him, the man (G.) said, "You hold a warrant for me; I am wanted for forgery." Pltf. left the man in a private room, & on searching the police-gazette & finding a notice therein, "W. G. wanted for forgery," telegraphed to the superintendent of police at Dewsbury, "Do you hold a warrant for the apprehension of W. G. for forgery?" Receiving an answer, "I still hold warrant for G., & should like him to be apprehended," pltf. apprehended & charged the man who was ultimately convicted. In answer to questions left to them, the jury found that G. was not in custody before the telegram was sent; but they were unable to agree as to whether or not he had given his name before it was sent:—*Held*: (1) pltf. was not entitled to claim the reward, the apprehension of G. not being the consequence of pltf.'s information, but of the criminal surrendering himself to justice.

(2) There are strong arguments of expediency, touching the administration of justice & the interests of the state, why constables should not be allowed to receive rewards (GROVE, J.).—*BENT v. WAKEFIELD BANK* (1878), 4 C. P. D. 1; 39 L. T. 576; 43 J. P. 55; 27 W. R. 168; 14 Cox, C. C. 208.

88. — Public policy.]—*BENT v. WAKEFIELD BANK*, No. 87, *ante*.

89. — Alleged neglect to give information of apprehension.—Until reward advertised.]—A police constable apprehended a boy in Bedfordshire having in his possession a horse & gig under circumstances of suspicion, & discovering that the boy had absconded with them from Woolwich, gave notice to his superintendent, who within a reasonable time gave notice to deft., the boy's master. After the boy's apprehension, but before the master received notice thereof, the latter had issued an advertisement offering a reward of £10 to any one who would give such information as should lead to the recovery of the property & the apprehension of the thief:—*Held*: a plea charging the police constable with a breach of duty in neglecting to inform deft. of the boy's apprehension until after the issuing of the advertisement was no answer to an action by the constable for the reward.—*NEVILLE v. KELLY* (1862), 12 C. B. N. S. 740; 32 L. J. C. P. 118; 7 L. T. 160; 10 W. R. 697; 142 E. R. 1333.

90. — Information lodged through agents.]—On May 29 deft. instructed his printers to print handbills, offering a reward of £25 to the person who should give information to a superintendent of police, named P. leading to the conviction of the perpetrator of a certain crime. Pltf., a police officer, on the same morning, before the instructions to print the handbills had been given by deft., had communicated the desired information to a fellow police officer named C., with instructions to forward it to Superintendent P., & C. thereupon communicated the information, in accordance with the rules of the force, to his own immediate superior officer, Inspector L., who sent it on the same evening to Superintendent P., whom it reached in due course on the following morning, May 30, after the time when the said handbills had been delivered to & had been dis-

tributed by him to the neighbouring police stations:—*Held*: pltf., the importance of whose information was admitted, was entitled to the reward, the messengers, C. & L., through whom such information was conveyed to Superintendent P., being pltf.'s agents to convey, & not P.'s agents to receive said message.—*GIBBONS v. PROCTOR* (1891), 64 L. T. 594; 7 T. L. R. 462; *sub nom.* *GIBSON v. PROCTOR*, 55 J. P. 616, D. C.

*Offer of reward for apprehension of wrongdoers generally.*]—See *CONTRACT*, Vol. XII., pp. 70, 71, Nos. 403–412.

## SECT. 2.—POWERS.

### SUB-SECT. 1.—IN GENERAL.

91. Power to turn trespassers off land.—Without order of owner.]—Peace officers have no right to turn trespassers off land, except by the order of the owner of the land.—*R. v. COX* (1859), 1 F. & F. 664.

92. Control of crowd on highway.—Prevention of nuisance.]—It was for the police to regulate the crowds so as to prevent any nuisance being caused by their assembling in the highway:—*LYONS, SONS & CO. v. GULLIVER*, [1914] 1 Ch. 631; 83 L. J. Ch. 281; 110 L. T. 284; 78 J. P. 98; 30 T. L. R. 75; 58 Sol. Jo. 97; 12 L. G. R. 194, C. A.

93. Power to demand payment.—For special services.]—*GLASBROOK BROTHERS, LTD. v. GEAMORGAN COUNTY COUNCIL*, No. 82, *ante*.

Employment of police in getting up divorce cases.]—See *HUSBAND & WIFE*, Vol. XXVII., p. 429, No. 4372.

Accuracy of statements made by police.]—See *CRIMINAL LAW*, Vol. XIV., p. 332, Nos. 3493, 3494.

Removal of dangerous lunatic.]—See *LUNATICS*, Vol. XXXIII., pp. 267, 268, Nos. 1863, 1864.

Prevention of poaching.]—See *GAME*, Vol. XXV., pp. 377–380, Nos. 267–295.

Betting Act, 1853 (c. 119).]—See *GAMING & WAGERING*, Vol. XXV., pp. 450, 451, Nos. 418–421.

*See, generally, TITLES passim.*

### SUB-SECT. 2.—ARREST.

Nature of arrest.]—See *CRIMINAL LAW*, Vol. XIV., pp. 172, 173, Nos. 1488–1504.

Effecting arrest.]—See *CRIMINAL LAW*, Vol. XIV., pp. 173, 174, Nos. 1505–1511.

Searching prisoner.]—See *CRIMINAL LAW*, Vol. XIV., p. 174, Nos. 1512, 1513.

Disposal of property.]—See *CRIMINAL LAW*, Vol. XIV., pp. 174, 175, Nos. 1514–1528.

Arrest without warrant.]—See *CRIMINAL LAW*, Vol. XIV., pp. 176, 176, 178, 179, 180, 181, 183, 185, 186, Nos. 1534–1538, 1555–1572, 1579–1590, 1594, 1617–1622, 1636, 1647, 1648–1653, 1654–1655.

Arrest under warrant.]—See *CRIMINAL LAW*, Vol. XIV., pp. 186–189, Nos. 1661–1693.

Arrest for cruelty to animals.]—See *ANIMALS*, Vol. II., p. 290, Nos. 606, 607.

Liability for improper arrest.]—See *PUBLIC AUTHORITIES; TRESPASS*.

### SUB-SECT. 3.—QUESTIONS TO AND STATEMENTS BY ACCUSED PERSONS.

Questions by police.]—See *CRIMINAL LAW*, Vol. XIV., pp. 414–417, Nos. 4318–4357.

**Sect. 2.—Powers: Sub-sects. 3, 4 & 5. Sect. 3. Part V. Sects. 1 & 2.]**

**Voluntary statements.]—See CRIMINAL LAW, Vol. XIV., p. 413, Nos. 4315–4317.**

**Confessions arising from inducements.]—See CRIMINAL LAW, Vol. XIV., pp. 417–426, Nos. 4358–4498.**

#### SUB-SECT. 4.—ENTRY AND SEARCH.

**Search warrants generally.]—See CRIMINAL LAW, Vol. XIV., pp. 189–191, Nos. 1694–1702.**

**Detention of women for immoral purpose.]—See CRIMINAL LAW, Vol. XV., p. 850, 851, Nos. 9342, 9343.**

**Licensed premises.]—See INTOXICATING LIQUORS Vol. XXX., pp. 91, 92, Nos. 702–707.**

**Theatres & places of entertainment.]—See THEATRES.**

**Entry on private premises—Liability of occupier for accident.]—See NEGLIGENCE, Vol. XXXVI., p. 40, No. 239.**

**Liability from improper entry or search.]—See TRESPASS.**

**Seizure of goods.]—See Sub-sect. 5, post.**

#### SUB-SECT. 5.—SEIZURE OF GOODS.

**Entry & search.]—See Sub-sect. 4, ante.**

**Property found on prisoner.]—See CRIMINAL LAW, Vol. XIV., pp. 174, 175, Nos. 1514–1528.**

**Seizure under search warrant.]—See CRIMINAL LAW, Vol. XIV., p. 190, Nos. 1700, 1701.**

**Under distress warrant.]—See DISTRESS, Vol. XVIII., pp. 407, 412, 425, 432, 450, Nos. 1475, 1515–1527, 1626, 1695, 1862.**

**Under Copyright Acts.]—See COPYRIGHT, Vol. XIII., p. 229, Nos. 696–698.**

**Seizure of game.]—See GAME, Vol. XXV., pp. 378, 379, Nos. 274–278.**

**Liability for improper seizure.]—See TRESPASS; TROVER.**

#### SECT. 3.—PRIVILEGES AND EXEMPTIONS.

**Exemption from toll.]—See HIGHWAYS, Vol. XXVI., p. 344, No. 720.**

**Reduction in fares when travelling on public service.]—See CARRIERS, Vol. VIII., p. 157, No. 1016.**

**Evidence of police spy.]—See CRIMINAL LAW, Vol. XIV., pp. 456, 457, Nos. 4828–4831; EVIDENCE, Vol. XXII., pp. 396, 463, Nos. 4037–4038, 4856.**

**Competency to give expert evidence.]—See EVIDENCE, Vol. XXII., p. 202, No. 1765.**

**Whether a public servant—Indictment for embezzlement.]—See CRIMINAL LAW, Vol. XV., p. 932, No. 10,278.**

**Privilege attaching to matter published by police.]—See Law of Libel (Amendment) Act, 1888 (c. 64), s. 4.**

**Right to weekly rest day.]—See Police (Weekly Rest Day) Act, 1910 (c. 13).**

## Part V.—Legal Proceedings by and against Police.

### SECT. 1.—PROCEEDINGS BY POLICE.

**94. Institution of proceedings—Must be on oath.]—The presentment of any offence by a constable, in order to put the party against whom it may be made, on his trial, must be upon oath before the Grand Jury of the county.—R. v. BRIDGEWATER & TAUNTON CANAL CO. (1827), 7 B. & C. 514; 6 L. J. O. S. M. C. 23; 108 E. R. 814; *sub nom.* R. v. SOMERSETSHIRE JJ., 1 Man. & Ry. K. B. 272; 1 Man. & Ry. M. C. 81.**

**95. — Under Sunday Observance Act, 1877 (c. 7)—Necessity for consent of chief constable.]—THORPE v. PRIESTNALL, [1897] 1 Q. B. 159; 66 L. J. Q. B. 248; 60 J. P. 821; 45 W. R. 223; 13 T. L. R. 95.**

**Annotations:—Expld. Re Boaler, Re Vexatious Actions Act, 1896, [1914] 1 K. B. 122. Mentd. Beardley v. Giddings (1904), 2 L. G. R. 719.**

**96. — — — — —]—By Sunday Observation Prosecution Act, 1871 (c. 87), s. 1, no prosecution shall be taken against any person for any offence under Sunday Observance Act, 1877 (c. 7), except with the consent in writing of the chief officer of police of the police district, or of two justices or a stipendiary magistrate having jurisdiction in the place:—Held: for the purpose of giving such consent the chief officer of police is a *persona designata*, & the consent cannot be given by the police officer who by the resolution of a council has been duly appointed to act in**

the absence of the chief officer as deputy for the chief officer & who is in fact so acting.—R. v. HALKETT, [1910] 1 K. B. 50; 101 L. T. 603; 22 Cox, C. C. 202; *sub nom.* R. v. HALKETT, *Ex p.* BUTINCK, 79 L. J. K. B. 12; 74 J. P. 12, D. C.

**97. — Under Town Police Clauses Act, 1847 (c. 89), s. 28—Police neither party aggrieved nor authorised by local authority.]—By above sect. every one who to the annoyance & danger of the passengers wantonly throws stones is liable to a penalty. By Public Health Act, 1875 (c. 55), s. 171, the provisions of above Act with respect to the above was “for the purpose of regulating such matters in urban districts” incorporated in that Act. It is provided by Public Health Act, 1875 (c. 55), s. 253, that “proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved or by the local authority of the district in which the offence is committed”:—Held: the district superintendent of police could lay an information under above sect., although not the party aggrieved or authorised by the local authority.—JOBSON v. HENDERSON (1900), 82 L. T. 260; 64 J. P. 425; 19 Cox, C. C. 477, D. C.**

**98. — Under Conspiracy & Protection of Property Act, 1875 (c. 86), s. 7.]—Appnts. were charged on an information preferred by resp., a police superintendent, with having, with a view**

#### PART V. SECT. 1.

**1. Institution of proceedings—Right of police constable to institute—Breach**

**of local bye-law.]—R. v. HARE, *Ex p.* BUSH (1887), 13 V. L. R. 71.—AUS. m. — Under Lord's Day Act—Necessity for consent of local authorities.]**

**—R. v. PANTON, *Ex p.* SCHUH (1888), 14 V. L. R. 529.—AUS.**

**n. — — — Liability for costs.]—**

to compel one A. to abstain from working at the L. motor works, where A. had a legal right to work, intimidated him by assembling in large numbers & throwing eggs at him when he was on his way from work. The evidence was that while A. was returning from the L. works some of appts., each of whom was wearing a white ribbon, & all of whom had recently been working at the L. works, but were no longer in such employment, threw eggs, two of which struck A. Some of the appts. were not proved to have thrown eggs, but they were with appts. who did so. There were shouts of "Blacklegs" & "Dirty Scabs." A. had not authorised resp. to lay the information, but he stated that he would have proceeded if the police had not done so. The justices convicted appts.:—*Held*: resp. was entitled to lay the information.—*YOUNG v. PECK* (1912), 107 L. T. 857; 77 J. P. 49; 29 T. L. R. 31; 23 Cox, C. C. 270, D. C.

99. — Under Disorderly Houses Act, 1751 (c. 36)—Metropolitan constable not a "parish constable."—*GARLAND v. AHRBECK* (1888), 5 T. L. R. 91.

— Sale of unsound meat—Requisite consents.]—*See FOOD & DRUGS*, Vol. XXV., p. 112, Nos. 355, 356.

100. Prosecution also undertaken by private person—Right to conduct of prosecution—As against police.]—Where the principal person interested in prosecuting a prisoner is desirous of conducting the prosecution, he is entitled to do so & to be allowed the costs of the prosecution.

In a case of aggravated assault by a prisoner on his wife, the wife retained a solr. to prosecute her husband. In pursuance of this retainer, the solr. prepared & delivered a brief to counsel at the assizes, with instructions to conduct the prosecution. A constable of the county had been bound over by recognisances to prosecute, & the clerk to the magistrates, as was the usual custom prepared & delivered a brief to counsel to prosecute:—*Held*: the conduct of a prosecution should not be taken out of the hands of the person principally interested, if that person wishes to undertake it.—*R. v. BUSHILL* (1888), 52 J. P. 136; 16 Cox, C. C. 367.

101. Costs of prosecution—Assault committed on constable in execution of duty—Whether payable out of poor rate.]—The expenses of a constable, in prosecuting an assault committed on him in the execution of his duty, cannot be paid by the overseer out of the poor rate, & are not within 18 Geo. 3, c. 19, s. 4.—*R. v. BIRD* (1819), 2 B. & Ald. 522; 106 E. R. 457.

*Annotations*:—*Distd. R. v. Chelmsford* (1843), 5 Q. B. 66. *Reid. R. v. Fowler* (1834), 3 Nev. & M. K. B. 826. *Mentd. R. v. Gwyer* (1834), 4 L. J. M. C. 39.

102. — Recognisances by constable to prosecute.]—A constable apprehended an offender for a misdemeanor committed in his presence in a place of religious worship, & carried him before a magistrate, & was bound over by recognisance to prosecute him for the offence:—*Held*: the expenses of such a prosecution were not moneys

expended by him in doing the business of his township, & he could not charge them in his accounts under 18 Geo. 3, c. 19, s. 4.—*R. v. SEVILLE* (1821), 5 B. & Ald. 180; 106 E. R. 1158.

*Annotation*:—*Distd. R. v. Chelmsford* (1843), 5 Q. B. 66.

103. — Award of extra costs—Criminal Law Act, 1826 (c. 64).]—Stealing from the person is not within above Act, s. 28, so as to enable the ct. to award the constable extra costs.—*R. v. THOMPSON* (1843), 2 L. T. O. S. 247; 1 Cox, C. C. 43.

104. — Reimbursement of superintendent constable—Prosecution of vagrants—Liability of parish.]—A superintendent constable, appointed for a division comprehending the parish of C., under County Police Act, 1839 (c. 93) & County Police Act, 1840 (c. 88), expended money in fees to the justices' clerk in respect of vagrants apprehended in the parish of C. The parish, for many years before those statutes passed, had defrayed such expenses when incurred by the parish constables:—*Held*: (1) the parish was liable for the expenses, inasmuch as County Police Act, 1839 (c. 93), s. 8, puts such constables in the situation of parish constables, & therefore authority might be inferred, from the previous conduct of the parish, to make the disbursements in question. (2) These were not to be deemed extraordinary expenses, within County Police Act, 1839 (c. 93), s. 18, so as to be payable by the division under County Police Act, 1840 (c. 88).—*R. v. CHELMSFORD* (CHURCHWARDENS) (1843), 5 Q. B. 66; 3 Gal. & Dav. 357; 12 L. J. M. C. 139; 1 L. T. O. S. 108, 385; 7 J. P. 432, 447; 7 Jur. 879; 114 E. R. 1172.

*Annotations*:—*As to* (1) *Consd. Garland v. Ahrbeck* (1888), 5 T. L. R. 91. *As to* (2) *Reid. R. v. Gloucester Corpn.* (1844), 5 Q. B. 862.

## SECT. 2.—PROCEEDINGS AGAINST POLICE.

Criminal proceedings—Acceptance of bribes.]—*See CRIMINAL LAW*, Vol. XV., p. 663, Nos. 7158, 7159.

— Embezzlement.]—*See CRIMINAL LAW*, Vol. XV., pp. 663, 664, 932, Nos. 7161, 10,278.

— Refusal or neglect of duty.]—*See CRIMINAL LAW*, Vol. XV., p. 667, Nos. 7210–7213.

— Permitting person to escape.]—*See CRIMINAL LAW*, Vol. XV., p. 712, No. 7693.

— Obtaining money by menaces.]—*See CRIMINAL LAW*, Vol. XV., pp. 875, 876, No. 9615.

— Liability to increase of sentence.]—*See CRIMINAL LAW*, Vol. XIV., p. 475, No. 5159.

Civil proceedings—Improper arrest & false imprisonment.]—*See TRESPASS*.

— Improper entry & search.]—*See TRESPASS*.

— Improper seizure of goods.]—*See Part. IV.*, Sect. 2, sub-sect. 5, *ante*.

— Alleged libellous statement.]—*See LIBEL & SLANDER*, Vol. XXXII., p. 129, No. 1606.

— Malicious prosecution.]—*See MALICIOUS PROSECUTION*, Vol. XXXIII., pp. 465 *et seq.*

— Whether protected as public authority.]—*See PUBLIC AUTHORITIES*.

*DUTTON v. WALHALLA* (SHIRE) (1899), 24 V. L. R. 910.—*AUS.*

*o. Recovery of wages.*]—19 Vict.

c. 52, imposes on the corpn. of St. John a statutory duty to pay the policemen their wages, & an action

will lie for the recovery thereof.—*ST. JOHN CORPN. v. PATCHELL* (1882), 22 N. B. R. 173.—*CAN.*

## Part VI.—Compensation for Damage by Riot.

See Riot (Damages) Act, 1886 (c. 38); Local Government Act, 1888 (c. 41), s. 3; Home Office Regulations, 1894, Nos. 2, 11.

**Riot.**—See CRIMINAL LAW, Vol. XV., pp. 646 *et seq.*

**Malicious damage to property.**—See CRIMINAL LAW, Vol. XV., pp. 1020 *et seq.*

**105. Who may claim.—Trustee of property.**—An action may be maintained under Riot Act, 1714 (c. 5), against hundredors, by the trustees in whom the property in a house of correction, belonging to the county, is vested, for the demolition of the house by the rioters.—*ONSLOW v. SMITH* (1784), 3 Doug. K. B. 348; 99 E. R. 690.

**106. ———.**—To support an action against the hundred for damages on Riot Act, 1714 (c. 5), for the riotous demolition of a house, it is not necessary to prove that twelve rioters were assembled at the time. Such an action is maintainable by a trustee in whom the legal estate is vested for existing purposes, &, as it seems, even by a bare trustee of a satisfied term.—*PRITCHIT v. WALDRON* (1792), 5 Term Rep. 14; 101 E. R. 8.

**107. ———. Reversioner.**—In an action against the hundred on a local Act to recover damages for the injury done to premises maliciously set on fire:—*Held*: a reversioner might sue for the injury which he has sustained.—*PELLEW v. WONFORD* (INHABITANTS) (1829), 9 B. & C. 134; 4 Man. & Ry. K. B. 130; 2 Man. & Ry. M. C. 127; 7 L. J. O. S. M. C. 84; 109 E. R. 50.

*Annotations*:—*Mentd. Hardy v. Ryle* (1829), 9 B. & C. 603; *Webb v. Fairman* (1838), 6 Dowl. 549; *Re Whitby, Ex p. Whitby* (1839), 8 L. J. Boy. 55; *Williams v. Burgess* (1840), 12 Ad. & El. 635; *Young v. Higgon* (1840), 6 M. & W. 40.

**108. ———. Joint lessee.**—A person who is joint lessee, but sole occupier, of premises feloniously injured against 7 & 8 Geo. 4, c. 30, s. 2, may maintain an action against the hundred, under 7 & 8 Geo. 4, c. 31, if he has complied with the requisites of 7 & 8 Geo. 4, c. 31; although the co-lessee have not so complied.—*LOWE v. BROXTOWE* (INHABITANTS), *MUSTERS v. THURGARTON* (INHABITANTS), *BEMROSE v. DERBY BOROUGH* (1832), 3 B. & Ad. 550; 1 L. J. M. C. 57; 110 E. R. 199.

**109. Formalities of claim.—Verification by statutory declaration.—Proof of evidence from claimant.**—Where a claim is made upon a police authority under Riot (Damages) Act, 1886 (c. 38), although the claim must be made in the form provided by the regulations under Riot (Damages) Act, 1886 (c. 38), & although the police authority is entitled to require the claim to be verified by a statutory declaration under reg. 8, yet the police authority is not entitled to require from claimant proofs of evidence, & a refusal by the police authority to act until after the receipt of such proofs is a refusal to fix compensation within Riot (Damages) Act, 1886 (c. 38), s. 4 (1).—*FORD v. METROPOLITAN POLICE DISTRICT RECEIVER*, [1921] 2 K. B. 344; 90 L. J. K. B. 929; 125 L. T. 18; 37 T. L. R. 467; 19 L. G. R. 686; 26 Cox. C. C. 722.

**110. Essentials of riot must be proved.**—*PRITCHIT v. WALDRON*, No. 106, *ante*.

**111. ———.**—In an action under Riot (Damages)

Act, 1886 (c. 38), s. 2, to recover compensation for the injury or destruction of a building by persons riotously & tumultuously assembled together, the following facts were proved:—At nine o'clock on a night at the end of Oct. a number of youths of ages varying from fourteen to eighteen years were congregated together upon the foot pavement of a road in a low neighbourhood shouting & using rough language. The pavement adjoined a nine inch wall of considerable length inclosing a yard & let into a house. Some of the youths were standing with their backs against the wall & others were running against them, or against the wall with their hands extended. After they had gone backwards & forwards in this way for about fifteen minutes, the wall, to the extent of about twelve feet, fell. As soon as it fell the caretaker of the premises came out into the street, & the youths then dispersed in different directions:—*Held*: there was no evidence of any intention on the part of the youths to help one another by force if necessary against any person who might oppose them in the execution of their common purpose of injuring or destroying the wall; or of any force or violence, other than the force or violence used in the actual demolishing of the wall displayed in such a manner as to alarm any person of reasonable firmness & courage; & therefore the youths were not riotously & tumultuously assembled together within Riot (Damages) Act, 1886 (c. 38), s. 2.

*Semle*: in order to sustain a claim under Riot (Damages) Act, 1886 (c. 38), s. 2, it is necessary to prove all the elements of a riot.—*FIELD v. METROPOLITAN POLICE RECEIVER*, [1907] 2 K. B. 853; 76 L. J. K. B. 1015; 97 L. T. 639; 71 J. P. 494; 23 T. L. R. 736; 51 Sol. Jo. 720; 5 L. G. R. 1121, D. C.

*Annotations*:—*Distd. Ford v. Metropolitan Police District Receiver*, [1921] 2 K. B. 344. *Refd. It. v. Wong Chey, Wong Sing, Yong Sing, Ah Yong, Fon Yong, Ah Fook & Ah Shack* (1910), 6 Cr. App. Rep. 59; *Kaufmann v. Liverpool Corpn.* (1916), 80 J. P. 223; *Motor Union Insec. v. Boggan* (1923), 130 L. T. 588.

**112. ———.**—By a policy of assurance applt. agreed to indemnify resps. against loss by burglary, housebreaking, & theft of cash in the cashier's office in resp.'s bakery in Dublin, subject to the proviso that "this insurance does not cover loss directly or indirectly caused by or happening through or in consequence of (a) invasions, hostilities, acts of foreign enemy, riots, strikes, civil commotions, rebellions, insurrections, military or usurped power, or martial law, or the burning of property by order of any public authority. . . ." During the currency of the policy four armed men entered the resp.'s premises on a summer evening while it was still daylight, held up the employees with revolvers, & took possession of all the money they could find in the cashier's office. There was no disturbance in the neighbourhood at the time. In answer to a claim by resps. against applt. to recover the loss applt. relied on the proviso in the policy. The dispute having been referred to arbn. under a clause in the policy, the arbitrators, by an award stated in the form of a special case, being of opinion that the circumstances in which the money was stolen

### PART VI.

*D. Whether police officer entitled to compensation—Wounding of police*

*officer—By stoning.*—*CREMIN v. CORK CORPN.*, [1908] 2 I. R. 61; 42 I. L. T. 1.—*IR.*

*q. ——— Shooting by homi-*

*cidal maniac.*—*MAGUIRE & WALSH v. LIMERICK CORPN.* (1908), 42 I. L. T. 97.—*IR.*

constituted a riot, found that resps. were not entitled to recover:—*Held*: the proviso was not confined to the case where the theft was facilitated, by an antecedent or simultaneous riot, but included a case where the theft itself in the manner in which it was conducted constituted a riot at law, & the arbitrators were right in their conclusion.—*LONDON & LANCASHIRE FIRE INSURANCE CO. v. BOLANDS, LTD.*, [1924] A. C. 836; 93 L. J. P. C. 230; 131 L. T. 354; 40 T. L. R. 603; 68 Sol. Jo. 629, H. L.

113. *Objections to claim—Riot taking place in private ground.*—*Pltf.* had arranged to hold a public racing competition between two men in his private running ground, admission to which was obtained on payment of certain entrance money. Between four thousand & five thousand people having assembled to witness the race, the two competitors, after walking on the track, did not run, but disappeared by a back entrance. When this became known, the people assembled demanded the return of their entrance money. This demand was refused. A riot thereupon ensued, & much damage was done to *pltf.*'s property. In an action brought against the police authority of the district for compensation:—*Held*: *pltf.*'s claim was not barred by reason of the riot having taken place in a private ground; but inasmuch as provocation had been used towards the assembled crowd, *pltf.* was not entitled to recover.—*GUNTER v. METROPOLITAN POLICE DISTRICT RECEIVER* (1888), 53 J. P. 249; 5 T. L. R. 58.

*Annotation*:—*Apld.* *Pitchers v. Surrey County Council*, [1923] 2 K. B. 57.

114. — *Military camp.*—Acts which constitute a riot when committed by civilians equally constitute a riot when committed by soldiers, notwithstanding that the acts take place in a military camp.

By Riot (Damages) Act, 1886 (c. 38), s. 2, where a house, shop or building in any police district has been injured or destroyed, or the property therein has been injured, stolen or destroyed in a riot, the persons who have suffered loss are entitled to compensation out of the police rate of the district:—*Held*: the fact that the rioters are soldiers & the property which has been injured or destroyed in a riot is situated in a military camp & in a private place does not disentitle the persons who have sustained loss thereby claiming compensation out of the police rate of the district.—*PITCHERS v. SURREY COUNTY COUNCIL*, [1923] 2 K. B. 57; 92 L. J. K. B. 415; 128 L. T. 746; 87 J. P. 113; 39 T. L. R. 233; 67 Sol. Jo. 402; 21 L. G. R. 264, C. A.

*Annotation*:—*Refd.* *Jarvis v. Surrey County Council*, [1925] 1 K. B. 554.

115. — *Provocation by plaintiff.*—*GUNTER v. METROPOLITAN POLICE DISTRICT RECEIVER*, No. 113, *ante*.

116. — *Riot by soldiers.*—*PITCHERS v. SURREY COUNTY COUNCIL*, No. 114, *ante*.

— *Assembly must be riotous.*—*See* Nos. 100–112, *ante*.

117. *Liability of police authority—County council.*—By Riot (Damages) Act, 1886 (c. 38), s. 3, claims for compensation under the Act are to be made to the police authority of the district in which the injury took place, & the police authority shall, if satisfied, fix such compensation as appears to them just; Riot (Damages) Act, 1886 (c. 38), s. 4, gives a right of action against the police authority to any person aggrieved by the refusal of the police authority to fix compensation. In counties quarter sessions are the police authority as defined

by Riot (Damages) Act, 1886 (c. 38), s. 9. Local Government Act, 1888 (c. 41), s. 3, transferred to the council of each county all business done by quarter sessions in respect of (*inter alia*) “any matters arising under the Riot (Damages) Act, 1886 (c. 38).” By Local Government Act, 1888 (c. 41), s. 9, the liabilities of quarter sessions “with respect to the county police” were transferred to the standing joint committee of the quarter sessions & county council appointed under the Act:—*Held*: the county council, & not the standing joint committee, are the police authority for all the purposes of the Riot (Damages) Act, 1886 (c. 38), including the liability to be sued under Riot (Damages) Act, 1886 (c. 38), s. 4.—*GLAMORGAN COAL CO. v. GLAMORGAN STANDING JOINT COMMITTEE OF QUARTER SESSIONS & COUNTY COUNCIL*, [1915] 1 K. B. 384; 84 L. J. K. B. 362; 112 L. T. 219; 79 J. P. 164; 13 L. G. R. 462; *subsequent proceedings, sub nom.* *GLAMORGAN COAL CO. v. GLAMORGANSHIRE STANDING JOINT COMMITTEE*; *POWELL DUFFRYN STEAM COAL CO. v. SAME*, [1916] 2 K. B. 206, C. A.

118. — *Not standing joint committee.*—*GLAMORGAN COAL CO. v. GLAMORGAN STANDING JOINT COMMITTEE OF QUARTER SESSIONS & COUNTY COUNCIL*, No. 117, *ante*.

119. — *Limitation of action—Public Authorities Protection Act, 1893 (c. 61).*—Public Authorities Protection Act, 1893 (c. 61), limiting the time for bringing actions against public bodies to “within six months next after the act, neglect, or default, complained of” does not apply to an action brought against a police authority for compensation under the Riot (Damages) Act, 1886 (c. 38), as such action is one for compensation under Riot (Damages) Act, 1893 (c. 38), & not to recover damages for any default on the part of the authority within Public Authorities Protection Act, 1893 (c. 61), s. 1.—*KAUFMANN BROTHERS v. LIVERPOOL CORPN.*, [1916] 1 K. B. 860; 85 L. J. K. B. 1127; 114 L. T. 699; 80 J. P. 223; 32 T. L. R. 402; 60 Sol. Jo. 446; 14 L. G. R. 642, D. C.

120. — *Civil Procedure Act, 1833 (c. 42).*—In an action against the police authority under Riot (Damages) Act, 1886 (c. 38), for damages caused by a riot, the cause of action is the refusal or failure of the authority to fix compensation.

Such an action is not an action “for penalties, damages, or sums of money given to the party grieved, by any statute” within Civil Procedure Act, 1833 (c. 42), s. 3, therefore the period for bringing an action limited by Civil Procedure Act, 1833 (c. 42), s. 3, in respect of those actions is not applicable.—*JARVIS v. SURREY COUNTY COUNCIL*, [1925] 1 K. B. 554; 94 L. J. K. B. 609; 132 L. T. 745; 89 J. P. 51; 41 T. L. R. 228; 69 Sol. Jo. 327; 23 L. G. R. 195.

121. — *When cause of action arises—Refusal to fix compensation.*—*JARVIS v. SURREY COUNTY COUNCIL*, No. 120, *ante*.

122. — *What amounts to refusal.*—*FORD v. METROPOLITAN POLICE DISTRICT RECEIVER*, No. 109, *ante*.

123. *Compensation—Sum sufficient to reinstate premises—Collateral matters affecting value of property.*—The owner of a house feloniously demolished by rioters, is entitled to such a sum, as compensation under 7 & 8 Geo. 4, c. 31, as will enable him to repair the injury & reinstate the premises, without regard to collateral circumstances rendering the property of little or no value.—*NEWCASTLE (DUKE) v. BROXTOWE HUNDRED* (1832), 4 B. & Ad. 273; 1 Nev. &



M. K. B. 598; 1 Nev. & M. M. C. 507; 2 L. J. M. C. 47; 110 E. R. 458.

*Annotations:—**Reid v. Yates v. Dunster* (1855), 11 Exch. 15; *Wednesbury Corp. v. Lodge Holes Colliery Co.*, [1907] 1 K. B. 78. *Mend. Crease v. Barrett* (1835), 1 Cr. M. & R. 919; *Dunraven v. Llewellyn* (1850), 15 Q. B. 791; *Hadley v. Baxendale* (1854), 23 L. T. O. S. 69; *Shedden v. Patrick* (1860), 2 Sw. & Tr. 170; *Joyner v. Weeks*, [1891]

2 Q. B. 31; *Evan v. Merthyr Tydvil U. D. C.* (1898), 79 L. T. 578; *Mercer v. Denne*, [1905] 2 Ch. 538.

124. — **Police rate.**—*PITCHERS v. SURREY COUNTY COUNCIL*, No. 114, *ante*

— **Insurance against loss**—**Right of insurer to subrogation.**—*See INSURANCE*, Vol. XXIX., pp. 309 310, Nos. 2557-2559.

## Part VII.—Superannuation and Other Allowances.

*See, now, Police Pensions Acts, 1921 (c. 31); 1926 (c. 34).*

125. **Right to pension—Necessity for compliance with statutory provisions.**—A police constable served more than fifteen years successively in a borough in which 11 & 12 Vict., c. 14, had been adopted. He was continued in the service by the watch committee, & claimed an allowance out of the superannuation fund in addition to his pay. He was under fifty years of age; & on that ground the council refused to pay him the allowance:—*Held*: he was not entitled to such allowance, as 11 & 12 Vict., c. 14, s. 3, made his attaining fifty or being incapable a condition precedent to his right to receive anything from the superannuation fund.—*HOBBSON v. HULL CORPN.* (1855), 4 E. & B. 986; 25 L. T. O. S. 81; 19 J. P. 659; 1 Jur. N. S. 892; 3 W. R. 405; 119 E. R. 367; *sub nom.* *HOBBSON v. KINGSTON-UPON-HULL CORPN.*, 24 L. J. Q. B. 251.

*Annotation:—Dist. R. v. Metropolitan Police District Receiver* (1863), 4 B. & S. 593.

126. — **Where granted by order of Secretary of State—Discretion to revoke.**—An allowance granted by order of the Secretary of State to an officer or constable of the Metropolitan police, charged on the superannuation fund created by Metropolitan Police Act, 1839 (c. 47), ss. 22 & 23, is not payable as matter of right, & may be revoked at any time by the Secretary of State in his discretion.—*R. v. METROPOLITAN POLICE DISTRICT RECEIVER* (1863), 4 B. & S. 593; 3 New Rep. 77; 33 L. J. Q. B. 52; 9 L. T. 375; 28 J. P. 39; 12 W. R. 74; 122 E. R. 582.

127. — **Gradation according to rank—Constable acting on special services.**—In 1878, the quarter sessions of N., in order to provide for the more efficient inspection of weights & measures & enforcement of Sale of Food & Drugs Act, 1875 (c. 63), & Explosives Act, 1875 (c. 17), resolved to appoint two additional inspectors of police whose whole time should be devoted to the carrying out of the inspection of weights & measures & of the above-named Acts. In pursuance of this resolution the quarter sessions appointed applt. & another inspectors of weights & measures, & on the same day applt. & his colleague were appointed police constables of the county; & under an order of the chief constable, they were saluted & treated in the police force as superintendents. Applt. continued a member of the police force till his retirement in 1905. Up to 1902, besides discharging duties as inspector of weights & measures & in the enforcement of the above-named Acts, he performed some independent duties. He was

accustomed to visit certain police stations & houses occupied by police inspectors, & sergeants, & constables, & examine & sign their books. Applt. had an allowance for a horse, & he was provided with a trap for his use in the performance of his duties. In 1890 the standing joint committee of N. passed a resolution that constables "up to the rank of walking inspector" should be entitled to retire on a pension without a medical certificate at fifty-two, & that constables "above that rank" should be entitled so to retire at fifty-six. There was nothing to show what was meant by "walking inspector" in the resolution. Applt. retired from the force without a medical certificate at fifty-three:—*Held*: he was entitled to a pension, as there was nothing to show that his rank was above that of walking inspector.—*STORY v. NOTTINGHAMSHIRE STANDING JOINT COMMITTEE* (1907), 72 J. P. 31; 6 L. G. R. 1018, D. C.

128. **Fees paid to constable—As inspector of weights & measures—Not payable to pension fund.**

—A local Act directed that fees received by constables for the performance of occasional duties, or of any act in the execution of their duty for which a fee might be received, might be paid, by order of the justices for the county, to the credit of the Police Superannuation Fund:—*Held*: fees paid to such constables as inspectors of weights & measures did not come within the operation of the above sect., such fees not being paid to them in the execution of their duties as constables, but merely by virtue of their appointment as inspectors of weights & measures.—*R. v. KESTIVEN J.J.* (1889), 58 L. J. M. C. 157; 61 L. T. 51; 53 J. P. 661; 37 W. R. 670; 18 Cox, C. C. 680; D. C.

129. **Medical examination of pensioner—Power of police authority to require attendance—Exercise of power not extended to collateral purpose—Illegal stoppage of pension.**—(1) The power conferred upon a police authority by the Police Act, 1890 (c. 45), s. 5, of requiring a pensioner to attend to be examined by a medical practitioner selected by them at a particular time & place, for the purpose of satisfying them that his incapacity to serve continues, cannot be exercised by the police authority for any collateral purpose.

A police authority, on July 12, 1894, resolved that their former chief constable, to whom they had granted a pension on the ground of incapacity by infirmity, should attend at Warwick on a specified day & hour for the purpose of being examined by two doctors as to his state of health, & that if he failed to do so his pension should be cancelled. The pensioner had been declared

### PART VII.

*r. Right to pension—Injury to policeman in execution of his duty.*—*GUMMERSON v. TORONTO POLICE BENEFIT FUND* (1905), 11 O. L. R. 194; 5 O. W. R. 581; 6 O. W. R. 517.—CAN.

*t. — Involuntary resignation.*—*DE LA RONDE v. OTTAWA POLICE BENEFIT FUND ASSOC.* (1912), 22 O. W. R. 123; 3 O. W. N. 1232; 6 D. L. R. 850.—CAN.

*s. — Right of children above age of fifteen years—To gratuity.*—

A constable having died within twelve months after the grant of his pension, the police authority, on application of his sons, agreed to grant them a gratuity & gave a cheque for the amount, but subsequently finding that the sons were adults, they counter-



bkpt. in 1891, & in 1892 a warrant had been issued for his arrest, on the ground that he being out of England had not attended his adjourned examination in bkpcy. He had been residing in Portugal since Apr. 1892; but in Mar. 1893, he had come to England for a day or two, & had been examined by a doctor, selected by the police authority, who had certified his continuing incapacity. He did not attend in compliance with the resolution of July 12, 1894, & the police authority cancelled his pension:—*Held*: upon the evidence, the police authority had used their statutory power of requiring the pensioner's attendance at Warwick, not for the purpose of satisfying themselves as to his continued incapacity, but for the purpose of assisting the Bkpcy. Ct.; & consequently, they had exceeded their jurisdiction, & the pensioner was entitled to a *mandamus* calling upon the police authority to show cause why they should not pay him the arrears of his pension.

(2) A police authority has no power under Police Act, 1890 (c. 45), s. 5 (4), to cancel a pension without requiring the pensioner to serve again.

(3) A police authority has power to fix the time & place for the examination of the pensioner by the medical practitioner whom they may select under the provisions of Police Act, 1890 (c. 45), s. 5.—*R. v. LEIGH (LORD), Re KINCHANT*, [1897] 1 Q. B. 132; 66 L. J. Q. B. 56; 75 L. T. 339; 61 J. P. 4; 13 T. L. R. 41; 41 Sol. Jo. 65; 18 Cox, C. C. 425, C. A.

**130. Computation of pension—Constable reduced in rank—Basis of reduced pay.**—Where a constable, appointed before the commencement of the Police Act, 1890 (c. 45), who did not decline in writing to accept the provisions of that Act as to pension, is during the three years next before his retirement, which took place after the passing of the Police Act, 1893 (c. 10), reduced from a higher to a lower rank, he is not entitled to have his pension calculated upon the average amount of pay actually received by him during said three years, but only upon his actual pay at the date of retirement.—*RUFF v. SECRETARY OF STATE FOR HOME DEPARTMENT* (1896), 60 J. P. 343; 12 T. L. R. 362, D. C.

*Annotations*:—*Held*, *Upperton v. Ridley* (1900), 69 L. J. Q. B. 475; *Liverpool Watch Committee v. Kydd* (1907), 6 L. G. R. 907.

**131. — Based on annual pay—What included therein—Value of free residence with gas & water.**—(1) By Police Act, 1890 (c. 45), a constable, after a certain number of years' approved service is entitled to a pension, which is to be calculated on the amount of his "annual pay" at the date of his retirement.

A divisional inspector of police with his family resided free of rent at the police station, & had the free use of fuel, gas, & water:—*Held*: the value of the free residence & fuel, gas, & water was not part of his "pay" for the purpose of calculating his pension.

(2) When a constable appeals to quarter sessions, under Police Act, 1890 (c. 45), s. 11, from the decision of the watch committee as to the amount of his pension, a case may be stated for the opinion of the K. B. Div. on a question of law.—*GOODWIN v. SHEFFIELD CORPN.*, [1902] 1 K. B. 629; 71

L. J. K. B. 492; 86 L. T. 682; 66 J. P. 533; 18 T. L. R. 441, D. C.

*Annotations*:—*As to* (3) *Held*, *Kydd v. Liverpool Watch Committee*, [1907] 2 K. B. 591. *Generally*, *Mentd. Bayley v. Bayley*, [1922] 2 K. B. 227.

**132. — Allowance for special duties.**—By Police Act, 1890 (c. 45), a constable who has completed a certain number of years' approved service is entitled to a pension which is to be "calculated according to the amount of his annual pay at the date of his retirement."

A constable at the date of his retirement was receiving 39s. a week, namely, 32s. being the ordinary pay of his rank & service, & 7s. in respect of special duty which he had performed for some years. He signed the weekly pay lists in which the 32s. was entered in a column headed "Amount of Pay," & the 7s. in a column headed "Allowance for Special Duties":—*Held*: the 7s. a week formed no part of his "pay" for the purpose of calculating his pension.

If, therefore, the question were to be decided on the construction of the Act of Parliament alone, I should be of opinion that this payment of 7s. per week was extra pay, & was as truly part of the constable's pay at the time of his retirement within the meaning of the Act [Police Act] of 1890 [c. 45], as the ordinary pay of his class. But I think it was competent for the constable to contract himself out of the Act, & to agree that extra pay for any special duties should not be reckoned as part of his pay for the purpose of fixing the amount of his pension on retirement. This, I think, is what he has done by signing the weekly pay sheets in which his ordinary pay only is entered under the column entitled "Amount of Pay" (LORD DAVEY).—*UPPERTON v. RIDLEY*, [1903] A. C. 281; 72 L. J. K. B. 535; 88 L. T. 642; 67 J. P. 349; 19 T. L. R. 522; 1 L. G. R. 659; 20 Cox, C. C. 453, H. L.; *affg.*, [1901] 1 K. B. 384, C. A.

*Annotations*:—*Consd.* *Goodwin v. Sheffield Corpn.*, [1902] 1 K. B. 629; *Kydd v. Liverpool Watch Committee*, [1908] A. C. 327. *Mentd.* *Bayley v. Bayley*, [1922] 2 K. B. 227.

**133. — From date of retirement.**—Applt., a constable in a county police force, who was entitled to a pension on retirement, was one of certain constables as to whom resps., the standing joint committee of the county, on Dec. 31, 1918, resolved that they should "be permitted to retire on pension as soon as the chief constable can arrange for their services to be dispensed with." Applt. was stationed at Sharpness Docks, which were policed by the standing joint committee under an arrangement which was to end at 6 a.m., on Apr. 1, 1919. The chief constable informed applt. on Jan. 3, 1919, through his superior officers, that he would be pensioned on Apr. 1. On Mar. 20, the chief constable wrote to the superintendent of police that the pension would commence on Apr. 1. On Mar. 31 applt. reported for duty at 10 p.m., & with the sanction of his superior officer, patrolled the docks until 3 a.m. on Apr. 1, but the chief constable had not sanctioned any police duty on the part of applt. after Mar. 31. On Apr. 1 applt. went by train to the police headquarters with a police ticket & received a discharge dated Mar. 31 with pay up to that date. On Apr. 8 the chief constable

manded the cheque & reversed their previous decision. In an action by the sons of deceased constable against the police authority *defts.* maintained that it was not the intention of the statute that a gratuity should be given to children above the age of fifteen years:—*Held*: *defts.* had acted within

their powers in granting the gratuity & having granted it they were not entitled to recall it.—*CAMPBELL v. GLASGOW POLICE COMRS.* (1895), 22 R. (Cl. of Sess.) 621; 32 Sc. L. R. 497; 3 S. L. T. 26.—*SCOT.*

b. *Constable's expenses—Of serving*

*summonses on two defendants.*—*JORDAN v. COATES* (1850), 2 All. 107.—*CAN.*

c. — *Liability of county therefor.*—*SILLS v. LENNOX & ADDINGTON COUNTY CORPN.* (1900), 31 O. R. 512.—*CAN.*

d. — *Liability of Government.*—

reported to resps. that he had allowed applt. to retire on Mar. 31. The chief constable was authorised to exercise resps. power under Police Act, 1890 (c. 45), s. 1, to fix the date of applt.'s retirement. Applt.'s pension was paid monthly at the rate in force on Mar. 31, & in accordance with Police Act, 1890 (c. 45), Sched. III., r. 11 (a), was calculated upon his pay at that date. In July, 1919, a parliamentary committee recommended an increase in police pay as from Apr. 1, 1919, & a reassessment of pensions in the case of men who had retired since that date. Resps. decided to make the increase of pay, & to reassess upon the new scale the pensions of constables who had retired since Mar. 31. No reassessment was made in applt.'s case, as resps. assumed that he had retired not after but on Mar. 31. Applt. then applied to resps. for an increased pension on the ground that he was serving on Apr. 1, 1919, but resps. refused the application:—*Held*: as applt. was employed as a constable on Apr. 1, 1919, that was the date of his retirement, & he was entitled to a pension on the increased scale.—*GREEN v. GLOUCESTERSHIRE STANDING JOINT COMMITTEE* (1921), 126 L. T. 370; 86 J. P. 39; 20 L. G. R. 23, D. C.

134. — *Effect of fresh appointment.*—(1) A., head constable of the City of Liverpool, at a salary of £1,400 a year, resigned that appointment & accepted that of Commr. of Police of the City of London at £1,250 a year:—*Held*: the pension payable by the City of Liverpool should be, calculated under Police Act, 1890 (c. 45), s. 13 (2), at £850, being the difference between £1,250 (A.'s present salary) & £2,100 (one & a half times his salary at Liverpool).

(2) A resolution to suspend the payment of A.'s pension, purporting to have been passed under Police Act, 1890 (c. 45), s. 13 (1), by the city council of Liverpool, was held to be invalid, the watch committee being the police authority for Liverpool within the meaning of Police Act, 1890 (c. 45), s. 13 (1).—*NOTT-BOWER v. LIVERPOOL CORPN.* (1904), 68 J. P. 243; 20 T. L. R. 261; 2 L. G. R. 494.

135. — *Appeal as to computation — Finality of appeal to quarter sessions.*—*GOODWIN v. SHEFFIELD CORPN.*, No. 131, *ante*.

136. — *Where under Police Act, 1890 (c. 45), s. 11, there is an appeal to quarter sessions as to the amount of a constable's pension, the ct. of quarter sessions may make such an order as appears to the ct. just, & from that order there is no appeal.*—*KYDD v. LIVERPOOL WATCH COMMITTEE*, [1908] A. C. 327; 77 L. J. K. B. 947; 99 L. T. 212; 72 J. P. 395; 24 T. L. R. 772; 52 Sol. Jo. 639; 6 L. G. R. 903, H. L.; *reversg.*, [1907] 2 K. B. 591, C. A.

*Annotations*:—*Mentl. Re Carpenter & Bristol Corpn.* (1907), 5 L. G. R. 977; *Re Atkin's Trusts, Smith v. Atkin*, [1909] 1 Ch. 471; *R. v. Salford Hundred J.J.*, [1912] 2 K. B. 567; *Lobitos Oilfields v. Admiralty Comrs.*, Crown S.S. Co. v. Same (1917), 86 L. J. K. B. 1444.

137. *Enforcement of payment of arrears — Mandamus to police authority.*—*R. v. LEIGH (LORD), Re KINCHANT*, No. 129, *ante*.

138. *Suspension of pension — Resolution must*

*be passed by competent police authority.*—*NOTT-BOWER v. LIVERPOOL CORPN.*, No. 134, *ante*.

139. *Qualification for pensions — "Approved service" — Need not be continuous service.*—(1) The "approved service" for not less than twenty-five years required by the Police Act, 1890 (c. 45), s. 1, to entitle a constable to a pension on retirement need not be continuous service.

(2) A certificate of "approved service" under Police Act, 1890 (c. 45), s. 4 (1), that is, of diligent & faithful service, must be under the order of the police authority.

(3) The chief officer of a police force has power under Police Act, 1890 (c. 45), s. 4 (2), to certify as to the period of the service, not as to its character.—*GARBUTT v. DURHAM JOINT COMMITTEE*, [1908] A. C. 291; 75 L. J. K. B. 459; 41 L. J. N. C. 263; 94 L. T. 525; 70 J. P. 265; 54 W. R. 596; 22 T. L. R. 444; 4 L. G. R. 647, H. L.

*Annotation*:—*Generally, Reid. Kydd v. Liverpool Watch Committee*, [1908] A. C. 327.

140. — *Certificate of — Must be under order of police authority.*—*GARBUTT v. DURHAM JOINT COMMITTEE*, No. 139, *ante*.

141. — *Certificate of time of service not character.*—*GARBUTT v. DURHAM JOINT COMMITTEE*, No. 139, *ante*.

142. *Pension fund payable partly from police pension fund & partly from Parliamentary funds — Apportionment — Mandamus to Treasury.*—A member of the Royal Irish Constabulary, which was a force with a salary paid out of money provided by Parliament, removed from that force with the written sanction of the chief officer thereof to the police force of a county in England. Upon his retirement from this latter force he became, under the Police Act, 1890 (c. 45), entitled to, & was granted by the police authority of the county, a pension calculated upon the number of years of his approved service in both forces. The police authority of the county applied to the Treasury, under Police Act, 1890 (c. 45), s. 14, to determine the proportions in which the pension should be payable from money provided by Parliament & from the county police pension fund, but the Treasury refused to do so upon the ground that the Royal Irish Constabulary was not a "police force" within the definition in Police Act, 1890 (c. 45), s. 33, as it was not maintained by any of the police authorities mentioned in Police Act, 1890 (c. 45), sched. III., & that therefore Police Act, 1890 (c. 45), s. 14, did not apply. Upon an application by the police authority for a *mandamus*:—*Held*: as the Royal Irish Constabulary was the only police force in which the salaries of the members were paid out of money provided by Parliament, the context required that the expression "police force" in Police Act, 1890 (c. 45), s. 14 (iii), should have its ordinary meaning, & not the limited meaning contained in the definition in Police Act, 1890 (c. 45), s. 33, & therefore it included the Royal Irish Constabulary, & Police Act, 1890 (c. 45), s. 14, applied; & a *mandamus* would lie to the Treasury to determine the proportions in which the pension was payable

Where a case of absolute necessity arises for an officer, in his official capacity, to incur an unavoidable expenditure, he might seek reimbursement from the Govt.—*SMITH v. NEWFOUNDLAND GOVERNMENT* (1885), 7 Nfld. L. R. 62.—*NFLD.*

*e. Establishment of benevolent fund — To provide gratuities for retired or incapacitated police constables.*—*Accu-*

*mulation until sum reached certain amount.*—In 1889 the police force of Hamilton established a benefit fund, to provide for a gratuity to any member resigning or being incapacitated from length of service or injury, & to the family of any member dying in the service. Each member of the force contributed a percentage of his pay for the purposes of the fund, & one of the rules provided as follows: "No

money to be drawn from the fund for any purpose whatever until it reach the sum of eight thousand (\$8,000) dollars":—*Held*: in case of a member of the force dying before the fund reached the said sum, the gratuity to his family was merely suspended, & was payable as soon as that amount was realised.—*MILLER v. HAMILTON POLICE BENEFIT FUND* (1898), 28 S. C. R. 475.—*CAN.*

under Police Act, 1890 (c. 45), s. 14.—*R. v. TREASURY LORDS COMRS.*, [1909] 2 K. B. 183; *sub nom. R. v. TREASURY COMRS.*, *Ex p. DEVON STANDING JOINT COMMITTEE*, 78 L. J. K. B. 680; 100 L. T. 896; 73 J. P. 299; 25 T. L. R. 450; 7 L. G. R. 746, D. C.

*Annotation*:—*Mentd. R. v. Speyer, R. v. Cassel* (1915), 85 L. J. K. B. 630.

*Attachment of pension.*—*See EXECUTION*, Vol. XXI., p. 632, No. 2144.

*Charitable gift to superannuation fund.*—*See CHARITIES*, Vol. VIII., p. 260, No. 216.

*Special disablement pension—As measure of damages in action by employers of constable—Against third party for negligence.*—*See MASTER & SERVANT*, Vol. XXXIV., p. 183, No. 1490.

## Part VIII.—Police Rates and Assessment of Police Premises.

*Police rates.*—*See RATES & RATING.*

*Assessment of police premises—For income tax.*—*See INCOME TAX*, Vol. XXVIII., p. 15, No. 75.

— *For local rates.*—*See RATES & RATING.*

## Part IX.—Powers of Secretary of State.

*See Parish Constables Acts*, 1842 (c. 109); 1872 (c. 92); *Lock-up Houses Act*, 1848 (c. 101); *Petty Sessions & Lock-up Houses Act*, 1868 (c. 22); *County Police Act*, 1839 (c. 93); *Metropolitan Police Act*, 1856 (c. 2); *County & Borough Police Act*, 1856 (c. 69); *County & Borough Police*

*Act*, 1859 (c. 32); *Municipal Corporations Act*, 1882 (c. 50); *Local Government Act*, 1888 (c. 41); *Police Acts*, 1890 (c. 45); 1919 (c. 46); *Special Constables Acts*, 1831 (c. 41); 1838 (c. 80); 1923 (c. 11).

## POLICY.

*See INSURANCE.*

## POLL.

*See ELECTIONS.*

## POLLUTION.

*See CRIMINAL LAW AND PROCEDURE; EASEMENTS AND PROFITS À PRENDRE; NUISANCE; WATERS AND WATERCOURSES.*

# POOR LAW.

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<i>Burial of Paupers</i> . . . . .	„ BURIAL.		
<i>District Schools</i> . . . . .	„ EDUCATION.		
<i>Election of Guardians</i> . . . . .	„ ELECTIONS.	<i>Registration of Voters</i> . . . . .	„ ELECTIONS.
<i>Industrial Schools</i> . . . . .	„ EDUCATION.	<i>Schools and School Districts</i> . . . . .	„ EDUCATION.
<i>National Insurance</i> . . . . .	„ WORK AND LABOUR.	<i>Vaccination</i> . . . . .	„ PUBLIC HEALTH.
<i>Pauper Lunatics</i> . . . . .	„ LUNATICS.	<i>Valuation</i> . . . . .	„ RATES AND RATING.
<i>Poor Rate</i> . . . . .	„ RATES AND RATING.		
<i>Reformatories</i> . . . . .	„ EDUCATION.		

## Part I.—Poor Law Authorities.

### SECT. 1.—THE MINISTRY OF HEALTH.

NOTE.—*The administration of relief to the poor was subject to the management, direction and control of the Local Government Board in which body was vested the powers of the former Poor Law Commissioners and the Poor Law Board. These powers are now transferred to the Ministry of Health.*

#### SUB-SECT. 1.—IN GENERAL.

*See, generally, Ministry of Health Act, 1919 (c. 21); Poor Law Act, 1927 (c. 14), ss. 1, 211–220, 240–245.*

*See, also, LOCAL GOVERNMENT, Vol. XXXIII., p. 8, Nos. 1–4; PUBLIC AUTHORITIES; PUBLIC HEALTH.*

### SUB-SECT. 2.—POOR LAW ORDERS.

*See Poor Law Act, 1927 (c. 14), ss. 211–220.*

1. *Power of authority to make—Order altering constitution of union—Annexation of objecting town.]—(1) The Poor Law Comrs. having made a union of fourteen country parishes, by the consent of that union, added to it a considerable town adjacent; the town, disliking the annexation to the union, obtained a rule for a certiorari to bring up the order, but the rule was discharged on the ground that the Comrs. were authorised to make the order.*

(2) *The ct. will not inquire into the soundness of the discretion exercised by the comrs. (LORD DENMAN, C.J.).—R. v. POOR LAW COMRS., Re*

**Sect. 3.—Justices of the Peace. Sects. 4 & 5: Sub-sects. 1 & 2, A.]**

the parish lies, "in the said county."—*R. v. TOTNES UNION* (1845), 7 Q. B. 690; 2 New Sess. Cas. 82; 1 New Mag. Cas. 383; 14 L. J. M. C. 148; 5 L. T. O. S. 240; 9 J. P. 584; 9 Jur. 660; 115 E. R. 649.

*Annotations:—Reld. R. v. Norfolk JJ.* (1845), 9 J. P. Jo. 774; *R. v. Brown* (1859), 8 W. R. 60. *Mentd. Parkes v. Parkes* (1852), 16 Jur. 1093.

**21. — Form of order.]—*R. v. TOTNES UNION, No. 20, ante.***

**22. — To whom order addressed.]—*R. v. TOTNES UNION, No. 20, ante.***

**23. — Order addressed to parish of settlement—Necessity arising in another parish.]—*R. v. WOOLSTANTON STAFFORD (INHABITANTS)* (1732), 1 Sess. Cas. K. B. 199; 93 E. R. 59.**

**24. — Justices acting outside union district.]—**The Durham union consists of the parishes & townships of the borough of Durham, & of several other parishes & townships in the county of Durham. Two justices, usually acting in and for the borough, made an order under Poor Law Amendment Act, 1834 (c. 76), s. 27, for out-door relief to a pauper who resided within the borough:—*Held*: they were not justices "usually acting for the district in which the union was situate," & had no jurisdiction to make the order.—*R. v. DURHAM UNION* (1851), 4 New Sess. Cas. 437; 16 L. T. O. S. 363; 15 J. P. Jo. 51.

**Power to make reception order—Admission of pauper lunatic to asylum.]—See LUNATICS, Vol. XXXIII., p. 267, No. 1861.**

**SECT. 4.—OVERSEERS.**

**NOTE.—**The office of overseer having been abolished by Rating & Valuation Act, 1925 (c. 90), s. 62, the cases on that subject have been omitted.

**SECT. 5.—GUARDIANS.**

**SUB-SECT. 1.—IN GENERAL.**

*Sec. now, Poor Law Act, 1927 (c. 14), ss. 4–33.*

**25. Ex officio guardians—Justices of the peace for county—County of a town.]—In Poor Law (Amendment) Act, 1834 (c. 76), s. 38, the word**

"county" includes county of a town, & justices acting for a county of a town, with a separate commission of the peace, & residing within the union, are entitled to vote & act as *ex officio* guardians equally with resident justices for the county at large.—*R. v. PEARCE* (1880), 5 Q. B. D. 386; 49 L. J. M. C. 81; 44 J. P. Jo. 216; *sub nom. R. v. PIERCE*, 28 W. R. 568, D. C.

**26. Disqualification—Receipt of salary from poor rate—Exceptions.]—**The clerk to a highway board or a school board, whose salary is paid out of a district or school board fund, which is fed by moneys which are contributed by several parishes in accordance with precepts issued under the provisions of Highway Act, 1864 (c. 101), or the Elementary Education Act, 1870 (c. 75), is not disqualified, under Poor Law (Amendment) Act, 1842 (c. 57), s. 14, as being a person receiving a fixed salary from the poor rates in any parish or union, from serving as a guardian in such parish or union.—*R. v. RAWLINS, R. v. DIBBIN* (1885), 15 Q. B. D. 382; 54 L. J. Q. B. 557; 50 J. P. 5, C. A. *Annotation:—Reld. Greville-Smith v. Tomlin* (1911), 104 L. T. 816.

**27. — Composition with creditors.]—**Where a guardian of the poor obtains an administration order under Bkpcy. Act, 1883 (c. 52), s. 122, providing for the payment of less than 20s. in the pound in respect of his debts, he has made a "composition or arrangement with his creditors" within Local Government Act, 1894 (c. 73), s. 46, & is disqualified for office.—*BRADFELD v. CHELTENHAM UNION*, [1906] 2 Ch. 371; 75 L. J. Ch. 618; 95 L. T. 78; 70 J. P. 371; 54 W. R. 611; 22 T. L. R. 639; 50 Sol. Jo. 560; 4 L. G. R. 961; 13 Mans. 207.

**28. — Interest in contract with guardians—Interest ceasing before office declared vacant.]—**A member of a board of guardians agreed with the board to collect on their behalf rent receivable by the board in respect of a certain house. There was no express agreement as to any fee or commission to be paid to the member for so doing. He collected the rent until the house was sold, & then paid to the board the amount of the rent received by him, less a sum which he claimed to be entitled to retain as commission, but he subsequently paid to the board the sum which he had retained. After receiving it the board declared the member's office of guardian to be vacant, on

**PART I. SECT. 4.**

**b. Rights & liabilities of—Under Acts of Assembly.]—**An overseer of the poor of the parish is liable, under the above Acts to an indictment for not accounting at the first general sessions of the peace in the year for moneys received by him for the support of the poor during the preceding year.—*R. v. MATTHEW* (1844), 4 N. B. R. (2 Kerr) 543.—CAN.

**c. — Actions for rent.]—MATTHEW v. CHITTIK** (1845), 4 N. B. R. (2 Kerr) 696.—CAN.

**d. — Supplies for use & support of poor.]—**Where supplies were furnished to deft., an overseer of the poor, for the use of the poor of the parish of St. John, on orders from time to time sent by him as such overseer to pltf.:—*Held*: he was personally liable for the payment of such supplies.—*GARDINER v. MATTHEW* (1847), 5 N. B. R. (3 Kerr) 501.—CAN.

**e. — —.]—BURNETT v. HATFIELD** (1857), 3 N. S. R. (2 Thom.) 161.—CAN.

**f. — —.]—MUNRO v. WALLACE TOWNSHIP OVERSEERS** (1880), 13 N. S. R. (1 L. & G.) 501.—CAN.

**g. — —.]—McCURDY v. HARVEY**

(1882), 15 N. S. R. (3 L. & G.) 240.—CAN.

**h. — —.]—**The overseer of the poor for the town is a corpn. sole, & for the breach of any contract made with him for the support of the poor of the town, the action should have been against the corpn. & not against the town.—*ROSS v. UPPER MILLS CORPN.* (1882), 22 N. B. R. 168.—CAN.

**k. — —.]—**The overseers of the poor in a parish in which overseers for the French inhabitants have also been elected under C. S., c. 99, s. 67, cannot, under c. 102, s. 8, recover from the latter overseers for relief provided to a French pauper in that parish.—*MONCTON FRENCH INHABITANTS OVERSEERS v. MONCTON FRENCH INHABITANTS OVERSEERS* (1889), 29 N. B. R. 632.—CAN.

**l. — —.]—NAAS v. OVERSEERS OF THE POOR, DISTRICT NO. 3** (1902), 35 N. S. R. 316.—CAN.

**m. — —.]—IRVINE v. STANLEY, COUNTY OF YORK OVERSEERS** (1900), 37 N. B. R. 572; 2 E. L. R. 5.—CAN.

**n. — — To pay for services rendered.]—**Where a deft., an overseer of the poor, made a written agreement to see that pltf. received pay for services

rendered to a transient pauper:—*Held*: liable, although his co-overseers repudiated the obligation.—*DENNISON v. DILL* (1859), 4 N. S. R. (Coch.) 33.—CAN.

**o. — —.]—IL. v. ARCHIBALD** (1878), 18 N. B. R. (2 P. & B.) 250.—CAN.

**p. — — Action against third party—For bringing paupers into parish.]—**The overseers of the poor, not having any corporate rights, cannot maintain an action against a person who brings paupers into the parish, who become chargeable thereon, such act being no injury to the overseers individually.—*GILLESPIE v. PHILLIPS* (1861), 10 N. B. R. (5 All.) 221.—CAN.

**q. — —.]—STEVENS v. WALLACE TOWNSHIP OVERSEERS** (1880), 13 N. S. R. (1 L. & G.) 495.—CAN.

**r. — —.]—MACCOM TOWNSHIP OVERSEERS v. DAVIDSON** (1882), 16 N. S. R. (4 R. & G.) 58.—CAN.

**t. — —.]—CARTER v. BROOKFIELD OVERSEERS** (1897), 30 N. S. R. (18 R. & G.) 225.—CAN.

**s. — — Removal of pauper.]—CUMBERLAND OVERSEERS, DISTRICT NO. 5 v. McDONALD** (1902), 35 N. S. R. 394.—CAN.

the ground that, by reason of charging commission for the collection of the rent, he had become disqualified under Local Government Act, 1894 (c. 73), s. 46 (1) (e), for being a member of the board:—*Held*: the fact that before the declaration of vacancy the employment had terminated, & the amount of commission had been paid by the member to the board, did not prevent him from being disqualified & the office was therefore, vacant.—*R. v. ROWLANDS*, [1906] 2 K. B. 292; 75 L. J. K. B. 501; 95 L. T. 502; 70 J. P. 463; *sub nom. R. v. ROWLANDS, Ex p. WYNNE*, 4 L. G. R. 983, D. C.

29. — **Absence from meetings — Illness.** — If a guardian or district councillor is absent from meetings of the board or council for more than six months consecutively through illness, it is not necessary for him to give notice of his illness to the board or council in order that he may not be disqualified under Local Government Act, 1894 (c. 73), s. 46 (8):—*Semble*: if his absence is not due to illness he is disqualified from acting, at all events until his excuse has been considered & accepted by the board or council, & he cannot by merely resuming attendance afterwards do away with the disqualification.—*R. v. HUNTON, Ex p. HODGSON* (1911), 75 J. P. 335; 9 L. G. R. 751, D. C.

30. — **Receipt of relief—By way of loan.** — Relief which is given by way of loan only is relief within Local Government Act, 1894 (c. 73), s. 46, & its receipt by way of loan acts as a disqualification as therein provided.—*CHARD v. BUSH*, [1923] 2 K. B. 849; 68 Sol. Jo. 104; 21 L. G. R. 601; *sub nom. CHARD v. BUSH, WILLIAMS v. BUSH*, 92 L. J. K. B. 1013; 130 L. T. 60; 87 J. P. 154; 39 T. L. R. 693; 27 Cox, C. C. 527, D. C.

31. — **Relief in hospital—Cost repaid.** — *Appt.*, B., who was a local government elector in the area of the Dartford Union, moved the Div. Ct. for a rule *nisi* directed to the Dartford Guardians to show cause why a writ of *mandamus* should not issue commanding them to declare vacant under Local Government Act, 1894 (c. 73), s. 46 (1) (b), (7), the office of guardian held by P., on the ground that since her election as guardian, she had received "union or parochial relief." Since her election as guardian, P. was for some time a private patient in a hospital at Dartford maintained by the guardians. P. had, however, repaid to the guardians the cost of her maintenance at the hospital as well as the cost of the medical relief obtained by her while at the hospital. She had also paid the expenses of her conveyance to the hospital:—*Held*: as the guardians had been paid in full for every privilege & advantage which P. had received at the hospital, there was no evidence on which it could be said that she had been in receipt of "union or parochial relief," & therefore, she was not disqualified for being a guardian.—*Ex p. BREWSTER* (1927), 91 J. P. 103; 43 T. L. R. 253; 71 Sol. Jo. 123, C. A.

32. **Meetings — Notice of meeting — Failure to notify one member.** — To an action of trespass for an assault, *defts.* pleaded that they were overseers of the poor, & that a select vestry of the parish was duly assembled & holden in a certain school room within the parish, & that *defts.*, as overseers, were present; that *pltf.* unlawfully entered the room, & *defts.* expelled him; it was proved that one of the five members who constituted the select vestry, had not been summoned, or received any previous notice of the meeting:—*Held*: the plea was not proved, as the meeting was not a legally constituted vestry so as to support the allegation, that the select vestry was duly assembled.—

*DOBSON v. FUSSEY* (1831), 7 Bing. 305; 2 Man. & Ry. M. C. 470; 5 Moo. & P. 112; 9 L. J. O. S. C. P. 72; 131 E. R. 117.

33. **Whether board legally constituted — No election in one district of union.** — Under Poor Law (Amendment) Act, 1834 (c. 76), ss. 26, 38, Poor Law Comrs. formed a union of six townships, comprehending T. & L., & ordered that there should be eighteen guardians of the union, two of whom were to be elected by L., & the other sixteen by the other townships, in specified proportions, there not being less than two for any one township. The first & two subsequent annual elections took place, at each of which more than six guardians were elected for the union; but L. elected none on any occasion:—*Held*: the board of guardians elected on the third election, though not eighteen in number, might, under sect. 38, make an order on the overseers of T. for payment of money conformably to the regulations issued for the union by the comrs.; & the overseers were compellable by *mandamus* to pay.—*ROBINSON v. TODMORDEN UNION* (1842), 3 Q. B. 675; 114 E. R. 665; *sub nom. ROBINSON v. R.*, 2 Gal. & Dav. 820; *sub nom. R. v. TODMORDEN & WALSDEN TOWNSHIPS OVERSEERS*, 11 L. J. M. C. 129, Ex. Ch.

34. **Election of guardians—Administration under board of directors.** — The Poor Law Comrs. have no powers under Poor Law (Amendment) Act, 1834 (c. 76), s. 39, to make an order for the election of a board of guardians in a parish where the administration of the poor laws is already in the hands of a board of directors, under a local Act.—*R. v. POOR LAW COMRS., Re ST. PANCRA'S PARISH* (1837), 6 Ad. & El. 1; 6 L. J. M. C. 41; 1 J. P. 21, 69; 112 E. R. 1; *sub nom. R. v. POOR LAW COMRS.*, 1 Nev. & P. K. B. 371; Nev. & P. M. C. 106; Will. Woll. & Dav. 79; 1 Jur. 53.

*Annotations*:—*Consd. R. v. St. James, Westminster* (1859), 7 W. R. 739. *Re R. v. Poor Law Comrs., Re Whitechapel Union* (1837), 6 Ad. & El. 34; *Re Holborn Union, R. v. Poor Law Comrs.* (1838), 6 Ad. & El. 56; *R. v. Poor Law Comrs., Re United Parishes of St. Giles-in-the-Fields & St. George, Bloomsbury* (1851), 15 Jur. 841; *R. v. Electricity Comrs., Ex p. London Electricity Joint Committee Co.* (1920), [1924] 1 K. B. 171. *Mentd. R. v. Paynter* (1849), 13 Q. B. 309.

— *See ELECTIONS*, Vol. XX., pp. 141, 142, Nos. 1153–1163; *CROWN PRACTICE*, Vol. XVI., pp. 355, 356, Nos. 1851, 1865.

**Privilege attaching to proceedings.** — *See LIBEL & SLANDER*, Vol. XXXII., pp. 118, 146, Nos. 1496, 1764.

## SUB-SECT. 2.—FINANCE.

### A. Payments.

*See, now*, Poor Law Act, 1927 (c. 14), ss. 136–141.

35. **Expenses of valuation & survey.** — *R. v. BANGOR OVERSEERS*, No. 4, *ante*.

36. **Improper payments — Jurisdiction of High Court—Injunction.** — *A.-G. v. MERTHYR TYDFIL UNION*, No. 188, *post*.

37. — **Declaration.** — *A.-G. v. MERTHYR TYDFIL UNION*, No. 188, *post*.

38. — — — — — *A.-G. v. POPLAR UNION*, No. 191, *post*.

39. **Limitation of time for payment—Date from which time runs.** — *Pltf.* entered into an agreement with *defts.* on Nov. 15, 1866, to render certain services as surveyor & valuer. For payment of these services *pltf.* claimed the sum of £596 11s., of which the sum of £585 was for services rendered up to Jan. 2, 1870, & the remaining sum of £11 11s. was for services rendered after

**Sect. 5.—Guardians: Sub-sect. 2, A. & B.; sub-sect. 3.]**

that date, & on Dec. 24, 1870, brought an action to recover the same. Defts. admitted the latter claim, but denied their liability to pay the former on the ground that such claim was barred by Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 1, which enacts "with respect to any debt, claim or demand, which may after the passing of this Act, be lawfully incurred by or become due from the guardians of any union parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards, the commencement of such half-year to be reckoned from the time when the last half-year's accounts shall or ought to have been closed":—*Held*: the claim of pltf. to the sum of £585 was barred by Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 1.—*CASTLE v. FULHAM UNION* (1872), 37 J. P. 56.

40. ———.]—A judgment of the Ct. of Appeal for payment by guardians of the poor of the costs of an appeal does not constitute a "debt, claim, or demand lawfully incurred or become due" within Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 1, until the amount has been determined on taxation, & the time for payment limited by that Act runs from the date of the allocatur, & not from the date of the judgment.—*MANCHESTER, SHEFFIELD & LINCOLNSHIRE RY. CO. v. DONCASTER UNION*, [1897] 1 Q. B. 117; 66 L. J. Q. B. 75; 75 L. T. 472; 60 J. P. 819; 45 W. R. 82; 13 T. L. R. 19; 41 Sol. Jo. 45, C. A.  
*Annotation*:—*Apld. Sharpington v. Fulham Grdns.*, [1904] 2 Ch. 449.

41. ———.]—The guardians of F. entered into a contract with S., a builder, for certain works required by them for the purpose of carrying out their public duties. The works were completed on May 3, 1901, & paid for in Sept. of that year. S. then claimed an additional sum by way of damages for loss alleged to have been caused by negligence & frequent changes of plans on the part of defts. The contract contained an arbn. clause, & pltf.'s claim was referred to arbn. in Nov. 1902. Defts. took two preliminary objections:—(a) that the claim was for neglect or default in the execution of defts.' public duty, & proceedings had not been commenced within six months as required by Public Authorities Protection Act, 1893 (c. 61); & (b) that the amount claimed became due, if at all, on or before May 3, 1901, & by Poor Law (Payment of Debts) Act, 1859 (c. 49), could only be paid within the half-year commencing Mar. 30, 1901, or within three months afterwards. This action was brought for the determination of these two points of law:—*Held*: the sum, if any, owing to pltf. did not become due within Poor Law (Payment of Debts) Act, 1859 (c. 49), until the amount was ascertained by arbn. according to the contract.—*SHARPINGTON v. FULHAM UNION* [1904] 2 Ch. 449; 73 L. J. Ch. 777; 91 L. T. 739; 68 J. P. 510; 52 W. R. 617; 20 T. L. R. 643; 48 Sol. Jo. 620; 2 L. G. R. 1229.

*Annotations*:—*Distd. Chester Waterworks Co. v. Chester Union Grdns.* (1907), 96 L. T. 566. *Mentd. Kent County Council v. Folkestone Corpn.*, [1905] 1 K. B. 620; *Lyles v. Southend-on-Sea Corpn.*, [1905] 2 K. B. 1; *Pearson v. Dublin Corpn.*, [1907] A. C. 351; *The Johannesburg*, [1907] P. 65; *Bennett v. Stepney Borough* (1912), 107 L. T. 383; *Bradford Corpn. v. Myers*, [1916] 1 A. C. 343.

42. ———.]—**Extension of time by guardians—Time for extension.**—Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 1, which enacts that any

debt due from the guardians of any union, etc., shall be paid within the half-year in which the same shall have been incurred, or within three months after the expiration of such half-year, but not afterwards provided, that the Poor Law Board by their order may, if they see fit, extend the time for payment for a period not exceeding twelve months after the date of such debt, precludes a creditor of the guardians from recovering in an action, commenced after the expiration of the half-year & three months, if the time has not been extended by the Poor Law Board, although at the time of the commencement of the action they might have done so.—*BAKER v. BILLERICAY UNION* (1863), 2 H. & C. 642; 3 New Rep. 295; 33 L. J. M. C. 40; 9 L. T. 486; 28 J. P. 24; 9 Jur. N. S. 1201; 13 W. R. 11; 159 E. R. 266.

*Annotations*:—*Distd. Sharpington v. Fulham Union* (1904), 73 L. J. Ch. 777. *Reid. R. v. Stepney Union* (1874), 43 L. J. M. C. 145; *Chester Waterworks Co. v. Chester Union* (1907), 96 L. T. 566.

43. ———.]—**"Debt, claim, or demand"**—**Weekly sum for maintenance of criminal lunatic.**—By the joint effect of 9 Geo. 4, c. 40, s. 54, & 3 & 4 Vict. c. 54, s. 7, power still remains, notwithstanding the total repeal of 9 Geo. 4, c. 40, by 8 & 9 Vict. c. 126, s. 1, in two justices to inquire into & adjudge the settlement of a person detained in custody during pleasure who has been acquitted of felony on the ground of insanity, & to order the overseers or guardians of the parish of settlement to pay such weekly sum for his maintenance as the justices shall from time to time direct. Such order is binding on the guardians when served upon them, although not accompanied by grounds of chargeability & particulars of settlement. Each weekly sum ordered by the justices to be paid is a "debt, claim, or demand," due from the guardians within Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 1, & must be paid, or proceedings commenced to enforce the payment, within the time limited by that sect., or the recovery will be barred.—*R. v. STEPNEY UNION* (1874), L. R. 9 Q. B. 383; 43 L. J. M. C. 145; 30 L. T. 808; 38 J. P. 549; 12 Cox, C. C. 631.

*Annotations*:—*Reid. Barton Regis Poor Law Union Grdns. v. Berks Clerk of the Peace* (1878), 48 L. J. M. C. 51; *Mld. Ry. v. Edmonton Union Grdns.* (1895), 43 W. R. 309.

44. ———.]—**Costs of House of Lords appeal.**—An order of this House for payment of the costs of an appeal without specifying the amount does not constitute a "debt, claim or demand lawfully incurred or become due" within Poor Law (Payment of Debts) Act, 1859 (c. 49), ss. 1, 4, until the amount has been certified by the Clerk of the Parliaments under the Standing Orders, & the time for payment limited by that Act runs from the date of the certificate, & not from the date of the order.—*WEST HAM UNION v. ST. MATTHEW, BETHNAL GREEN (CHURCHWARDENS, ETC.)*, [1896] A. C. 477; 65 L. J. M. C. 201; 75 L. T. 286; 60 J. P. 740; 12 T. L. R. 423; 40 Sol. Jo. 530, H. L.

*Annotations*:—*Fold. M. S. & L. Ry. v. Doncaster Union Grdns.*, [1897] 1 Q. B. 117. *Apld. Sharpington v. Fulham Grdns.*, [1904] 2 Ch. 449. *Reid. Chester Waterworks Co. v. Chester Union Grdns.* (1907), 96 L. T. 566.

45. ———.]—**Damages.**—Defts., as the owners & occupiers of a workhouse, had entered into an agreement with the water co. for the supply by meter of water to the workhouse at a rate varying with the quantity consumed, according to the co.'s scale of charges, & water was so supplied for the workhouse for several years, when defts. requested the co. to remove the meter & furnish a supply for domestic purposes at rates based on annual value. The co. refused to do so, & the water was supplied by meter to & used by

defts. as before, but for several years no payment had been made for it, defts. refusing to pay except on the basis of a domestic supply. It was admitted that some at least of the purposes for which the water was supplied were non-domestic purposes, & of these some were found as a fact to be trade or business purposes:—*Held*: with regard to a claim for damages for wasting the water supplied, but not paid for, which had been amended at the hearing & treated as a claim for water supplied at the former rate, plffs. were precluded by Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 1, from recovering all such rates as had not become due within the previous six months, & by sect. 4, from recovering the last quarter's rate, as, until the claim was amended, the action was not a "proceeding" within sect. 4.—**CHESTER WATERWORKS CO. v. CHESTER UNION** (1907), 96 L. T. 566; 71 J. P. 133; 23 T. L. R. 245; 5 L. G. R. 215; *on appeal* (1908), 98 L. T. 701, C. A.

*Annotations*:—*Reid*, Bristol Grdns. v. Bristol Waterworks Co., [1912] 1 Ch. 846. *Mentd*, Frederick v. Bognor Water Co., [1909] 1 Ch. 149.

**46. — Guardians also sanitary authority**  
—*Limitation restricted to debts as guardians.*—The limitation of actions contained in Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 1, applies only to debts contracted by the guardians as such, & is not extended by Public Health Act, 1875 (c. 55), s. 9, to debts contracted by them in their capacity of rural sanitary authority.—**DEARLE v. PETERSFIELD UNION** (1888), 21 Q. B. D. 447; 57 L. J. Q. B. 640; 60 L. T. 85; 53 J. P. 102; 37 W. R. 113; 4 T. L. R. 586, C. A.

**47. — "Commencement of proceedings"**  
*Application to tax costs.*—(1) The Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 1, enacts that "any debt, claim or demand lawfully incurred or become due" from the guardians of any union shall be paid within the half-year in which same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards. Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 4, provides that if any person claiming any debt or demand shall "commence proceedings in any ct. of law or equity, or before any justice or other competent authority" within the time thereinbefore limited, & shall with due diligence prosecute such proceedings to judgment or other final settlement of the question, such judgment shall be satisfied by the guardians, notwithstanding that such judgment may be recovered or such final settlement arrived at after the expiration of the period thereinbefore provided.

An appeal to quarter sessions against an assessment to the poor rate having been allowed with costs, appts. within the three months limited by Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 1, applied to the clerk of the peace to tax the costs. The costs were taxed after the expiration of three months, & no proceedings to enforce payment of the taxed amount were commenced by appts. within the three months after the expiration of the half-year in which the costs were taxed:—*Held*: the application to tax was not a commencement of proceedings within Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 4, & appts. could not recover the costs.

(2) *Qu.*: whether before taxation of the costs there was "any debt, claim or demand incurred or become due."—**MIDLAND RY. CO. v. EDMONTON**

**UNION**, [1895] A. C. 485; 64 L. J. Q. B. 710; 72 L. T. 811; 60 J. P. 68; 11 T. L. R. 448; 11 R. 246, H. L.

*Annotations*:—*As to* (1) *Consd.* West Ham Union Grdns. v. St. Matthew, Bethnal Green, [1896] A. C. 477. *Appld.* Sharpington v. Fulham Grdns., [1904] 2 Ch. 449. *Reid*, Chester Waterworks Co. v. Chester Union Grdns. (1907), 96 L. T. 566; R. v. Dixey, etc. JJ., *Ex p.* Cobb & Castle (1911), Konst. & W. Rat. App. 323. *As to* (2) *Reid*, M. S. & L. Ry. v. Doncaster Union Grdns., [1897] 1 Q. B. 117. *Generally*, *Mentd*, R. v. Winder, [1900] 2 Q. B. 666; R. v. Cumberland JJ. (1903), 68 J. P. 153.

**48. — Delay in instituting proceedings—Prosecution "with due diligence."**—An action was brought by an engineer, within the time limited by Poor Law (Payment of Debts) Act, 1859 (c. 49), for services rendered to defts., who were a rural sanitary authority acting under Public Health Act, 1875 (c. 55). After issue joined pltf. took out a summons to refer the matter to arbn.; this summons was opposed by defts., & was dismissed. Pltf. then allowed two assizes at Leeds, where the action was to be tried, to pass without giving notice of trial; defts. then took out a summons to dismiss the action for want of prosecution, after which pltf. gave notice of trial for the assizes then coming on. At the trial, the judge, with the consent of the parties, ordered the matter to be referred to an arbitrator who found for pltf. for a certain sum. In an action for a *mandamus* to defts. to levy a rate to satisfy the award:—*Held*: granting the *mandamus*, as the action was a proper one to be referred to arbn., & as pltf. had taken out a summons to refer, which defts. opposed, pltf. had not, under the circumstances, failed to prosecute the proceedings in the action "with due diligence" within Poor Law (Payment of Debts) Act, 1859 (c. 49).—**RHODES v. PATELEY BRIDGE UNION** (1884), 51 L. T. 235; 48 J. P. 168.

*Annotation*:—*Reid*, Mid. Ry. v. Edmonton Union Grdns. (1894), 64 L. J. Q. B. 113.

—*J.*—*See, also*, LIMITATION OF ACTIONS, Vol. XXXII., p. 326, No. 120.

**Execution against property vested in guardians.**  
—*See* EXECUTION, Vol. XXI., p. 423, No. 48.

### B. Borrowing.

*See, now*, Poor Law Act, 1927 (c. 14), ss. 142–144.

**49. Repayment of loan—According to terms of contract—Alteration subject to lender's consent.**  
—Guardians of the poor who have since Apr. 24, 1871, the date of the passing of 34 & 35 Vict. c. 11, borrowed moneys, to be repaid at stipulated times, cannot even with the authority of an order of the Local Government Board under 34 & 35 Vict. c. 11, s. 2, compel the lender to accept against his will repayment otherwise than in accordance with the contract.—**WEST DERBY UNION v. METROPOLITAN LIFE ASSURANCE SOCIETY**, [1897] A. C. 647; 66 L. J. Ch. 726; 77 L. T. 284; 61 J. P. 820; 13 T. L. R. 536, H. L.

*Annotations*:—*Mentd*, Dartford R. C. v. Bexley Heath Ry. (1897), 67 L. J. Q. B. 231; Sheffield Corp'n. v. Sheffield Electric Light Co., [1898] 1 Ch. 203; *Re* New River Co. & Metropolitan Water Board (1904), 68 J. P. 329; A.-G. v. Liverpool Corp'n., [1922] 1 Ch. 211.

### SUB-SECT. 3.—CONTRACTS.

*See* Poor Law Act, 1927 (c. 14), ss. 7 (e), 241.

**50. Liability of individual member.**—The members of a board of guardians are not liable to be sued personally for contracts entered into

**Sect. 5.—Guardians: Sub-sects. 3, 4, 5 & 6.]**

with them in their corporate capacity. The action must be against the board.—*JENKINS v. DAVIES* (1844), 3 L. T. O. S. 100; 8 J. P. Jo. 308.

**51. When written contract necessary—Local act.]**—A local Act for the management of the poor of Brighton, empowered the directors & guardians, when & as they should find it necessary, to alter, enlarge, extend, & repair the existing poor-house, or to erect other houses or buildings for the better receiving, employing, & maintaining the poor: & provided that all contracts or agreements made between the directors & guardians & any other person or persons relating to "any act, matter, or thing to be done in pursuance of that Act," should be reduced into writing, & signed by the parties thereto. By Poor Law (Amendment) Act, 1844 (c. 101), the comrs. are for the first time empowered to direct that schools shall be built in parochial districts:—*Held*: a contract made by the directors & guardians, by order of the Poor Law Comrs., in relation to the erection of an industrial school within the parish, was not a contract for "a thing to be done in pursuance of the local Act," & therefore was not required by sect. 220 of that Act to be in writing.—*ARMSTRONG v. BOWDIDGE* (1855), 16 C. B. 358; 25 L. T. O. S. 165; 139 E. R. 797.

*See, also*, CORPORATIONS, Vol. XIII., pp. 380, 382, 391, 393, 394, Nos. 1102, 1103, 1111–1114, 1168, 1183–1188.

**Exemption from stamp duty.]—See** REVENUE.

SUB-SECT. 4.—SUPPLY OF PROVISIONS BY  
GUARDIANS.

*See* Poor Law Act, 1927 (c. 14), s. 226.

**52. Sale of goods for poor—Fair market price.]**—A farmer furnished the produce of his land to the poor of the parish of which he was churchwarden, at a fair market price:—*Held*: he was liable to penalties under Poor Relief Act, 1815 (c. 137).—*POPE v. BACKHOUSE* (1818), 8 Taunt. 239; 2 Moore, C. P. 186; 129 E. R. 375.

*Annotation* :—*Consd. Skinner v. Buckee* (1824), 3 B. & C. 6.

**53. — Purchase by workhouse master from guardian.]**—I. being the master of the workhouse, appointed by, & receiving orders from, the guardians of the poor of the parish of W. bought provisions from A. one of such guardians:—*Held*: A. was liable to the penalty of £100, imposed by Poor Relief Act, 1815 (c. 137), s. 6.—*WEST v. ANDREWS* (1822), 5 B. & Ald. 328; 106 E. R. 1211; *subsequent proceedings*, 1 B. & C. 77.

*Annotations* :—*Raff. Barber v. White* (1834), 1 Ad. & El. 514; *Le Feuvre v. Lankester* (1854), 3 E. & B. 530; *Tomkins v. Jolliffe* (1887), 51 J. P. Jo. 247.

**54. — Guardian not having acted as such.]**—By a local Act, for regulating the affairs of a parish, the churchwardens & overseers for the time being were directed to meet annually at Easter, to nominate & appoint twenty discreet vestrymen, who, together with the churchwardens & overseers, were to be, & be called governors & directors of the poor. By a subsequent Act, the same mode of nominating & appointing twenty discreet vestrymen was to be adopted, & it was further enacted that they together with the churchwardens & overseers & all persons seised of land, etc., within the parish, of the annual value of £80, shall be, & be called governors & directors of

the poor; & by another Act, reciting the previous acts, it was enacted, that the churchwardens & overseers, & thirty-two vestrymen by name, & their successors to be nominated & appointed in the manner directed by the recited Acts, should be the governors & directors:—*Held*: this latter Act virtually repealed the former Acts; & a governor & director by estate, within the local Act who supplied the poor of the parish with provisions, was not liable to the penalties of Poor Relief Act, 1815 (c. 137), s. 6.—*STANLEY v. DODD* (1823), 2 Dow. & Ry. K. B. 809; 1 L. J. O. S. K. B. 177; *previous proceedings* (1822), 1 Dow. & Ry. K. B. 397.

**55. — Sale not for own profit.]**—By Poor Relief Act, 1815 (c. 137), s. 6, no churchwarden or overseer of the poor, either in his own name or in the name of any other person, shall supply for his own profit any goods, materials, or provisions for the use of any workhouse, or otherwise for the support or maintenance of the poor in any place for which he shall be appointed overseer, during the time he shall retain such appointment, nor shall be concerned directly or indirectly in supplying the same, or in any contract or contracts relating thereto, under the penalty of £100:—*Held*: an overseer who supplied coals indirectly for the use of the poor, was not liable to any penalty, unless he did it with a view to his own profit.—*SKINNER v. BUCKEE* (1824), 3 B. & C. 6; 4 Dow. & Ry. K. B. 628; 2 Dow. & Ry. M. C. 360; 107 E. R. 637.

**56. — Authority of workhouse master to purchase—Immaterial.]**—A guardian of the poor who has knowingly supplied, for his own profit, goods for the use of the poor in the workhouse contrary to Poor Relief Act, 1815 (c. 137), s. 6, & Excise Management Act, 1834 (c. 51), is liable to the penalty thereby imposed whether the master of the workhouse to whom he sold the goods was authorised to enter into such a contract or not.—*GREENHOW v. PARKER* (1861), 6 H. & N. 882; 31 L. J. Ex. 4; 4 L. T. 473; 26 J. P. 24; 158 E. R. 364.

*Annotation* :—*Fold. Davies v. Harvey* (1874), L. R. 9 Q. B. 433.

**57. — Knowledge of guardian.]**—Applt. was a guardian of the poor for N. Union; he was also a cabinet maker, & carried on business with D. as D. & Son; an application was made to the board of guardians for clothing & a bedstead for an outdoor pauper of the union, & an order made by the guardians for clothing only; the relieving officer purchased from D. at the shop of D. & Son, a bedstead, which was delivered by D. at the house of the outdoor pauper; the bedstead was only lent to the pauper by the guardians & remained their property; D. knew, but applt. did not know, that the bedstead was purchased for the guardians & was to be supplied to the pauper by way of parochial relief:—*Held*: applt. was liable to be convicted under Poor Law (Amendment) Act, 1834 (c. 70), s. 77, although he had not knowledge that the bedstead was to be given in parochial relief; & it was immaterial whether the relieving officer to whom the bedstead was sold was authorised to purchase it.—*DAVIES v. HARVEY* (1874), L. R. 9 Q. B. 433; 43 L. J. M. C. 121; 30 L. T. 629; 38 J. P. 661; 22 W. R. 733.

*Annotations* :—*Mentl. Newman v. Jones* (1886), 17 Q. B. D. 132; *Sherras v. De Rutzen*, [1895] 1 Q. B. 618; *Collman v. Mills* (1896), 75 L. T. 590; *Griffiths v. Studebakers* (1923), 93 L. J. K. B. 50.

motion, directed pltd. to be at liberty to mark judgment for the amount of the three penalties claimed.—*M'DERMOTT v. SULLIVAN* (1868), 1 R. 2 C. L.

312.—IR.

b. *Cancellation of—Necessity for consent of Local Government Board.*—The guardians of the poor cannot cancel

a contract definitely & finally entered into without the consent of the Local Government Board.—*LIMERICK UNION v. CASEY*, [1920] 2 I. R. 399.—IR.

**58. Work done by guardian in workhouse—Supply of necessary material.]**—Poor Relief Act, 1815 (c. 137), s. 6, which prohibits any churchwarden, overseer, etc., from "supplying, for his own profit, any goods, materials, or provisions for the use of any workhouse or otherwise for the support & maintenance of the poor in any parish, etc. for which he shall be appointed," does not extend to a person doing work on the workhouse, & supplying materials incidentally to such work; as a painter & glazier who mends the windows of the workhouse, providing paint, glass, & lead.—*BARBER v. WAITE* (1834), 1 Ad. & El. 514; 3 Nev. & M. K. B. 611; 2 Nev. & M. M. C. 359; 3 L. J. M. C. 101; 110 E. R. 1304.

**59. Supply to individual pauper.]**—Poor Relief Act, 1815 (c. 137), s. 6, only prohibits churchwardens or overseers from supplying the workhouse, or the poor of the parish generally; & therefore, where an overseer, receiving an order for the relief of S., an individual pauper, paid S. part in money, & by the consent of S., gave her the remainder in goods from his shop:—*Held*: he was not liable to the penalty of £100 imposed by Poor Relief Act, 1815 (c. 137).—*PROCTOR v. MANWARING* (1819), 3 B. & Ald. 145; 106 E. R. 610.

*Annotations*:—*Fold*. *Henderson v. Sherborne* (1837), 2 M. & W. 236. *Distd.* *Robinson v. Emerson* (1866), 4 H. & C. 352. *Held*. *Woodard v. Dowling* (1828), 2 Man. & Ry. K. B. 74.

**60. —.]**—A parish officer who supplies goods for his own profit to an individual pauper, is not liable to the penalty imposed by Poor Relief Act, 1815 (c. 137), s. 6.—*HENDERSON v. SHERBORNE* (1837), 2 M. & W. 236; *Murp.* & H. 40; 6 L. J. M. C. 28; 1 Jur. 152; 150 E. R. 743.

*Annotations*:—*Consd.* *Robinson v. Emerson* (1866), 4 H. & C. 352. *Mentd.* *Sims v. Pay* (1889), 60 L. T. 602; *R. v. Norman*, [1924] 2 K. B. 315.

**61. —.]**—Poor Law (Amendment) Act, 1834 (c. 76), s. 77, forbidding under a penalty of £5 the supply by parish officers, for profit, of goods, etc., ordered to be given in parochial relief, or of goods, etc., in respect of money ordered to be given in parochial relief, to any person in the parish or union, does not repeal Poor Relief Act, 1815 (c. 137), s. 6, & therefore an overseer of the poor of a parish in a union is liable to be sued for the £100 penalty, imposed by Poor Relief Act, 1815 (c. 137), s. 6, for supplying for his own profit, whilst he is such overseer, goods, etc. for the use of the workhouse & otherwise for the support & maintenance of the poor in the parishes forming the union, he not having at any time obtained the certificate of a justice of the peace or other person permitting him so to do, as provided by Poor Relief Act, 1815 (c. 137), s. 6.—*ROBINSON v. EMERSON* (1866), 4 H. & C. 352; 14 L. T. 291; 30 J. P. 328; 12 Jur. N. S. 378; 14 W. R. 658.

*Annotation*:—*Mentd.* *Sims v. Pay* (1889), 58 L. J. M. C. 39.

#### SUB-SECT. 5.—CARE OF CHILDREN AND YOUNG PERSONS.

See Poor Law Act, 1927 (c. 14), ss. 78–88.

**62. Custody of child—Workhouse boy sent abroad.]**—*R. v. BRISTOL UNION* (1874), 38 J. P. Jo. 725.

—*Child deserted by mother.]*—See *BASTARDY*, Vol. III., p. 383, No. 214.

**63. Contribution towards expenses—Child in hospital for infectious diseases.]**—Certain pauper children chargeable to the guardians of the C. Union were, under the provisions of the Poor Law Certified Schools Act, 1862 (c. 43), sent to a school situated in the urban district of T. An outbreak of fever having occurred at the school some of the children were taken to a hospital provided by the B. & D. Joint Hospital Board, constituted by provisional order under Public Health Act, 1875 (c. 55), s. 279. The children were so taken at the instance of the medical adviser to the school, who was also the medical officer of health for the T. district; the authority of the guardians of the C. Union was not obtained for the removal of the children to the hospital. The urban district of T. was one of the constituent districts of the B. & D. Joint Hospital Board; the C. Union was outside such constituent districts. Upon an action by the B. & D. Joint Hospital Board against the guardians of the C. Union to recover the expenses of maintenance of the pauper children in the hospital:—*Held*: (1) *plffs.* could not recover under any statutory provisions; (2) there was, in fact, no promise by the superintendent of the school to repay the expenses of maintenance of the children in the hospital, & moreover, the superintendent had no authority to pledge the credit of *defts.* to any expense outside the school; (3) there was no such urgency as to create an implied request by *defts.* to *plffs.* to maintain the children in the hospital:—*Seemle*: even if the case had been one of urgency *plffs.* would not have been entitled to recover.—*BURY & DISTRICT JOINT HOSPITAL BOARD v. CHORLTON UNION* (1905), 70 J. P. 31; 4 L. G. R. 489.

—*Education.]*—See *EDUCATION*, Vol. XIX., p. 579, Nos. 139, 140.

#### SUB-SECT. 6.—LEGAL PROCEEDINGS.

See Poor Law Act, 1927 (c. 14), ss. 5 (1), (2), 224–237.

**64. Who may be sued—Sums due for salaries of officers—Not chairman of board.]**—*MEYMOTT v. HUNT*, No. 89, *post*.

**65. Personal liability of guardians for costs—Notice of abandonment of removal order—Undertaking to pay costs.]**—*JONES v. FOTHERGILL* (1846), 2 New Mag. Cas. 49; 8 L. T. O. S. 121; 11 J. P. 188.

**66. — Guardians no longer in office.]**—An action was brought to recover possession of certain premises in the occupation of A., to which the parish of B. claimed title. A vestry of such parish being held upon the subject they resolved that the action should be defended by an attorney who defended it accordingly, & judgment was ultimately given for *pltf.*, but long after the parish officers who were in office at the time of the resolution had gone out of office. Upon an application for a rule calling upon such parish officers to pay the costs:—*Held*: they were not liable.—*FIELD v. MERRISON* (1863), 7 L. T. 754; 27 J. P. 119; 11 W. R. 473.

**67. Appeal to quarter sessions—Union partly in borough—Order by borough justices—Jurisdiction of borough quarter sessions.]**—By Poor Law (Amendment) Act, 1867 (c. 106), s. 27, where a union extends into several distinct jurisdictions, every

#### PART I. SECT. 5, SUB-SECT. 5.

*o. Power of parental control—Necessity for resolution of guardians—Of unfitness of parents.]*—*Re M'GLYNN*, [1913] 2 I. R. 37.—*IR.*

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*matter, act, charge, or complaint by which the guardians thereof are affected, or in which they have any interest, shall for the purpose of jurisdiction be deemed to arise or exist equally throughout the union. A poor-law union included the township of B., situate in the county of S., & the parish of W., situate in the borough of W., which has a recorder & separate quarter sessions. Two justices of the borough, by virtue of Poor Law (Amendment) Act, 1867 (c. 106), s. 27, made an order removing a pauper residing in the township of B., to the place of his last settlement:—Held: the appeal against the order was governed by & dependent upon the jurisdiction of the justices by whom the order was made, & the appeal was therefore to the borough sessions, & not to the county sessions.*—*R. v. STAFFORDSHIRE J.J.* (1872), *L. R. 7 Q. B.* 288; *41 L. J. M. C.* 78; *36 J. P.* 679; *20 W. R.* 366.

**Enforcement against guardians of contracts not under seal.**—*See CORPORATIONS*, Vol. XIII., p. 393, Nos. 1183–1185.

**Costs of prosecution where indictment removed by defendant.**—*See CROWN PRACTICE*, Vol. XVI., p. 458, No. 3326.

**Notice of action.**—*See PUBLIC AUTHORITIES.*

**SUB-SECT. 7.—OFFICERS.****A. Appointment and Duties.****(a) In General.**

*See Poor Law Act, 1927 (c. 14), ss. 29–31, 218, 226–230, 238, 244.*

**68. Power of authority—To direct appointment of officers.**—Where several parishes have been united for the purpose of the relief & employment of the poor, the Poor Law Comrs. have no authority, under Poor Law (Amendment) Act, 1834 (c. 76), s. 46, to direct the guardians of the union to appoint a collector of the rates in any one of the parishes forming the union.—*R. v. POOR LAW COMRS., Re CAMBRIDGE UNION* (1839), *9 Ad. & El.* 911; *2 Per. & Dav.* 323; *3 Jur.* 723; *112 E. R.* 1459; *sub nom. R. v. POOR LAW COMRS., Re ST. ANDREW THE LESS*, *8 L. J. M. C.* 77; *3 J. P.* 659.

**Annotations.**—*Consd. R. v. Braintree Union* (1841), *1 Q. B.* 130. *Reid. R. v. Greene* (1852), *17 Q. B.* 793; *Molyneux v. Bagshayne* (1863), *2 New Rep.* 196; *Re Sudbury Union* (1863), *1 New Rep.* 235.

**69. — Actual appointment vested in guardians.**—In a poor law union formed under *22 Geo. 3, c. 83*, the Comrs. under Poor Law (Amendment) Act, 1834 (c. 76), may, by sect. 46, direct the appointment of an auditor for the union, to audit the accounts of the incorporation & of its several parishes at proper periods; to examine into the expenditure & allow or disallow charges; & to see that the accounts are properly stated & supported by vouchers, & all sums received, or which ought to have been received, brought into account; with power, in case the accuracy of any account shall be doubted, to compel the appearance of persons & production of documents. They may also appoint a clerk, with a salary, to attend meetings of the guardians, keep minutes of their proceedings, conduct their correspondence, communicate orders from the Comrs. & guardians to the persons administering relief within the union,

give instructions for executing such report neglects, etc.; & to keep a book of moneys received & paid, orders & cheques given, accounts passed, & salaries ordered to be paid, by the board of guardians; to make up & balance the union accounts, & abstract them quarterly, etc.; to assist the auditor in making a quarterly abstract of the accounts of each parish; & to revise the accounts of the master of the poor-house. But they cannot direct that such clerk shall, as a part of his duties, “prepare or superintend the preparation, & take measures for ensuring the prompt & correct return, of all such statistical information & reports as may be required for the public service”; & an order for the govt. of an incorporation, containing such a clause, is altogether void.—*R. v. POOR LAW COMRS., ALLSTONEFIELD INCORPORATION* (1840), *11 Ad. & El.* 558; *3 Per. & Dav.* 59; *9 L. J. M. C.* 33; *4 Jur.* 335; *113 E. R.* 527.

**Annotations.**—*Apld. R. v. Stockton Directors of the Poor* (1858), *E. B. & E.* 583. *Reid. R. v. Poor Law Comrs., Re United Parishes of St. Giles-in-the-Fields & St. George Bloomsbury, R. v. Poor Law Comrs., Re St. James, Westminster* (1851), *15 Jur.* 841; *L. v. St. James, Westminster Governors, etc.* (1859), *33 L. T. O. S.* 346. *Mentd. R. v. Hunt* (1840), *12 Ad. & El.* 130; *R. v. St. Andrew Holborn above Bars & St. George the Martyr, Middlesex & Marchant, Bardons & Street* (1844), *13 L. J. Q. B.* 341.

**70. —**—Where the Poor Law Comrs. issued an order to the parish officers of Lambeth, directing that in elections for guardians, there should be a presiding officer, & that he should have the power of appointing assistants to enable him to conduct the proceedings of the election; these assistants to receive such compensation as the comrs. should allow, to be paid out of the poor rate:—*Held*: this order was invalid, as the assistants were paid officers within Poor Law (Amendment) Act, 1834 (c. 76), s. 46, & therefore the comrs. had no power to appoint, they could under that sect. recommend what officers there should be, & what amount of salary they should receive, but the appointment of those officers was vested in the parish authorities.—*R. v. HUNT* (1840), *12 Ad. & El.* 130; *3 Per. & Dav.* 476; *9 L. J. M. C.* 86; *4 J. P.* 462; *113 E. R.* 760.

**Annotations.**—*Reid. R. v. Poor Law Comrs., Re United Parishes of St. Giles-in-the-Fields & St. George Bloomsbury, R. v. Poor Law Comrs., Re St. James, Westminster* (1851), *15 Jur.* 841.

**71. — Parish regulated by local Act.**—Poor Law guardians acting under a local Act are not exempt from the authority of the Poor Law Comrs., who have power to order how vacancies are to be filled up among the officers of the local boards, whose regulations, if in collision with, or in evasion of, the orders of the Comrs., are waste paper.—*R. v. OXFORD UNION* (1844), *17 Q. B.* 457, n.; *1 New Mag. Cas.* 38; *3 L. T. O. S.* 138; *8 J. P.* 710; *15 Jur.* 845, n.

**72. —**—The Poor Law Comrs. may, by their orders under Poor Law (Amendment) Act, 1834 (c. 76), ss. 15, 42, control, regulate & guide the guardians of a parish or union, though governed by a local Act, in the management of the poor: but they cannot change the relations of the local authorities among themselves, nor substantially alter the machinery established under the Act to carry out its purpose. Under a local Act, the general management of the affairs of a district, relative to the maintenance & govt. of the poor, was entrusted to a body of vestrymen; & they, under the same Act, chose directors of the poor,

**PART I. SECT. 5, SUB-SECT. 7.—****A. (a).**

**d. Power of local authority—To appoint parish officer.**—The mere

absence from the parish of a parish officer appointed by the county council under *C. S. c. 99, s. 86*, does not create such a vacancy as will authorise the

appointment of a person to fill the office by the councillors of the parish.—*R. v. CLOSE* (1880), *19 N. B. R.* (3 P. & B.) 502.—CAN.



who performed executive duties under the vestrymen, & subject to rules of govt. which the Act empowered the vestrymen to make. The directors were by the same Act to exercise all the powers, as to the poor, which might be exercised by churchwardens & overseers. The vestrymen were authorised to appoint a governor of the workhouse, & such other officers as they should think fit, with salaries, & from time to time to remove such officers & appoint others in their places. The Poor Law Comrs., acting under Poor Law (Amendment) Act, 1834 (c. 76), made an order, requiring, among other things, by art. 66, that the vestrymen of the above district should, whenever it should be requisite, or there should be a vacancy, appoint persons to certain enumerated offices, including that of master of the workhouse, & also such assistants & servants as they or the directors, with the consent of the comrs., might deem necessary for the efficient performance of the duties; & by art. 67, that the officers so appointed should respectively perform such duties as might be required of them by the rules of the poor law board, & such other duties, conformable to the nature of their offices, as the vestry or the directors might lawfully require of them; & providing, by art. 88, that the directors might at their discretion suspend any of the above named officers, reporting the cause of such suspension to the Comrs., who might thereupon remove it:—*Held*: on motion for a *certiorari*, the Comrs. had, in arts. 66 & 88, exceeded their authority by unduly transferring powers from the vestrymen to the directors. *Certiorari* granted.—*Re* ST. GILES-IN-THE-FIELDS & ST. GEORGE BLOOMSBURY UNITED PARISHES, *R. v. POOR LAW COMRS.* (1851), 17 Q. B. 445; 15 Jur. 841; 117 E. R. 1350; *sub nom.* *R. v. POOR LAW BOARD*, 17 L. T. O. S. 38; 15 J. P. 132.

*Annotation*:—*Reid. R. v. Robinson, R. v. St. James, Westminster, Governors* (1851), 17 Q. B. 466.

73. ———.]—By a local Act the vestrymen of the parish of St. J. W. were required to nominate twenty-one persons who should become the directors of the poor, & who were to make rules & regulations for the maintaining of the poor, & which were to be subsequently confirmed by the vestry. In pursuance of this sect., in 1763, the vestry nominated twenty-one persons directors, by whom certain rules were made, which, among other things, appointed that the officers should be elected annually at Easter. These rules were duly confirmed, & have never since been repealed. By an order, bearing date July 19, 1850, & addressed to the vestrymen of the said parish, the poor law board directed, among other things, by art. 67, that the directors, whenever a vacancy occurred, should appoint fit persons to fill certain offices, & art. 83 that every officer appointed to or holding any office under the order should continue to hold the same until he die, resign, or be removed by the poor law board, or be proved to be insane to the satisfaction of the board:—*Held*: these arts. did not exceed the powers conferred by Poor Law (Amendment) Act, 1834 (c. 76), s. 46, on the poor law board, & the order was, therefore, valid.—*R. v. ST. JAMES, WESTMINSTER, GOVERNORS OF THE POOR* (1851), 17 Q. B. 474; 117 E. R. 1364; *sub nom.* *R. v. POOR LAW COMRS., Re ST. JAMES'S WESTMINSTER VESTRYMEN & GOVERNORS OF THE POOR*, 20 L. J. M. C. 236; 15 Jur. 848; *sub nom.* *Re St.*

*JAMES, WESTMINSTER & POOR-LAW BOARD*, 15 J. P. 402; *subsequent proceedings, sub nom. R. v. ST. JAMES, WESTMINSTER, GOVERNORS OF THE POOR* (1852), 17 Q. B. 480.

*Annotation*:—*Mentl. R. v. Groene* (1852), 16 Jur. 663.

74. ———.]—The proviso to Metropolis Management Act, 1855 (c. 120), s. 197, which excepts from the jurisdiction of parish auditors appointed under the Act all accounts which, before the passing of that Act, would have been subject to the audit of an auditor appointed under Poor Law (Amendment) Act, 1834 (c. 76), is not repealed by Metropolis Management (Amendment) Act, 1856 (c. 112), s. 3; & the Poor Law Comrs. have therefore still the right to order the overseers or guardians of any parish to appoint an auditor to audit the poor law accounts.—*R. v. STOCKTON, ETC., ST. PANCRAS DIRECTORS OF THE POOR* (1858), E. B. & E. 583; 27 L. J. M. C. 281; 31 L. T. O. S. 198; 22 J. P. 385; 5 Jur. N. S. 120; 6 W. R. 647; 120 E. R. 627.

*Annotation*:—*Reid. R. v. St. James, Westminster, Governors* (1859), 28 L. J. M. C. 172.

75. ———.]—The Poor Law Board have power under Poor Law (Amendment) Act, 1834 (c. 76), s. 46, to direct the appointment of an auditor for a parish which is regulated by a local Act, & notwithstanding it has adopted the provisions of Vestries Act, 1831 (c. 60), & has, since the passing of Metropolis Management Act, 1855 (c. 120), appointed auditors under that Act.—*R. v. ST. JAMES, WESTMINSTER, GOVERNORS OF THE POOR* (1859), 1 E. & E. 872; 29 L. J. M. C. 2; 33 L. T. O. S. 346; 24 J. P. 37; 5 Jur. N. S. 1289; 7 W. R. 739; 120 E. R. 1138, Ex. Ch.

*Necessity for seal on appointment by guardians.*

—*See* CORPORATIONS, Vol. XIII., p. 382, Nos. 1111–1114.

(b) *Clerk to Guardians.*

*See* Poor Law Act, 1927 (c. 14), ss. 7 (4), 130, 146, 215, 224, 225.

76. *Mandamus to compel guardians to admit—On ground that previous election void—Not granted.*

—(1) On motion for a *mandamus* to guardians of a Poor Law union, to admit J. to the office of their clerk, it appeared that J. & R. had been candidates for the clerkship, but that, at a meeting of the persons acting as guardians to elect, R. had the majority of votes, & was declared elected. J. suggested, as a ground for the rule, that several of the guardians whose votes gave R. the majority were themselves not duly elected. Assuming that the ct. would grant a *mandamus* to admit to this office:—*Held*: they would not grant it for the purpose of scrutinising the elections of guardians who had voted; & if this inquiry were open, the ct. could not grant the writ, since it did not appear who were the proper persons to make a return; & if the guardians *de facto* might make it, they might also appoint a clerk.

(2) The ct. will not take judicial notice of the rules made by the Poor Law Comrs., for the govt. of a union, under Poor Law (Amendment) Act, 1834 (c. 76), s. 15.—*R. v. DOLGELLY UNION* (1838), 8 Ad. & El. 561; 3 Nev. & P. K. B. 542; 1 Will. Woll. & H. 513; 7 L. J. M. C. 99; 112 E. R. 951.

—*See* CROWN PRACTICE, Vol. XVI., pp. 300, 355, Nos. 1133, 1854.

77. *Right to act as superintendent registrar.*—*Re* DRAPER, *Ex p. PASSMAN* (1860), 24 J. P. Jo. 389.

o. *Right to retract appointment—No fraud or mistake.*—The Board of Health, under 12 Vict. c. 131, s. 4,

have no power to retract their approval of an appointment under that Act, when it has not been obtained by fraud

or under a mistake.—*RYAN v. KILDY-SART UNION* (1851), 2 L. C. L. R. 1: 4 IR. Jur. 30.—IR.

**Sect. 5.—Guardians: Sub-sect. 7, A. (b), (c), (d) & (e), & B.]**

**78. —**—Under Births & Deaths Registration Act, 1836 (c. 86), s. 7, the clerk to the board of guardians of a union created under Poor Law (Amendment) Act, 1834 (c. 76), has no right to be superintendent registrar except in the case of the first appointment after Births & Deaths Registration Act, 1836 (c. 86), coming into operation; & on any subsequent vacancy the power of appointment is in the board of guardians. A., who was clerk to the board of guardians of a union, created under Poor Law (Amendment) Act, 1834 (c. 76), & was also superintendent registrar appointed to the Registrar-General, under Births & Deaths Registration Act, 1837 (c. 22), died on Jan. 4, 1861. On Jan. 17, deft. was appointed superintendent registrar by the board of guardians. On Feb. 14, the relator was appointed clerk to the board of guardians. Upon information in the nature of *quo warranto*:—*Held*: deft. was duly appointed superintendent registrar.—*R. v. ACASON* (1862), 2 B. & S. 795; 31 L. J. Q. B. 227; 6 L. T. 535; 26 J. P. 436; 8 Jur. N. S. 841; 121 E. R. 1267; *sub nom.* *R. v. ALASON*, 10 W. R. 691. *Annotation*:—*Refd.* *R. v. Burrows*, [1892] 1 Q. B. 399.

**Liability of surety on fidelity bond.]—See GUARANTEE, Vol. XXVI., p. 189, No. 1462.**

**(c) Treasurer of Union.**

**79. Appointment—Evidence of—Stamped appointment—Or recital in bond executed by treasurer.]—**(1) The appointment in writing of a person to be treasurer at a yearly salary requires a stamp.

(2) If such appointment be not receivable in evidence for want of a stamp, a recital in a bond executed by him is sufficient evidence of his appointment.

(3) His duties may be shown from the clauses of the local Act of Parliament under which he is appointed.—*R. v. WELCH* (1846), 2 Car. & Kir. 296; 1 Den. 199; 8 L. T. O. S. 254; 169 E. R. 210; 2 Cox. C. C. 85; *sub nom.* *R. v. WELSH*, 11 J. P. 485. C. C. R.

*Annotation*:—*As to* (1) *Consd.* *R. v. Gompertz* (1846), 9 Q. B. 824.

**80. — Necessity for stamp.]—R. v. WELCH, No. 79, ante.**

**81. Duties of treasurer—Evidence of—Clauses of Act under which appointment made.]—R. v. WELCH, No. 79, ante.**

**82. Liability of surety under fidelity bond.]—COSFORD UNION v. GRIMWADE** (1892), 8 T. L. R. 775.

—*See* GUARANTEE, Vol. XXVI., pp. 81, 152, 164, Nos. 574, 1140, 1238.

**83. Liabilities of treasurer—Loss through failure of bank—Treasurer giving gratuitous services.]—**Deft. had been appointed, & for some years had acted, as the treasurer of ptfs.; his services were gratuitous, & his duty was to receive all moneys tendered to be paid to the guardians & to pay thereout all orders drawn on him in respect of the union, & for the faithful performance of his duties he had given a bond with sureties. The accounts of the union were kept alternately at one bank for a year, & at another bank for the next year, & the account was entitled "C. Union," & into this account were paid direct all moneys received for rates, etc., & receipts countersigned by deft. were given by the bank to the overseers. In an action by the guardians against deft. to recover a loss caused by the failure of the bank:—*Held*: deft. was not liable to pay to the guardians

the amount lost through the failure of the bank, whether the account were the guardians' account, which was found as a fact to be the case, or deft.'s account, &, moreover, apart from that authority, the position of an honorary treasurer was analogous to that of a trustee or receiver, & he would not be responsible for a loss incurred, through no default of his own, but through the necessary employment of an ordinary mercantile agent.—*COLCHESTER UNION v. MOY* (1893), 68 L. T. 564; 57 J. P. 265; 9 T. L. R. 280; 37 Sol. Jo. 388; 5 R. 304.

**Treasurer also bank manager.]—See BANKERS, Vol. III., p. 172, No. 295.**

**Indictable for embezzlement.]—See CRIMINAL LAW, Vol. XV., p. 925, No. 10201.**

**(d) Relieving Officer.**

*See* Poor Law Act, 1927 (c. 14), s. 35.

**84. Power to grant relief—No power after refusal by parish.]—R. v. KEEN** (1848), 12 J. P. Jo. 311.

**85. — Cash instead of kind—Payment to women with illegitimate children.]—R. v. NORFOLK JJ.** (1857), 21 J. P. 435.

**86. — "Sudden or urgent necessity"—Discretion of relieving officer to decide—Liability for refusal of relief.]—**By Poor Law (Amendment) Act, 1834 (c. 76), s. 98, any person who wilfully neglects or disobeys any rules, etc., of the Comrs., shall, upon conviction, forfeit any sum not exceeding £5; & by Consolidated Orders of the Poor Law Comrs., s. 215, r. 6, which describes the duties of relieving officers, they are directed, "in every case of sudden or urgent necessity, to afford such relief to the destitute person as may be requisite, either giving such person an order for admission into the workhouse, & conveying him thereto if necessary, or by affording him relief out of the workhouse," etc.:—*Held*: the relieving officer has no absolute discretion in deciding what is a case of urgent necessity; & a relieving officer having refused relief in an alleged case of urgent necessity, & being convicted for such refusal, this ct. being of opinion that the convicting justice was right in his view of the facts, refused to quash the conviction.—*CLARK v. JOSLIN* (1873), 27 L. T. 762; 21 W. R. 294.

**87. Appointment—Tenure of office.]—**The Poor Law Comrs. have a discretionary power of removing a relieving officer of a union whom they deem unfit for his office, without giving him notice of their intention to remove him, or hearing what he has to say in his defence.—*Ex p. TEATHER* (1850), 1 L. M. & P. 7; *sub nom.* *R. v. POOR LAW COMRS.*, 4 New Mag. Cas. 41; 14 L. T. O. S. 355; 14 J. P. Jo. 36; *sub nom.* *Re TEATHER & POOR LAW COMRS.*, 19 L. J. M. C. 70.

*Annotation*:—*Refd.* *Everett v. Ryder* (1926), 135 L. T. 302.

**88. — Who may dispute legality by action—Person resident not ratepayer—No action against relieving officer personally.]—**Pltf. who was a resident, but not a ratepayer, in the parish of St. Mary, Islington, brought an action against deft., who had been appointed relieving officer for the parish by a resolution of the board of guardians, in which he claimed a declaration that the appointment was unlawful as being contrary to unsuspended standing orders of the board, & an injunction to restrain deft. from acting in the capacity of relieving officer:—*Held*: (1) pltf. was not entitled to bring such an action, inasmuch as he was merely a resident, & not a ratepayer in the parish, & (2) the action would not lie against deft. himself, as this was not a case where an information *quo warranto* lay.—*EVERETT v. RYDER* (1926), 135

L. T. 302; 90 J. P. 110; 42 T. L. R. 439; 24 L. G. R. 491.

**Liability of surety on fidelity bond.]—**See GUARANTEE, Vol. XXVI., pp. 166, 215, Nos. 1256, 1693.

**Discretion of relieving officer as to reception of lunatic.]—**See LUNATICS, Vol. XXXIII., p. 267, No. 1858.

(e) *Other Officers.*

**89. Auditor—Tenure of office.]—**(1) An auditor of accounts under the Poor Law (Amendment) Act is removable at pleasure without notice.

(2) The chairman of a board of guardians is not, as such, the proper party to be sued for salaries to the officers of the parish or union.—MEYMOTT v. HUNT (1839), 3 J. P. 550.

**90. — Mandamus to appoint.]—**Directors of the poor were chosen by the vestry, who appointed the officers to act under the directors & make the poor rates; but the rates, when collected, were vested in the directors, & they distributed & performed all the usual functions of overseers & guardians of the poor:—*Held*: a *mandamus* to appoint an auditor in pursuance of an order of the Poor Law Board was properly directed to them alone.—R. v. STOCKTON, ETC., ST. PANCRAS DIRECTORS OF THE POOR (1858), E. B. & E. 583; 27 L. J. M. C. 281; 31 L. T. O. S. 198; 22 J. P. 385; 5 Jur. N. S. 120; 6 W. R. 647; 120 E. R. 627.

*Annotation*:—*Reid*, R. v. St. James, Westminster, Governors (1859), 28 L. J. M. C. 172.

**91. — — —.]—**R. v. ST. JAMES, WESTMINSTER, GOVERNORS OF THE POOR, No. 75, *ante*.

**92. Workhouse master—Mandamus to appoint.]—***Mandamus* to guardians of the poor to elect a master of a union workhouse.—*Re* BEVERLEY UNION, *Ex p.* POOR LAW BOARD (1854), 22 L. T. O. S. 248.

**Clerk to—Necessity for seal on appointment.]—**See CORPORATIONS, Vol. XIII., p. 382, No. 1114.

**93. Medical officer—Tenure of office.]—**A district medical officer, appointed under the Medical Appointments Order, 1857, of the Poor Law Board, holds his office *durante bene placito*.—DONAHOO v. LOCAL GOVERNMENT BOARD (1882), 46 L. T. 300; *sub nom.* DONAHOO v. DODSON, 30 W. R. 334.

**Necessity for seal on appointment.]—**See CORPORATIONS, Vol. XIII., p. 382, No. 1113.

**94. Assistant matron—Tenure of office.]—**By art. 187 of the Poor Law Commissioners' General Consolidated Order of July 24, 1847, made under Poor Law (Amendment) Act, 1834 (c. 76), every officer appointed to or holding any office under the order, other than a medical officer, shall continue to hold the same until he die, or

resign, or be removed by the comrs., now the Local Government Board; & by art. 188, every porter, nurse, assistant, or servant may be dismissed by the guardians without the consent of the comrs.:—*Held*: art. 188 gives the guardians the absolute right to dismiss the persons named therein without any notice; & consequently a person appointed by the guardians as assistant matron of the workhouse may be dismissed by the guardians without notice.—LLOYD v. BERMONDSEY UNION (1912), 108 L. T. 716; 77 J. P. 72; 29 T. L. R. 84; 11 L. G. R. 751.

**95. Appointment of assistants—Sanction by authority—Of office not individual.]—**The sanction of the Local Government Board, required by No. 153 of the Poor Law Orders to be given to certain appointments by the guardians of assistants that they think necessary is a sanction of the office, & not of the individual nominated to fill it.—AUSTIN v. BETHNAL GREEN UNION (1874), L. R. 9 C. P. 91, *sub nom.* AUSTIN v. ST. MATTHEW, BETHNAL GREEN PARISH BOARD OF GUARDIANS, 43 L. J. C. P. 100; 29 L. T. 807; 38 J. P. 248; 22 W. R. 406.

*Annotations*:—*Reid*, Lloyd v. Bermondsey Union (1913), 108 L. T. 716. *Mentl*, Wells v. Kingston-upon-Hull Corp'n. (1875), L. R. 10 C. P. 402; Wood v. East Ham U. D. C. (1907), 71 J. P. 129.

**Collector of poor rates—Necessity for seal on appointment.]—**See CORPORATIONS, Vol. XIII., p. 382, No. 1111.

**Liability of surety on fidelity bond.]—**See GUARANTEE, Vol. XXVI., pp. 166, 167, 170, Nos. 1250, 1251, 1260, 1276.

**Chaplain of workhouse.]—**See ECCLESIASTICAL LAW, Vol. XIX., pp. 531, 548, 549, Nos. 3922, 4063-4068; LUNATICS, Vol. XXXIII., p. 248, No. 1683.

*B. Misconduct by Officers.*

See Poor Law Act, 1927 (c. 14), ss. 218, 226-230; Prevention of Corruption Act, 1906 (c. 34), s. 1 (3).

**96. Misapplying money—Form of information.]—**An information against a parish officer for misapplying the moneys, etc., of the parish, under Poor Law Amendment Act, 1834 (c. 76), s. 97, must state that he misapplied them "wilfully."—CARPENTER v. MASON (1840), 12 Ad. & El. 629; Arn. & H. 37; 4 Per. & Dav. 439; 10 L. J. M. C. 1; 4 J. P. 687; 113 E. R. 953.

**97. Procuring removal of pauper to another parish—Criminal information.]—**R. v. BRIGHTMAN (1848), 11 L. T. O. S. 126; 12 J. P. Jo. 323.

**98. Causing pauper to become chargeable to another parish.]—**S., a relieving officer of W. union, gave B., who was resident in that union, an order to go into the union workhouse; but as B. did not go, but went to live with his daughter out of the union, S. obtained the order back, & afterwards B. became ill & applied to the C. union for relief:—

n. — *Right of guardians to combine offices—Of poor house governor & medical officer.]—*KILWINNING PARISH COUNCIL v. CUNNINGHAME COMBINATION POOR HOUSE (BOARD OF MANAGEMENT), (1909) 8 C. 829; 46 Sc. L. R. 370; (1909) 1 S. L. T. 205.—SCOT.

o. *Parish officers' election—Whether sessions bound to confirm election.]—*Where a list of the parish officers elected at the parish meeting has been properly certified by the chairman & attested by the clerk, the sessions are bound to confirm the election unless some irregularity is shown in the election.—*Ex p.* ROBINSON (1873), 14 N. B. R. (1 Pug.) 321.—CAN.

p. *Assistant schoolmaster—Power to dismiss.]—*M'GUIGAN v. BELFAST UNION (1886), 18 L. R. Ir. 89.—IR.

PART I. SECT. 5, SUB-SECT. 7.—

A. (a).

f. *Medical officer—Who determines salaries—Guardians.]—*R. v. LIMERICK UNION (1855), 4 I. C. L. R. 636.—IR.

g. — — —.]—Under 14 & 15 Vict. c. 68, s. 8, it is the duty of the guardians to fix & disburse, subject to the power of the poor law comrs. to raise or lower, the salaries of the medical officers of the union.—R. v. BANTRY UNION (1858), 8 I. C. L. R. 331; 10 Ir. Jur. 391.—IR.

h. — *Appointment of locum tenens—Remuneration fixed by dispensary committee.]—*O'BRIEN v. CASTLEBLANEY UNION (1897), 31 I. L. T. 538.—IR.

k. — *Extra medical assistance—Payment in excess of scale allowed.]—*

Where it is necessary in a case of sudden & urgent necessity to call in another doctor to assist the dispensary doctor of the district in rendering medical aid to a poor but not destitute person, a contract by the relieving officer to pay such doctor in excess of the scale laid down in Dispensary Regulations, 1899, Art. 23, is not binding on the guardians.—OLIPHANTS v. DOWNPATRICK POOR LAW GUARDIANS (1902), 36 I. L. T. 239.—IR.

l. — — —.]—MURPHY v. GARRICK-ON-SUIR UNION (1920), 54 I. L. T. 155.—IR.

m. — *Discretion of Local Government Board—to require appointment of persons over military age—During war time.]—*R. v. LOCAL GOVERNMENT BOARD, [1918] 2 I. R. 131.—IR.

**Sect. 5.—Guardians: Sub-sect. 7, B. & C.; sub-sect. 8.]**

**Held:** this was no reasonable evidence of S. committing an offence under Poor Removal Act, 1846 (c. 66), s. 6, by causing B. to become chargeable to the C. union.—*SHEE v. DANNATT* (1862), 26 J. P. 359.

**99. Liability of guardians for torts of officers—Negligence in performance of statutory duty—Common employment.]**—The employment of a pauper set to work by the guardians of the poor under the powers given to them by the Poor Law Acts & Orders is not contractual, but statutory, & therefore the defence of common employment is no answer to an action by a pauper so employed against the guardians to recover damages for injury suffered in such employment through the negligence of an officer of the guardians. But the setting the paupers to work is part of the administrative duties imposed on the guardians by statute, & an action by the pauper against the guardians for negligence of their officer in discharge of these duties will not lie.—*TOZELAND v. WEST HAM UNION*, [1907] 1 K. B. 920; 76 L. J. K. B. 514; 96 L. T. 519; 71 J. P. 194; 23 T. L. R. 325; 5 L. G. R. 507, C. A.

*Annotations:—Distd. Barns v. St. Mary, Islington Union* (1911), 10 L. G. R. 113. *Mentd. Ching v. Surrey County Council*, [1910] 1 K. B. 736.

—*J.—See LUNATICS*, Vol. XXXIII., pp. 257, 272, Nos. 1765, 1896.

**Procuring marriage of pauper in order to acquire settlement.]—See CRIMINAL LAW**, Vol. XIV., p. 118, Nos. 878–880.

**Liability for assault on inmate.]—See CRIMINAL LAW**, Vol. XV., p. 827, Nos. 9052, 9053.

**C. Superannuation.**

*See Poor Law Officers' Superannuation Act*, 1896 (c. 50); *Poor Law Officers' Superannuation Act (Amendment) Act*, 1897 (c. 28).

**100. "Officer or servant in the service or employment" of guardians—Public vaccinator not included.]**—A public vaccinator appointed by a board of guardians under the Vaccination Acts is not "an officer or servant in the service or employment" of the guardians within the meaning of the *Poor Law Officers' Superannuation Act*, 1896 (c. 50), but is a contractor who has contracted with them for the performance of certain work for certain fees. A district medical officer who is also a public vaccinator is not entitled to bring in his fees for vaccinations as part of the "salary & emoluments" upon which the superannuation allowance to which he is entitled under that Act is calculated.—*LAWSON v. MARLBOROUGH UNION*, [1912] 2 Ch. 154; 81 L. J. Ch. 525; 106 L. T. 838; 76 J. P. 305; 28 T. L. R. 404; 56 Sol. Jo. 503; 10 L. G. R. 443.

**101. "Salary & emoluments"—District medical officer also public vaccinator—Fees for vaccinations not included.]—LAWSON v. MARLBOROUGH UNION**, No. 100, *ante*.

**102. Right of superannuation—Loss of—"Grave misconduct."]**—(1) By *Poor Law Officers' Superannuation Act*, 1896 (c. 50), s. 7, an officer or servant in the service or employment of the guardians of a union who ceases to hold office "in consequence of any offence of a fraudulent character or of grave misconduct" shall forfeit all claims to any superannuation allowance under the Act in respect of his previous service:—**Held:** the words "grave misconduct" are not limited by

the previous words "any offence of a fraudulent character" so as to be confined to grave misconduct of a fraudulent character, but in order to constitute "grave misconduct" the misconduct must be of a higher standard than that which would justify an employer in dismissing his servant & must be of a very serious character.

(2) *Pltf.* was employed by *defts.* as (*inter alia*) relieving officer & collector. For several years he had been in the habit of using money received by him as *defts.*' collector for his own purposes, instead of paying it into their account, & with the aid of his salary, had paid quarterly to *defts.*' account the amount of the money so used by him. Upon being told that the practice must cease he nevertheless continued it, & in particular he did not pay into the guardians' account until June 5, 1912, a sum of money he had collected in Apr. 1912, & then only by the aid of money he borrowed for the purpose. A sum of money which he had collected during June, 1912, ought to have been paid into the guardians account on or before July 4, 1912, but *pltf.* failed to make this payment. He also debited *defts.* in his books with the sum of 3s. a week for thirteen weeks for relief to a man who was in fact dead; & he debited *defts.* with a sum of 8s. due to the overseer of another union, but did not in fact pay the 8s. until about nine months later. There was no suggestion of fraud against *pltf.*, who resigned his office in consequence of these irregularities:—**Held:** although *pltf.* had not committed any offence of a fraudulent character he had been guilty of "grave misconduct" within *Poor Law Officers' Superannuation Act*, (c. 50), s. 7, & was therefore not entitled to any superannuation allowance under the Act in respect of his previous service in the offices of relieving officer & collector.—*POAD v. SCARBOROUGH UNION*, [1914] 3 K. B. 959; 84 L. J. K. B. 209; 111 L. T. 491; 78 J. P. 465; 12 L. G. R. 1044, C. A.

**103. —Computation of service—"Served for not less than twenty years"—Meaning of.]**—For the purpose of computing the service entitling the holder of a joint appointment on its vacation to a superannuation allowance under the *Poor Law Officers' Superannuation Act*, 1896 (c. 50), the words "served for not less than twenty years" in the proviso to sect. 8 refer to the aggregate service of the officer or servant under any union in which he has served & not only to service under the particular union in which the joint appointment was made.—*PRICE v. EASTBOURNE UNION*, [1920] 1 Ch. 535; 89 L. J. Ch. 152; 122 L. T. 521; 18 L. G. R. 81.

**104. Reference to authority—Question arising between guardians & officer—As to amount of superannuation allowance.]**—*Poor Law Officers' Superannuation Act*, 1896 (c. 50), s. 3, regulates the scale of superannuation allowances under the Act, & these are to be based on the amount of salary, wages, or emoluments during the five years immediately preceding the day on which an officer or servant ceases to hold the office or employment. *Poor Law Officers' Superannuation Act*, 1896 (c. 50), s. 12, provides for contributions by officers & servants in the employment of the guardians of a union for the purposes of the Act.

By *Poor Law Officers' Superannuation Act*, 1896 (c. 50), s. 18, the Local Government Board [now the Ministry of Health] may, if they think fit, determine any question which may arise between guardians . . . & any officer or servant, & which may be referred to them by either party,

**PART I. SECT. 5, SUB-SECT. 7.—C.**

**q. Right to superannuation.]—R. v. LISNASKA UNION**, [1918] 2 I. R. 585.—*IR.*

as to the right to or the amount of superannuation allowance of such officer or servant, & the decision of the Local Government Board shall be binding & conclusive. Under Poor Law Officers' Superannuation Act, 1896 (c. 50), s. 18, a question as to the value of the emoluments of a master & matron of schools under the control of the guardians of a union, on which depended their superannuation allowances, was rightly referred to the Minister of Health; & where the guardians had refused an application to ante date an increased valuation of their emoluments, on which depended their superannuation allowance, the Minister had jurisdiction to entertain the appeal.—*R. v. MINISTRY OF HEALTH, Ex p. WYCOMBE UNION* (1922), 92 L. J. K. B. 373; 128 L. T. 370; 87 J. P. 37; 67 Sol. Jo. 278; 20 L. G. R. 778, D. C.

**105. No power to contract out of superannuation provisions—In guardians or officers.]—**A compulsory scheme for providing superannuation pensions for poor law officers & servants was established by the Poor Law Officers' Superannuation Act, 1896 (c. 50). Obligatory pensions were payable by the guardians & obligatory contributions by the officers & servants.

The pensions were expressly made inalienable, but there was no express provision against contracting out:—*Held*: it was not open either to the guardians or to their officers or servants to contract themselves out of the statutory obligations & rights respectively imposed or conferred upon them by the Act.—*SALFORD UNION v. DEWHURST*, [1926] A. C. 619; 95 L. J. Ch. 457; 135 L. T. 514; 90 J. P. 179; 42 T. L. R. 657; 24 L. G. R. 477, H. L.; *affg.* S. C. *sub nom.* *DEWHURST v. SALFORD UNION*, [1925] Ch. 655, C. A.

*Annotation*:—*Refd.* *R. v. Grain, Ex p. Wandsworth Union* (1926), 43 T. L. R. 38.

**Compensation for loss of office on dissolution of union.]—***See* Nos. 157, 158, *post*.

**Surcharge of superannuation allowance.]—***See* No. 134, *post*.

**Deduction of contribution from income.]—***See* INCOME TAX, Vol. XXVIII., p. 89, No. 529.

**Officers of asylum.]—***See* LUNATICS, Vol. XXXIII., p. 248, Nos. 1687, 1688.

#### SUB-SECT. 8.—THE COMMON FUND.

*See* Poor Law Act, 1927 (c. 14), ss. 133, 179 (2), 191.

**106. Order by guardians to collect contribution—Defects in order constituting union—Order valid till quashed.]—**The Poor Law Comrs. in 1837, by an order, directed nine parishes, townships & places, to be formed into a union, to be called the Pateley Bridge Union, for the administration of the law for the relief of the poor.

In the margin of the order were enumerated eleven townships & the Comrs. ordered that a board should be constituted according to Poor Law (Amendment) Act, fourteen to be the number of guardians, three for Bewerley, two for Dacre, etc., treating them as separate townships. They then directed them to contribute to a common fund, for the purpose of providing a workhouse, etc., & afterwards fixed the proportions payable by each township or place. In 1848, the chairman & guardian of the union made an order on *pltf.* & three others, as overseers of the parish of Dacre-cum-Bewerley, treating the two as one township, for payment of £500 by way of contribution towards the relief of the poor, etc. This order having been disobeyed, *defts.*, who were

magistrates, issued their summons to *pltf.* & the other overseers, as overseers of Dacre-cum-Bewerley, & afterwards issued a warrant of distress, under which *pltf.*'s goods were taken. In an action of trespass against *defts.* for a seizure of *pltf.*'s goods under this warrant:—*Held*: (1) Poor Rate Act, 1839 (c. 84), s. 1, gave to the magistrates a power similar to that exercised by them in enforcing a legal poor-rate; but in the absence of a legal obligation to pay the contribution by the party whose goods had been seized, the magistrates had acted without jurisdiction & were liable; (2) if they acted under such circumstances, they were liable in an action of trespass, & justices Protection Act, 1847 (c. 44), which, in certain cases, makes a magistrate liable in an action on the case only, did not apply; (3) although the order of the Comrs. would have been wrong in ordering three guardians to be elected for Bewerley, & two for Dacre, instead of five for the entire township, if those places constituted one township, still the defects in the order were cured by Poor Law (Amendment) Act, 1834 (c. 76), s. 105, & the order was valid *ad interim*; & the acts of the guardians were valid.—*NEWBOULD v. COLTMAN* (1851), 6 Exch. 189; 20 L. J. M. C. 149; 16 L. T. O. S. 488; 15 J. P. 372; 155 E. R. 508.

*Annotations*:—*As to* (1) *Consd.* *Podley v. Davis* (1861), 10 C. B. N. S. 492. *As to* (3) *Refd.* *Brushfield v. Baynton* (1859), 33 L. T. O. S. 145.

**107. — Disobedience to order—Remedy by distress.]—***NEWBOULD v. COLTMAN*, No. 106, *ante*.

**108. — — —.]—**An order of a board of guardians was made upon an overseer for contribution, which he refused to comply with, & upon an application to justices for a warrant of distress, they refused to grant it:—*Held*: this *ct.* would review & control their discretion.—*Ex p. BRIDGEND & COWBRIDGE UNION* (1864), 9 L. T. 720.

**109. Charges on common fund—Extra-parochial district added to union—District liable to maintain own poor.]—**An extra-parochial place was, by 5 & 6 Vict. c. 48, made liable to maintain its own poor, & afterwards comprised in W. union. Certain paupers had lived all their lives in that place, & as far as was known, neither they nor their ancestors had any settlement elsewhere:—*Held*: as these paupers were irremovable, because there was no place to which they could be removed, & not by reason of Poor Removal Act, 1846 (c. 66), the charges of relief must be borne by the place itself, & were not cast on the common fund of the union by Poor Law (Amendment) Act, 1848 (c. 110), s. 3.—*R. v. EAST DEAN OVERSEERS* (1854), 22 L. T. O. S. 258.

**110. — Pauper irremovable by having no known settlement.]—**Poor Law (Amendment) Act, 1848 (c. 110), s. 3, is inapplicable to the case of a pauper who is irremovable by his having no known settlement, although he has resided without interruption for five years, so as to be irremovable if settled elsewhere.—*R. v. BENNETT* (1854), 3 E. & B. 341; 2 C. L. R. 977; 23 L. J. M. C. 39; 18 J. P. 217; 18 Jur. 311; 118 E. R. 1169.

*Annotations*:—*Distd.* *Re Bedminster Union* (1857), 8 E. & B. 573; *R. v. Segrani* (1857), 6 W. R. 74. *Consd.* *Wilkesden Union v. Westminster Union*, [1926] 2 K. B. 356.

**111. — — —.]—**Poor Law (Amendment) Act, 1848 (c. 110), casts upon the common fund the relief of paupers not having any known settlement to which they might have been removed before Poor Removal Act, 1846 (c. 66). Therefore the costs of relief of a pauper who had resided for many years in the parish of B., but did not

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gain a settlement there, nor was his place of settlement known, was properly chargeable to the common fund of the union in which the parish is situate.—*R. v. SEGRAM* (1857), 6 W. R. 74.

112. ———.] — Poor Law (Amendment) Act, 1848 (c. 110), s. 3, is applicable to the case of a pauper whose settlement is not known, it not being known that he has no settlement, & who has resided without interruption for five years in a parish in a union, so that, if his settlement were found to be elsewhere, he would still not be removable.—*Re BEDMINSTER UNION* (1857), 8 E. & B. 573; 120 E. R. 214; *sub nom. Ex p. BEDMINSTER UNION*, 30 L. T. O. S. 316; 21 J. P. 806; 4 Jur. N. S. 301.

113. — Removal of pauper to another parish in same union.]—Poor Removal Act, 1861 (c. 55), s. 1, does not operate so as to affect the relations of parishes which are in the same union.

M. who had resided for forty years in S., his parish of settlement, moved into the parish of P. in the same union, & there resided for a period of less than three years, when he there became a pauper:—*Held*: M. was removable from P. to S. & he was chargeable to S., & not to the common fund of the union.—*GREAT SALKELD (CHURCHWARDENS & OVERSEERS) v. PLUMPTON WALL (OVERSEERS)* (1864), 4 New Rep. 237.

114. Validity of order for contribution—Balance standing to credit of parish—Embezzlement of balance.]—The guardians of the London Union made a contribution order pursuant to art. 82 of the Consolidated Order of the Poor Law Comrs., 1837; but the clerk, in preparing it, disregarded the terms of art. 81, inasmuch as, in computing the sum for which the parish of St. M. B. was to be ordered to contribute to the expenses of the union, he omitted to estimate "the probable balance due to that parish"; for, if he had taken that balance into account, it was so largely in its favour that no sum whatever would have been needed to meet the cost of the maintenance of its poor, & the other charges for which the order was made. The reason for this omission was, that the balances in favour of that & several other parishes in the hands of the treasurer of the union had been fraudulently appropriated by an officer of the union who was employed to collect the rates for certain of the parishes forming the union, of which the parish of St. M. B. was not one:—*Held*: as the guardians might by taking the proper steps, either by orders apportioning the amount of the loss amongst the various parishes of the union, or by orders apportioning it exclusively amongst those parishes for which the defaulting officer was collector, realise the balance due to the parish of St. M. B., they had no right to treat it as non existing, & consequently, the order was illegally made, & could not be enforced.—*HALE v. CITY OF LONDON UNION* (1859), 6 C. B. N. S. 863; 29 L. J. M. C. 5; 24 J. P. 54; 6 Jur. N. S. 74; 141 E. R. 689.

*Annotations*:—*Consd.* Tynemouth Union v. Backworth Overseers (1888), 57 L. J. M. C. 53. *Reid* Sparrow v. Implington Overseers (1860), 6 Jur. N. S. 953.

115. — Sum including balance due from preceding half-year.]—The guardians of the London Union made an order upon one of the parishes comprised therein for the payment of a sum which included a balance due from the parish at the preceding half-year, which balance was made up of the accumulated balances of several successive years:—*Held*: the order was rendered valid by Poor Law (Payment of Debts) Act, 1859 (c. 49),

s. 6.—*CITY OF LONDON UNION v. ACOCKS* (1860), 8 C. B. N. S. 760; 24 J. P. 502; 8 W. R. 608; 141 E. R. 1364.

*Annotations*:—*Apld.* Calstor Union v. North Kelsey Overseers (1890), 59 L. J. M. C. 102. *Reid* Saul v. Wlpton Rural Sanitary Authority & Bowness-on-Solway Overseers, etc. (1886), 56 L. T. 438. *Mentl.* Townsend v. Read (1861), 10 C. B. N. S. 309.

116. — Sum including arrears accrued due three years previously.]—A contribution order made by the guardians of a union in respect of expenses for the relief of the poor in 1889, included arrears accrued due from the parish in 1886. Such arrears had not been inserted in any contribution order between 1886 & 1889:—*Held*: the order was good, under Poor Law (Payment of Debts) Act, 1859 (c. 49), s. 6.—*CAISTOR UNION v. NORTH KELSEY OVERSEERS* (1890), 59 L. J. M. C. 102; 62 L. T. 731, D. C.

117. — Theft of money belonging to some parishes—Loss thrown on all parishes.]—*R. v. CITY OF LONDON UNION*, No. 140, *post*.

118. Sums overpaid under precepts—Successful appeal against valuation list—Adjustment of sums overpaid.]—The guardians of a union claimed & received sums from the overseers of a township under precepts based upon the then existing valuation list. It was subsequently decided, on an appeal against a rate by colliery owners who represented two-thirds of the township, that the valuation list was too high. The overseers did not appeal against the valuation list under Union Assessment Committee Act, 1862 (c. 103), s. 32, but, having refunded the amount overpaid by the colliery owners, claimed credit for the excess paid by them to the guardians:—*Held*: (1) the guardians might give credit for the sums overpaid by the overseers, even though the latter had not appealed against the valuation list; (2) justices might refuse to enforce by distress warrant the guardians' precept for a general rate based on the old valuation list when it appeared that such sums had already been paid in excess by the overseers.—*TYNEMOUTH UNION v. BACKWORTH OVERSEERS* (1888), 57 L. J. M. C. 53; 59 L. T. 178; 52 J. P. 357; 4 T. L. R. 492, D. C.

*Annotations*:—*As to* (2) *Reid* R. v. Gillespie (1903), 73 L. J. K. B. 106; *lt. v.* Bermondsey B. C., *Ex p.* Bermondsey Union (1908), 99 L. T. 14.

119. Liability to contribute to common fund—Extra parochial district added to union.]—By an order, pursuant to Extra-Parochial Places Act, 1857 (c. 19), s. 1, two justices of the peace for Middlesex appointed an overseer for the parish of Staple Inn, theretofore extra-parochial; & afterwards the Poor Law Comrs., by order under Poor Law (Amendment) Act, 1834 (c. 76), s. 32, & Extra-Parochial Places Act, 1857 (c. 19), s. 1, annexed the parish of Staple Inn to the Holborn Union. By Poor Removal Act, 1861 (c. 55), s. 9, parishes comprised in any Union under Poor Law (Amendment) Act, 1834 (c. 76), are to contribute to the common fund thereof, in proportion to the annual ratable value of the lands, tenements, etc., therein assessable to the poor rate in force for the time being, whether such lands, etc., be actually rated or not. Before Poor Removal Act, 1861 (c. 55), no property in Staple Inn had ever been assessed to a poor rate; but an order for it to contribute had been made since the passing of that Act:—*Held*: Staple Inn was rightly annexed to the Union, pursuant to Poor Law (Amendment) Act, 1834 (c. 76), s. 32, & Extra-Parochial Places Act, 1857 (c. 19), s. 1; & having become a parish comprised within a Union previous to Poor Removal Act, 1861 (c. 55), it was under the latter Act liable to contribute to the common fund of



the Union.—**STAPLE INN OVERSEERS v. HOLBORN UNION** (1868), 2 H. & C. 284; 2 New Rep. 331; 32 L. J. M. C. 181; 8 L. T. 464; 27 J. P. 695; 9 Jur. N. S. 652; 11 W. R. 838; 159 E. R. 119.

120. ——— **District having no poor.**—N. an extra-parochial place having become a parish, & by an order of the Poor Law Board added to a union, a contribution order was made by the guardians of the union upon C., the overseer. Upon his refusal to pay, the guardians applied to justices for a summons under Poor Rate Act, 1839 (c. 84), s. 1, which empowers them, if they "shall think fit," to issue their warrant for levying the amount. At the hearing, the only ground which C. urged against the issuing of the warrant was, that, as the parish of N. had not at that time any paupers chargeable to it, it was unjust & unreasonable that the ratepayers thereof should be called upon to pay anything towards the expenses of the union. The justices refused to issue their warrant, adding that they did so in the exercise of their discretion. Upon application under Justices Protection Act, 1848 (c. 44), s. 5, for a rule on the justices to issue their warrant, this ct. made it absolute, with costs.—**R. v. BOTELER** (1864), 4 B. & S. 959; 3 New Rep. 505; 33 L. J. M. C. 101; 28 J. P. 453; 10 Jur. N. S. 798; 12 W. R. 466; 122 E. R. 718.

*Annotations*:—**Mentd.** **R. v. Adamson** (1875), 1 Q. B. D. 201; **R. v. Oxford** (Bp.) (1879), 4 Q. B. D. 525; **Davies v. Evans** (1882), 9 Q. B. D. 238; **R. v. London** (Bp.) (1889), 24 Q. B. D. 213; **Sharp v. Wakefield**, [1891] A. C. 173; **R. v. L. G. Board**, *Ex p. Hackney B. C.*, etc. (1908), 6 L. G. R. 665.

121. **Amount of contribution**—Assessed on annual ratable value of lands—**Power of auditor to assess.**—The guardians of a union formed under Poor Law (Amendment) Act, 1834 (c. 76), had agreed, in pursuance of sect. 33, that for the purposes of settlement the parishes should be considered as one parish. After the passing of Poor Removal Act, 1861 (c. 55), the poor law auditor allowed accounts of the union, in which the proportion of the contributions to be paid by each parish to the common fund was ascertained in the manner provided by Poor Law (Amendment) Act, 1834 (c. 76):—**Held**: Poor Removal Act, 1861 (c. 55), s. 9, applies to unions under Poor Law (Amendment) Act, 1834 (c. 76), s. 33, & therefore the contributions of the parishes ought to be according to the annual ratable value of the lands, etc.; the auditor had power to ascertain & assess the share of the common charges to be borne by the parishes in the union.—**R. v. CALTHROP** (1863), 4 B. & S. 216; 27 J. P. 550; 122 E. R. 441; *sub nom.* **R. v. CLOTHROP**, 11 W. R. 826.

122. **Metropolitan common poor fund**—Provision of casual ward on land of one union—**Contribution from common poor fund.**—The H. union acquired in 1838 & 1849 certain land upon which were erected casual wards, the money for their erecting having been borrowed, which was repaid by instalments out of the Metropolitan common poor fund. The H. union sought to recover the value of the land out of the Metropolitan common poor fund in the half year ending Michaelmas 1903:—**Held**: this sum could not be recovered in one half year, & rules *nisi*, directed to the auditor who had disallowed the item, for a *certiorari* to quash the disallowance, & for a *mandamus* to grant a certificate of allowance, accordingly quashed.

*Qu.*: whether the H. union were not entitled to the fair value of the land for the half year out of the Metropolitan common poor fund.—**R. v.**

**MOWATT**, *Ex p. HOLBORN UNION* (1905), 93 L. T. 789; 69 J. P. 461; 21 T. L. R. 646.

#### SUB-SECT. 9.—ACCOUNTS.

*See* Poor Law Act, 1927 (c. 14), ss. 149, 151 (1), 181 (1), 193 (1), 211 (1), 241 (2); District Auditors Act, 1879 (c. 6), s. 3; Metropolitan Asylums District Audit (Local Authorities) Act, 1922 (c. 14), s. 1.

123. **Appeal against overseers' accounts**—**Form of notice.**—(1) A notice of appeal against overseers' accounts, stated that applt. objected to certain specified payments alleged in the accounts, to have been made to persons specified by name in the notice:—**Held**: the notice was bad because it did not state the cause & ground of appeal as required by 41 Geo. 3, c. 23, s. 4.

(2) The attorneys, some days before the appeal was tried, agreed to admit on the trial of the appeal, that the sums objected to were paid to the persons to whom it was alleged in the accounts that they were paid:—**Held**: this was not any waiver of the irregularity in the notice because the consent of the attorneys was not signified in open ct.—**R. v. SHEARD** (1824), 2 B. & C. 856; 4 Dow. & Ry. K. B. 480; 2 Dow. & Ry. M. C. 201; 107 E. R. 600.

*Annotations*:—*As to* (1) **Refd.** **Redheugh Colliery v. Gateshead Assmt. Com.**, [1924] 1 K. B. 369. *As to* (2) **Distd.** **R. v. Wickenby** (1852), 16 J. P. 583. *Generally*, **Mentd.** **R. v. Newcastle-on-Tyne JJ.** (1831), 1 B. & Ad. 933.

124. ———— **Waiver of irregularity**—**Necessity for consent in open court.**—A notice of appeal against overseers' accounts, merely stating that the party intended to try his appeal against the accounts, on the grounds & for the reasons thereafter set forth, & then specifying the items against which he intended to appeal, & the objection which he intended to make to each item, was held to be sufficient, although it was not stated that the party intending to appeal was a rated inhabitant of the parish, or a party aggrieved.—**R. v. SOMERSETSHIRE JJ.** (1823), 7 B. & C. 681, n.; 6 L. J. O. S. M. C. 116; 108 E. R. 878.

*Annotation*:—**Refd.** **R. v. Poole Recorder** (1837), Will. Woll. & Dav. 497.

125. ———— **Waiver of irregularity**—**Necessity for consent in open court.**—**R. v. SHEARD**, No. 123, *ante*.

126. ———— **Costs of litigation.**—Overseers' accounts being allowed, & an appeal against them dismissed, the allowance & order of sessions were brought up by *certiorari*, & an item appeared to be for the expenses of defending an appeal against overseers' accounts. The ct. quashed the allowance & order, such an item being bad on the face of it, inasmuch as no supposable facts could justify it.—**R. v. JOHNSON** (1836), 5 Ad. & El. 340; 2 Har. & W. 201; 6 Nev. & M. K. B. 727; 3 Nev. & M. M. C. 746; 5 L. J. M. C. 129; 111 E. R. 1194.

127. ———— **Unnecessary & improper litigation.**—One of the partners in a firm, acting as attorneys for a parish, was duly appointed auditor of the union comprising that parish, & acted as such until, on the passing of 7 & 8 Vict. c. 101, he became auditor of the district comprising that parish. It was known that he was a partner in the firm; & for some time no objection was made to his acting as auditor, though in doing so he had to allow or disallow bills of costs of his own firm. The objection was at last taken. The auditor, after an unsuccessful attempt to have the audit, as to these bills, conducted by a stranger, which the Poor Law Comrs. would not sanction, held an audit himself, though with the assistance

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of a disinterested party; that party, however, not acting formally as assessor. The auditor, during such audit, allowed several bills of costs belonging to his own firm. The accounts & allowances being brought up by *certiorari*: on a motion to quash them:—*Held*: (1) the auditor, being duly appointed & having accepted the office, was bound to fulfil its duties, & therefore the audit was not void, though the auditor had a direct interest in the accounts.

Amongst the items allowed were the costs of a litigation, in support of rates irregularly made, which, in the opinion of the ct., was unnecessary & improper, though the litigation was *bond fide*, carried on under the advice of counsel, & sanctioned by the vestry:—*Held*: (2) these items ought not to have been allowed; & the auditor's allowance of them was quashed.—*R. v. GREAT WESTERN RY. CO., Re BURNHAM RATES* (1849), 13 Q. B. 327; 3 New Mag. Cas. 133; 18 L. J. M. C. 145; 13 L. T. O. S. 45; 13 J. P. 198; 13 Jur. 652; 116 E. R. 1288.

*Annotation*:—*As to* (2) *Distd. R. v. Street* (1852), 18 Q. B. 682.

**Right of ratepayer to inspect.**—*See* DISCOVERY, Vol. XVIII., p. 111, No. 623.

## SUB-SECT. 10.—AUDIT.

*See* Poor Law Act, 1927 (c. 14), ss. 149–160, 193, 211; District Auditors Act, 1879 (c. 6), ss. 3, 4; Local Authorities (Expenses) Act, 1887 (c. 72), s. 3; Ministry of Health Act, 1919 (c. 21), s. 3 (1), Sched. I.; Audit, Local Authorities, etc., Act, 1922 (c. 14), s. 1.

**Jurisdiction of court**—**To review decision of auditor—Action for declaration.**—*See* Nos. 188, 191, *post*.

**128. Power of auditor to call for accounts—Auditor auditing accounts of parish composing union—Parish having accounted to own auditor.**—

—(1) The Poor Law Comrs. caused an auditor to be appointed under Poor Law (Amendment) Act, 1834 (c. 76), s. 46, to audit the accounts of a union & the several parishes therein, to examine whether the expenditure was lawful, to strike out payments & charges not authorised by some provision of the law, or order of the comrs., & to see that the accounts were properly stated, with vouchers. A district within the union had already auditors under a local Act which provided for the maintenance of the poor & regulation of the nightly watch. Their duty under the Act was, to audit the accounts of the directors of the poor, which the directors were required to produce, with vouchers: no power of disallowing items was given to the auditors; but it was enacted that, if they disapproved of any part of the accounts, it should be lawful for them to appeal to quarter sessions, entering into recognisance to pay costs if awarded against them: & the sessions were empowered to award costs to applt. or the party appealed against:—*Held*: the directors, though they had accounted to their own auditors according to the local Act, were not thereby exempted from accounting to the union auditor under Poor Law (Amendment) Act, 1834 (c. 76), s. 47.

(2) The officers accounting for the receipt & expenditure of the poor rate to an auditor appointed by direction of the Poor Law Comrs. must account for all sums collected under the denomination of poor rate, & expended for any

purposes (as watching, police, etc.) to which, by local or general Acts, the poor rate is applicable; not for those sums only which are raised & laid out strictly for the relief & management of the poor.—*R. v. ST. ANDREW'S, HOLBORN DIRECTORS OF THE POOR* (1844), 6 Q. B. 78; 1 New Mag. Cas. 67; 13 L. J. Q. B. 341; 3 L. T. O. S. 201; 8 J. P. 391; 8 Jur. 688; 115 E. R. 30.

*Annotations*:—*As to* (1) *Refd. R. v. Bristol Union* (1849), 13 Q. B. 405; *R. v. St. Pancras Directors* (1858), E. B. & E. 583; *R. v. St. James, Westminster Governors, etc.* (1859), 5 Jur. N. S. 1389. *As to* (2) *Refd. R. v. Tyrwhitt* (1853), 2 E. & B. 77.

**129. — Disallowance of particulars unfurnished—Mandamus to furnish particulars not granted.**—Where overseers produce their accounts to the auditor appointed by the Poor Law Comrs., but refuse to furnish particulars of the items of those accounts, the ct. will not grant a *mandamus* to compel them to do so, the auditor having it in his power to disallow the charges of which particulars are not furnished.—*R. v. HALIFAX OVERSEERS* (1841), 10 L. J. M. C. 81; 5 J. P. 610.

**130. Auditor also solicitor for parish—Validity of audit.**—*R. v. GREAT WESTERN RY. CO., Re BURNHAM RATES*, No. 127, *ante*.

**131. Surcharge by auditor—Costs paid by directors under local Act.**—By a local & personal Act provision was made for electing governors & directors for the relief of the poor & for the watching & lighting of a district, consisting of one parish & part of another; & the governors & directors were empowered to elect auditors for the purpose of auditing the accounts of the district. The governors & directors were empowered to make rules for the application of moneys to be raised under the Act; to bring or defend actions affecting the property vested in them under the Act, or relating to the due execution of the Act; & to meet & ascertain the amount necessary to be assessed for the purposes of the Act, which amount the inhabitants were to raise by rate. The governors & directors were also empowered to appoint a clerk, & to make such allowance to him & their other officers as they should think proper. Auditors were also to be elected by the inhabitants, who were to meet half yearly, at least, & were empowered to appeal against any part of the accounts of which they should disapprove. After the passing of this Act, the Poor Law Comrs. included the district within one of several unions comprised in the N. W. M. district, for which last district they appointed an auditor under Poor Law (Amendment) Act, 1844 (c. 101), s. 32. The last-mentioned auditor disallowed part of a bill of costs, paid by the governors & directors to their clerk, & surcharged three of the governors & directors with the amount disallowed:—*Held*: he had power so to disallow & surcharge, notwithstanding the provisions of the local Act.—*R. v. TYRWHITT* (1853), 2 E. & B. 77; 1 C. L. R. 551; 21 L. T. O. S. 113; 17 J. P. 678; 17 Jur. 893; 1 W. R. 327; 118 E. R. 697.

*Annotation*:—*Refd. R. v. St. Pancras Directors* (1858), 6 W. R. 647.

**132. — Distress warrant to enforce payment—Jurisdiction of justices.**—When a relieving officer is surcharged by the auditor of an audit district, & application is made to justices to issue a distress warrant, if the statutable proof of the surcharge be complete, the justices have no power to inquire into the grounds of the surcharge, but must issue the warrant. If they refuse to do so, the ct. will compel them by a rule or a *mandamus*.—*R. v. LINFORD* (1857), 7 E. & B. 950; 119 E. R. 1500.

*Annotations*:—*Refd. R. v. Finnis* (1859), 5 Jur. N. S. 791; *R. v. Hertfordshire JJ.* (1873), 38 J. P. 87.



**133. — Auditor's costs.]—**Pltf., a poor law auditor, certified a deficiency in the accounts of defts.' overseer who failed to pay the amount to defts.' treasurer within the seven days required by Poor Law (Amendment) Act, 1844 (c. 101), s. 32. Pltf. applied, as required by that sect. to the justices for a distress warrant, but as the overseer had by that time paid part of the certified deficiency, the justices declined to issue a warrant, for more than the unpaid part. Pltf. refused to accept this, & applied without success to this ct. for a *mandamus*. Upon appeal by the overseer, the Local Government Board under Poor Law Audit Act, 1848 (c. 91), s. 4, consented to remit the disallowance on condition that the overseer would pay pltf.'s costs incurred before the justices & this ct. Pltf. having failed to obtain the performance of this condition by the overseer, brought this action for his costs against defts.:—*Held*: under the circumstances defts.' were liable. —*PRIEST v. ROYSTON UNION* (1875), 33 L. T. 564; 24 W. R. 174.

—*See DISTRESS*, Vol. XVIII., pp. 450, 451, Nos. 1865, 1869, 1870.

**134. — Grounds for surcharge — Payment amounting to improper conduct.]—**In calculating the superannuation allowance to a registrar of births & deaths guardians took into account certain gratuities paid to him by them, as being "emoluments." These gratuities had been paid on the suggestion of & were approved by the Minister of Health, to supplement the registrar's statutory income. The district auditor disallowed the portion of the superannuation allowance based on these gratuities & surcharged it, on the ground that there was no legal warrant for the gratuities & that the sanction of the Minister of Health could not legalise their payment, & that they could not, therefore, form part of the basis of the calculation of the superannuation allowance:—*Held*: (1) as the only grounds upon which the above payment of superannuation allowance could be surcharged was that its payment amounted to improper conduct or was an illegal payment, & that it was neither, the surcharge was wrong; (2) the auditor had no power to disallow the portion of the superannuation allowance based upon said payment of gratuities. —*R. v. GRAIN, Ex p. WANDSWORTH UNION*, [1927] 1 K. B. 540; 96 L. J. K. B. 175; 91 J. P. 10; 43 T. L. R. 38; 70 Sol. Jo. 1242; 24 L. G. R. 583; *on appeal*, [1927] 2 K. B. 205; 96 L. J. K. B. 563; 136 L. T. 776; 91 J. P. 71; 43 T. L. R. 342; 71 Sol. Jo. 308; 25 L. G. R. 231, C. A.

**135. — Illegal payment.]—***R. v. GRAIN, Ex p. WANDSWORTH UNION*, No. 134, *ante*.

**136. — Power in case of misconduct or negligence of overseers.]—**A poor law auditor, acting under Poor Law (Amendment) Act, 1844 (c. 101), s. 32, has power to surcharge an overseer for any deficiency that may, on the face of the documents submitted to him, appear to have arisen through the negligence or misconduct of the overseer, & the ct. will not interfere with the auditor's surcharge where, on the face of the documents submitted to him, there is evidence from which he might reasonably have concluded that there had been misconduct or negligence on the part of the overseer. —*R. v. KNOTT* (1866), 15 L. T. 291.

**137. — Superannuation payments.]—***R. v. GRAIN, Ex p. WANDSWORTH UNION*, No. 134, *ante*.

**138. — Signature to certificate or order—Need not be made at public session.]—**It is not essential to the validity of an order of surcharge by a

district auditor upon a guardian, or to the validity of a certificate made by the auditor under art. 39 of the Order of the Poor Law Board dated Jan. 27, 1858, as to the correctness of the accounts, that they should be signed by the auditor at a sessions of the audit to which the public have access. —*R. v. LOCAL GOVERNMENT BOARD, Ex p. WARREN* (1909), 100 L. T. 434; 73 J. P. 186; 25 T. L. R. 223; 7 L. G. R. 468, D. C.

— **Time for commencing proceedings to enforce.]—***See MAGISTRATES*, Vol. XXXIII., p. 314, No. 317.

**139. Disallowance of items in accounts—Grounds for disallowance—Inexpedient or *malâ fide* payments.]—**The overseers of a parish, at a vestry meeting held for the purpose, assessed a railway co. at £2,708. The co. gave notice of appeal. At a subsequent vestry it was decided that the assessment should be reduced to £2,000 & that, if the co. refused that compromise, the overseers should take such proceedings as they might be advised were necessary. The co. appealed; & the then overseers, without calling a vestry meeting, contested the appeal. The sessions reduced the rate to £300, subject to a case for the Q. B. The case was not sent up, the overseers having arranged with the co. that the rate should be fixed at £150. The Poor Law auditor disallowed the expenses of contesting the appeal, on two grounds: (a) that the overseers should have called a vestry meeting to determine whether the appeal should be contested; (b) that they should, after the decision at sessions, have summoned a vestry to determine whether the case for the Q. B. should be proceeded on. The expenses in question were after the audit, sanctioned by the inhabitants at a vestry meeting:—*Held*: the overseers were not bound to summon a vestry meeting before contesting the appeal or abandoning the case reserved; & as the auditor did not allege that what they had done was inexpedient or that they had acted *malâ fide*, the grounds of disallowance were bad. —*R. v. STREET* (1852), 18 Q. B. 682; 22 L. J. M. C. 29; 19 L. T. O. S. 165; 10 J. P. 359; 16 Jur. 1085; 118 E. R. 258.

**140. — Whether auditor must alter balance with own hand—Or provide for disallowed item.]—**(1) Certain surplus moneys belonging to some of the parishes of the L. union then in the hands of the union were stolen. The guardians of the union applied part of their general funds to restore these balances to the credit of the parishes to which they belonged, & then debited the whole of the parishes of the union with the deficiency under the head of common charges. The auditor having disallowed this item:—*Held*: the auditor was right in disallowing the item, for it was in effect throwing the loss which originally fell on a few parishes upon the whole of the parishes of the union.

(2) *Semble*: where a Poor Law auditor disallows an item in the accounts, & directs it to be expunged, he is not bound to alter the balance with his own hand; nor is he bound to state what is to be done with, or who else is to be debited with the disallowed item. —*R. v. CITY OF LONDON UNION* (1862), 26 J. P. 295.

**141. — Solicitor's bill—Finality of decision as against overseers & ratepayers.]—**(1) Poor Law (Amendment) Act, 1844 (c. 101), s. 39, makes the decision of the auditor of the poor law on any question as to an attorney's bill final, at all events as against the overseers, unless the bill has been taxed before it is presented to the auditor; & therefore the ct. cannot grant, at the instance of

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the overseers, a *certiorari* to bring up such a disallowance of such a bill of costs.

(2) *Qu.*: whether, if the complaint were by a ratepayer that the bill was improperly allowed, the decision of the auditor would be final as against the ratepayer, because the bill was not taxed.—*R. v. HUNT* (1856), 6 E. & B. 408; 119 E. R. 918; *sub nom.* *R. v. NAPTON, WARWICKSHIRE OVERSEERS*, 25 L. J. Q. B. 296; 2 Jur. N. S. 1138; *sub nom.* *Re NAPTON, WARWICKSHIRE OVERSEERS*, 27 L. T. O. S. 124; *sub nom.* *Ex p. NAPTON OVERSEERS*, 20 J. P. 581; 4 W. R. 561.

*Annotations*:—*Generally*, *Mentl. Southampton Union v. Bell & Tayler* (1888), 21 Q. B. D. 297; *Re Porter, Amphlett & Jones*, [1912] 2 Ch. 98.

**142. — Illegal payment—Relief to able-bodied men.]—A.-G. v. MERTHYR TYDFIL UNION**, No. 188, *post*.

**143. Neglect of overseer to attend audit.]—**The mere absence of a churchwarden from the audit of the poor law accounts of his parish, due notice having been given, is not sufficient in itself to support a conviction for wilful disobedience of

the rules of the Poor Law Comrs. under Poor Law (Amendment) Act, 1834 (c. 76), s. 98.

A churchwarden who failed to attend the audit of the poor law accounts of his parish, was convicted of a wilful neglect, or disobedience of the rules, orders, & regulations of the Poor Law Comrs. under the Poor Law (Amendment) Act, 1834 (c. 76), s. 98:—*Held*: as he had taken no part in the poor law administration of the parish; as the churchwardens had not usually attended the audit, & no intimation had been given that their absence had interfered with the transaction of the business; & as the notice of audit under Poor Law (Amendment) Act, 1844 (c. 101), s. 33, contained an intimation that it was "requisite that one at least of the overseers" should personally attend the audit, as well as the assistant overseer, he might reasonably have supposed that his attendance was not necessary & the conviction must be quashed.—*HOLGATE v. BRETT* (1888), 58 L. T. 452; 52 J. P. 661; *sub nom.* *HALGATE v. BRETT*, 36 W. R. 471, D. C.

**Notice of certiorari to bring up allowance of accounts.]—See CROWN PRACTICE**, Vol. XVI., p. 463, No. 3381.

## Part II.—Poor Law Areas.

### SECT. 1.—PARISH.

*See, now*, Poor Law Act, 1927 (c. 14), s. 2; & *generally*, LOCAL GOVERNMENT, Vol. XXXIII., p. 29.

**144. What constitutes a poor law parish.]—**A parish in reputation which, in 1801, & ever since has had parochial rates & churchwardens, shall be assessed towards the relief of its own poor.—*HILTON v. PAUL* (1627), Litt. 73; Cro. Car. 92; Hut. 93; 124 E. R. 143.

*Annotations*:—*Reid*, *Nichols v. Walker & Carter* (1834), Cro. Car. 394; *R. v. Severn & Arnold* (1756), Say. 278; *R. v. Marriott* (1838), 7 L. J. M. C. 95; *R. v. Worcester-shire JJ.* (1838), 1 Will. Woll. & H. 432; *R. v. Worcester-shire JJ.* (1840), 3 Per. & Dav. 465; *R. v. Clayton* (1849), 13 Q. B. 354; *R. v. Sharpley* (1854), 23 L. T. O. S. 172.

**145. —.]—H.** lived ten years in the Forest of Dean, & then died, & left several children: two justices made an order to remove them to Linton in Herefordshire. If a place be a reputed parish, & have churchwardens & overseers of the poor, it is within Poor Relief Act, 1801 (c. 2), though in truth it be no parish; but if it be merely extra-parochial, as the justices cannot send to such a place, so they cannot send from it: as it is exempt from receiving, so it shall not have the benefit of removing, for they have not proper persons to complain. Persons in extra-parochial places must subsist on private charity, as all persons did at common law before Poor Relief Act, 1801 (c. 2), which enacts, that every parish shall keep their own poor; in consequence of which the jurisdiction of removals was first set up before Poor Relief Act, 1866 (c. 12). For, unless the poor were removed to their own parishes, every parish could not maintain their own poor. But Poor Relief Act, 1801 (c. 2), does not extend to extraparochial places.—*FOREST OF DEAN (INHABITANTS) v. LINTON (PARISH)* (1700), 2 Salk. 487; 91 E. R. 419.

*Annotations*:—*Reid*, *R. v. Sparrow* (1740), 7 Mod. Rep. 393; *R. v. Clayton* (1849), 13 Q. B. 354.

**146. —.]—The parish of Pershore**, is divided into six parts; five consist of distinct chapelries,

which have separate chapels, & have, as far as can be ascertained, maintained their own poor. The other part is subdivided into the town of Pershore, & the hamlet of Pensham; the extent of the whole being 1,300 acres, the population about 1,100. Pensham has its own constable, collects its own highway & county rates. It has no chapel, but supplies one of the churchwardens to the mother church in Pershore. One poor rate has been made for the whole, & for a great many years there has been one overseer for Pensham, who has collected one-third of that rate from the hamlet, & paid it over to the joint fund, out of which the poor have been maintained indiscriminately:—*Held*: Pensham was not a separate district, & did not appear to be unable to receive the benefit of Poor Relief Act, 1801 (c. 2), & therefore, an appointment of overseers for it separately, was bad.—*R. v. MARRIOTT* (1838), 12 Ad. & El. 35, n.; 7 L. J. M. C. 95; 113 E. R. 723; *sub nom.* *R. v. WORCESTERSHIRE JJ.*, 3 Nev. & P. K. B. 434; 1 Will. Woll. & H. 432; 2 J. P. 470; 2 Jur. 889.

*Annotation*:—*Reid*, *R. v. Clayton* (1849), 13 Q. B. 354.

**147. —.]—The parish of A. & township of P.** had maintained their poor jointly & indiscriminately, as far back as could be traced, & possessed a joint workhouse. They had the same parish church & churchwardens; but separate overseers, collectors, & other officers; & the rate for the maintenance of the poor was separately levied, in the proportions of two-thirds for one division & one-third for the other:—*Held*: the fact of joint maintenance of the poor was conclusive, under these circumstances, to show that P. was not a separate & distinct township for the maintenance of the poor, within Poor Relief Act, 1802 (c. 12); & the township of P., jointly with the parish, could have the benefit of Poor Relief Act, 1801 (c. 2).—*PRICE v. QUARRELL* (1842), 12 Ad. & El. 784; 2 Gal. & Dav. 632; 11 L. J. M. C. 131; 6 Jur. 604; 113 E. R. 1012.

*Annotations*:—*Reid*, *R. v. Clayton* (1849), 13 Q. B. 354. *Mentl. Udney v. East India Co.* (1853), 13 C. B. 733.

148. —[Where a district had always been treated as one parish for the purpose of maintaining the poor & repairing the roads, but there was evidence that there had formerly been two churches & two rectories; & for most ecclesiastical purposes the district had been treated as two parishes:—*Held*: upon the facts stated, the district was still to be treated as one parish for the maintenance of the poor, it having been, at all events, a reputed parish at the time of the passing of Poor Relief Act, 1801 (c. 2).—*R. v. SHARPLEY* (1854), 23 L. T. O. S. 172; 18 J. P. 409; 18 Jur. 835.

149. —[A parish consisting of eight townships, for which the overseers had been irregularly appointed, sometimes for one township, sometimes for more, from 1813 up to 1833, is a parish in which a settlement could be gained by hiring & service in one of the townships.—*R. v. RUABON* (1858), 32 L. T. O. S. 104; 7 W. R. 17; 22 J. P. Jo. 784.

150. —*Presumption*.—[The ct. will presume that a place in England is parochial, if nothing to the contrary appears.—*R. v. ST. MARGARET, WESTMINSTER (INHABITANTS)* (1845), 7 Q. B. 569; 1 New Mag. Cas. 328; 2 New Sess. Cas. 31; 14 L. J. M. C. 131; 5 L. T. O. S. 193; 9 J. P. 618; 9 Jur. 534; 115 E. R. 603.

151. *Extra-parochial place — Proof*.—[In a question as to whether N. was extra-parochial or part of the parish of T., it appeared that since 1698 N. had maintained its own poor. An agreement of that date was lately found in a chest of a large owner of N., agreed to maintain their own poor, & reciting that N. was in the parish of T. A rate having been made by the parish of T., on the inhabitants of N.:—*Held*: the agreement came from proper custody & was admissible; if N. had been entered in the registrar general's report in the last census as extra-parochial, that would have been conclusive under the Extra-Parochial Places Act, 1857 (c. 19), s. 1; but as it was entered "T. with N." & not N. separately, the objection of extra-parochiality was not sustained.—*R. v. MYTTON* (1860), 2 E. & M. 557; 121 E. R. 209; *sub nom.* MYTTON *v.* THORNBURY (CHURCHWARDENS & OVERSEERS), 29 L. J. M. C. 109; 2 L. T. 12; 24 J. P. 180; 6 Jur. N. S. 341; 8 W. R. 275.

*Division of parish*.—[See No. 102, *post*.

## SECT. 2.—UNION.

See Poor Law Act, 1927 (c. 14), ss. 2, 3, 22–28.

152. *Power of authority to unite parishes—Parish having local Act & not consenting to union*.—[Poor Law (Amendment) Act, 1834 (c. 76), authorises the Poor Law Comrs. to constitute, as part of a union for the administration of the laws for the relief of the poor, a parish, having a local Act for the management of its poor, without the consent of the trustees or managers appointed under the local Act.—*R. v. POOR LAW COMRS., Re WHITECHAPEL UNION* (1837), 6 Ad. & El. 34; 2 Nev. & P. K. B. 8; Nev. & P. M. C. 303; Will. Woll. & Dav. 440; 6 L. J. M. C. 114; 1 J. P. 195; 1 Jur. 428; 112 E. R. 13.

*Annotations*.—*Consd.* *R. v. Poor Law Comrs., Re Holborn Union* (1838), 3 Nev. & P. K. B. 77. *Apld.* *R. v. St. James's Westminster Governors & Directors of the Poor* (1859), 33 L. T. O. S. 346.

153. —[The parish of St. G. was created, under 10 Anne, c. 11, a parish for ecclesiastical purposes only, but for the relief of the poor & other parochial purposes it continued to form part of the parish of St. A., from which it

had been severed. In various local Acts respecting these parishes they were spoken of as united parishes, & at the passing of Poor Law (Amendment) Act, 1834 (c. 76), the laws for the administration of relief to the poor were vested in a board of fifty guardians elected from the two parishes jointly; but neither of these parishes had ever maintained their poor separately:—*Held*: these parishes were not a union incorporated for the relief of the poor under any local Act, & therefore, the Poor Law Comrs. might join them to a union under Poor Law (Amendment) Act, 1834 (c. 76), s. 26, without the consent of two-thirds of the existing guardians, as required in certain cases by sect. 32.—*R. v. POOR LAW COMRS., Re HOLBORN UNION* (1838), 6 Ad. & El. 56; 3 Nev. & P. K. B. 77; 7 L. J. M. C. 33; 2 J. P. 22; 2 Jur. 108; 112 E. R. 21.

154. —*Parish having no paupers or poor rate*.—[*STAPLE INN OVERSEERS v. HOLBORN UNION*, No. 119, *ante*.

155. —*Consent of guardians of union*.—[Under the Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), the Local Government Board has power to dissolve any union, whether formed under a general or a local Act. The consent of the guardians of a union is not required to the uniting of a parish with other parishes under Poor Law (Amendment) Act, 1844 (c. 101), s. 64. The consent required concerns only the guardians of the parish, where there are such guardians.—*LOCAL GOVERNMENT BOARD v. SOUTH STONEHAM UNION*, [1909] A. C. 57; 78 L. J. K. B. 124; 99 L. T. 896; 73 J. P. 57; 25 T. L. R. 100; 53 Sol. Jo. 97; 7 L. G. R. 167, H. L.; *revg.* S. C. *sub nom.* *R. v. LOCAL GOVERNMENT BOARD, Ex p. SOUTH STONEHAM UNION*, [1908] 2 K. B. 368, C. A.

156. *Union of unions*.—[One union of parishes formed under 22 Geo. 3, c. 83, cannot unite with another such union, so that there shall be a joint occupation of one poorhouse for the paupers of two unions.

The union of A. was formed under 22 Geo. 3, c. 83, & the union of B. was afterwards similarly formed. The latter union not having any poorhouse, arranged with union A. that its paupers should be received into the workhouse of union A., & the charges & expenses of maintenance be paid by union B. The workhouse was enlarged to afford this additional accommodation, & union B. was charged with the interest upon the money borrowed. The auditor of the district, in auditing the accounts of one of the townships in union B., disallowed certain items as paid to the treasurer of union A., on account of the paupers of the said parish & the before-mentioned debt:—*Held*: he was right in his disallowance, for the arrangement between the two unions was unlawful.—*R. v. SHAW* (1860), 29 L. J. M. C. 211; 2 L. T. 435; 24 J. P. 390; 8 W. R. 587.

157. *Dissolution of union—Compensation to officers for loss of office—Emoluments to be taken into consideration*.—[The clerk to the guardians of a union, who was an attorney, was, by the dissolution of the union, deprived of his office. He had, previously to the dissolution, been employed to conduct proceedings on behalf of the guardians under Lands Clauses Act, to obtain compensation in respect of lands within the union taken by a railway, & was to be paid for these services. The Poor Law Board in assessing the compensation to which he was entitled [under Poor Law (Amendment) Act, 1867 (c. 106), s. 20] for the loss of his office or employment took into consideration the profits so made by him, in addition to his salary:

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—*Held*: the Poor Law Board, in so doing, had not exceeded their jurisdiction.—*R. v. POOR LAW BOARD* (1871), L. R. 6 Q. B. 785; 41 L. J. M. C. 16; 25 L. T. 304; 36 J. P. 327.

158. ———]—The parish of M. was managed by trustees under a local Act. On Jan. 1, 1856, Metropolis Management Act, 1855 (c. 120), came into operation. By sect. 90 all the powers of the trustees, except such duties as relate to the affairs of the church or the management or relief of the poor, ceased, & were transferred to the vestry. The trustees continued as a body, having the management & relief of the poor. In Feb. the trustees resolved that after Lady Day, 1857, the business of the board should be conducted by one clerk, with the aid of a solr., & that the office of solr. be offered to S., who accepted the offer. On the passing of the Metropolitan Poor Act, 1867 (c. 6), the poor law board, under sect. 73, directed that after July 7, 1867, the relief of the poor in the parish of M. should be managed by a board of guardians elected according to the Poor Law Acts. By sect. 74 the guardians are subject to the same regulations as the guardians elected under the Poor Law Acts. By sect. 76 officers & persons appointed or acting under any such local Act for any purpose of the relief of the poor, or otherwise in the service of the guardians . . . shall be entitled to continue in office after the constitution of the new board of guardians under this Act to the same extent as if this Act had not been passed, & their service before the constitution of that board shall be reckoned in the computation of any superannuation allowance to which they may become entitled. Provided that in any case any officer of a union or a parish shall be deprived of his office by reason of the operation of this Act, the poor law board may award to him such compensation for the loss of his office & its emoluments, either by way of gross sum or by way of annuity, as to them shall seem reasonable. The board of guardians continued the appointment of S. as solr., but the poor law board having refused to sanction it, as not being authorised by sect. 74, the board of guardians gave S. notice that his appointment would be determined on Sept. 29, 1867:—*Held*: S. held an office within Metropolitan Poor Act, 1867 (c. 6); & he had been deprived of his office by the operation of that Act, & was entitled to compensation.—*R. v. LOCAL GOVERNMENT BOARD* (1874), L. R. 9 Q. B. 148; 43 L. J. Q. B. 49; 29 L. T. 769; 38 J. P. 165; 22 W. R. 315.

*Annotation*:—*Distd. re Carpenter & Bristol Corpn.*, [1907] 2 K. B. 617.

159. ——— What officers entitled—Solicitor.]

—A local Act, by which a poor law union & a rural district were dissolved, provided that any officer of the guardians or rural district council who should be in office at the commencement of the Act, & who by virtue thereof should suffer direct pecuniary loss, should be deemed to be an officer entitled to compensation within Local Government Act, 1888 (c. 41), s. 120, & that that sect. should apply accordingly. By sect. 100 of that Act the expression "office" includes "any place, situation or employment," & the expression "officer" is to be construed accordingly.

A firm of solrs. were during a period of about twenty-six years next before the commencement of the Act from time to time employed by the board of guardians of the union & the rural district council to do such legal work as those bodies required to have done, receiving by way of re-

muneration for that work the usual professional costs & charges payable to solrs. for such work; & during that period no other solr. was employed by the board of guardians or council:—*Held*: the solrs. so employed could not be considered as officers of or as holding any "place, situation or employment" under the board of guardians or rural district council within Local Government Act, 1888 (c. 41), ss. 100, 120.—*Re CARPENTER & BRISTOL CORPN.*, [1907] 2 K. B. 617; 76 L. J. K. B. 1145; 97 L. T. 461; 71 J. P. 417; 23 T. L. R. 654; 51 Sol. Jo. 589; 5 L. G. R. 977, C. A.

160. ——— Effect of dissolution.]—In replevin for taking goods in the workhouse of the W. Union, against the guardians of C., incorporated by a local Act, defts. avowed as landlords for rent in arrear, & the tenancy was put in issue by a plea in bar. It appeared in evidence that by an order of the Poor Law Comrs., made on Sept. 16, 1835, which purported to be founded on the consent of two-thirds of the guardians of C., such union was ordered to be dissolved; & on Sept. 17 another order of the Comrs. was made under the provisions of the Poor Law (Amendment) Act, 1834 (c. 76), that the parishes comprised in the union of C. should, together with others, be formed into the union of W. From the date of the latter order the guardians of the W. Union used the union house formerly belonging to the C. Union for the poor of their union, & payments expressed to be for rent had been made by the guardians of the W. Union to the treasurer of the C. Union until Sept. 1838, when the payments were made generally, but receipts were given by the treasurer as for rent. On that day a sum of money was paid by the W. Union to the C. Union as a balance for the furniture, etc., in the workhouse. In Jan. 1841, the Poor Law Comrs. made an order, which recited that the premises in question had, under the order of Sept. 17, become convertible to the use of the W. Union, & had since been used & occupied by the poor of such union, & directed the guardians of the W. Union to pay to the treasurer of the C. Union a yearly rent as compensation for the use of the premises. This order appeared to have been acted on by both parties:—*Held*: (1) p'tfs. were not estopped, by having sued defts. as a corpn., from giving in evidence the order of Sept. 16, 1835; (2) the effect of that order was not *ipso facto* to dissolve the incorporation for all purposes; (3) this order was admissible in evidence, without proof of the consent of two-thirds of the guardians of the C. Union, as that corpn. had since ceased to perform the duty of providing for & taking care of the poor, & a jury might rightly presume that it operated as a valid dissolution; (4) supposing upon the dissolution of the C. Union the property in the workhouse was diverted from it, of which *quaere*, yet that if the guardians of W. had contracted with them as owners expressly or impliedly, the mere want of legal ownership would not take away their right to distrain; (5) under the circumstances the occupation of the workhouse by the W. Union must be referred to the order of the Comrs., which must be presumed to have been communicated to the C. Union, & not to any contract creating the relation of landlord & tenant between the parties.—*WOODBRIDGE UNION v. COLNELS UNION* (1849), 13 Q. B. 269; 18 L. J. Q. B. 126; 12 L. T. O. S. 421; 13 J. P. 409; 13 Jur. 803; 116 E. R. 1266.

161. ——— Union formed under local Act.]—*LOCAL GOVERNMENT BOARD v. SOUTH STONEHAM UNION*, No. 155, *ante*.

**162. Division of parish—Loss of benefit of Poor Law Acts.]—**A parish cannot legally be divided for the relief & maintenance of the poor, unless it cannot otherwise have the full benefit of Poor Relief Act, 1601 (c. 2).—*BASTOCK v. RIDGWAY* (1827), 6 B. & C. 496; 9 Dow. & Ry. K. B. 585; 4 Dow. & Ry. M. C. 424; 5 L. J. O. S. M. C. 139; 108 E. R. 534.

*Annotations:—**Apld.* *Price v. Quarrell* (1842), 12 Ad. & El. 784. *Reid.* *R. v. Clayton* (1849), 13 Q. B. 354.

**163. Alteration of boundaries of union—Adjustment of property & liabilities—Adjustment between unions—Not between union & transferred area.]—**By an order under the Local Government Acts, 1888 (c. 41), & 1894 (c. 73), part of a township within the area of a union was detached from it & transferred to another union. On a claim by the union from which the transfer had been made for an adjustment, under Local Government Act, 1894 (c. 73), s. 68, of the property, debts, & liabilities affected by the transfer:—*Held*: any such adjustment must be made between the two unions, & not between the union from which the transfer had been made & the area transferred.—*Re* *ROCHDALE UNION & HASLINGDEN UNION*, [1899] 1 Q. B. 540; 68 L. J. Q. B. 531; 80 L. T. 146; 47 W. R. 322; 15 T. L. R. 223; 43 Sol. Jo. 277, C. A.

*Annotations:—**Consd.* *Re* *Buckinghamshire County Council & Hertfordshire County Council*, [1899] 1 Q. B. 515; *Caterham U. C. v. Godstone R. C.*, [1904] A. C. 171. *Reid.* *Re* *St. Thomas R. D. C. & Heavitree U. D. C.* (1902), 86 L. T. 153; *Re* *Durham County Council & West Hartlepool Corp.* (1905), 3 L. G. R. 738.

**164. ——— Adjustment must be final.]—**Where, on the separation of a parish from a union which it previously formed part under the Poor Law (Amendment) Act, 1834 (c. 76), s. 32, the Local Government Board by an order intended to be made under that sect. directed that sums payable annually by the county council to the union under the Local Government Act, 1888 (c. 41), s. 24 (2) (d) & s. 26 (1), should be apportioned between the union & the parish in each year according to their respective ratable values for the time being:—*Held*: the Local Government Board had no power to make such an order, inasmuch as Poor Law (Amendment) Act, 1834 (c. 76), s. 32, contemplates a final settlement between the two bodies based on an estimate of the existing proportionate values of their respective interests in the property to be apportioned.—*R. v. LOCAL GOVERNMENT BOARD*, [1901] 1 K. B. 210; 70 L. J. Q. B. 272; 83 L. T. 648; 65 J. P. 36; 49 W. R. 226; 17 T. L. R. 120; 45 Sol. Jo. 137, C. A.

**165. ——— Increase of burden on ratepayers—Evidence.]—**By a Provisional Order, confirmed by 1 & 2 Geo. 5, c. xxxvi, the city of B. extended its municipal boundaries, & a new Poor Law area was created. Certain unions & parishes were amalgamated to form the new Birmingham union, & certain parishes which did not lie within the boundaries as extended were transferred to the T., M. & Br. unions.

By art. 2, of a Provisional Order of 1912, confirmed by 2 & 3 Geo. 5, c. lxii, it was provided that "On any adjustment made otherwise than by agreement for the purpose of the Order, or of the confirming Act, under sect. 32 or sect. 62 of the Local Government Act, 1888, or either of those sects. as modified or adapted by the order, provisions shall be made for the payment to any council or other authority affected by the order

of such a sum as seems equitable in accordance with the rules contained in the first schedule to this order in respect of any increase of burden which will probably be thrown on the ratepayers of the area of that council or other authority in meeting the cost incurred by that council or other authority in the execution of any of their powers & duties in consequence of any alteration of boundaries affected by the order, or other change in relation to which the adjustment takes place."

Rule 1 of the first schedule of the order provided that: "Regard shall be had to—(a) The difference between the burden on the ratepayers which will properly be incurred by the council or other authority affected by the order in meeting the cost of executing any of their powers & duties, & the burden on the ratepayers which would properly have been incurred by that council or other authority in meeting such cost had no alteration of boundaries or other change taken place."

An arbitrator appointed to adjust financial relations between the new B. Union on the one hand & the T., M., & Br. Unions on the other gave the new B. Union no compensation for any alleged increase of burden in respect of their loss of the transferred parishes. In determining what was equitable, he was, in accordance with the above-mentioned schedule, to have regard to the difference between the burden on the ratepayers of the new B. union, which would properly be incurred by the union in meeting the cost of executing any of their powers & duties & the burden on these ratepayers which would have properly been incurred by the new B. Union in meeting such costs had no alteration of boundaries taken place. The new B. Union provided as their sole evidence for the arbitrator, evidence as to the amount which the parishes severed from the unions, now amalgamated as the new B. Union, contributed before the amalgamation to the unions of which they then formed part, & they contended that, whatever the expenditure of the new B. Union it would have been less by this contribution had the several parishes still formed part of the new union. The arbitrator held that this evidence alone did not enable him to decide the question asked, as the amalgamation of unions would probably create great economies in administration; & he awarded that the new B. Union were not entitled to have provision made for the payment to them of any sum under art. 2 of the said order of 1912:—*Held*: the arbitrator was right.—*BIRMINGHAM UNION v. TAMWORTH UNION, SAME v. MERIDEN UNION, SAME v. BROMSGROVE UNION* (1916), 116 L. T. 342; 80 J. P. 425; 14 L. G. R. 826.

**166. ——— Portion of one parish added to another in different union—Order not purporting to affect union boundaries—Poor Law Union of added portion.]—**Land forming part of parish D. in the poor law union of Bootle was, by order of the county council confirmed by the Local Government Board, transferred to parish S. in the union of Whitehaven, & parish S. was transferred from the rural district of Whitehaven to the rural district of Bootle. The order did not purport to affect the boundaries of the Unions:—*Held*: the whole of parish S., as enlarged by the order, was comprised within the union of Whitehaven.—*BOOTLE UNION v. WHITEHAVEN UNION*, [1903] 2 Ch. 142; 72 L. J. Ch. 582; 80 L. T. 237; 67 J. P. 325; 51 W. R. 550; 19 T. L. R. 453; 47 Sol. Jo. 514; 1 L. G. R. 585.

*See, also*, Part V., Sect. 2, *post*.

## Part III.—Workhouses.

### SECT. 1.—ESTABLISHMENT.

See Poor Law Act, 1927 (c. 14), ss. 48–62, 161, 205, 212 (1), 244.

**167. Power of authority to direct building of workhouse—Discretion of authority.]**—The Poor Law Comrs., under Poor Law (Amendment) Act, 1834 (c. 76), s. 23, by consent of the guardians of an union, ordered them to purchase land & build a workhouse thereon for the union. On motion for a *certiorari*, upon the ground that one of the parishes of the union already had a workhouse, which might be altered to suit the purpose, the ct. refused the rule, & would not inquire into the soundness of the discretion exercised by the comrs.—*Re NEWPORT UNION, R. v. POOR LAW COMRS.* (1837), 6 Ad. & El. 54; 112 E. R. 20.

**168. — Consent of majority of guardians necessary.]**—Where, by order of the Poor Law Comrs., under Poor Law Amendment Act, 1834 (c. 76), s. 39, guardians are appointed to administer the poor law in a single parish, the consent to an order for building a workhouse in such parish, under Poor Law Amendment Act, 1834 (c. 76), s. 23, must be given by a majority of the guardians, as it is, in the case of a union, under Poor Law Amendment Act, 1834 (c. 76), s. 38; & not by a majority of the ratepayers. When the Poor Law Comrs., under the privilege given by Poor Law Amendment Act, 1834 (c. 76), s. 106, show cause in the first instance against a motion for a *certiorari*, & succeed, the ct. will grant them costs, if proper ground appear for it, though the general rule of practice is that a party showing cause in the first instance shall not have costs.—*R. v. POOR LAW COMRS., Re ST. MARY ABBOTS* (1846), 9 Q. B. 291; 1 New Mag. Cas. 583; 7 L. T. O. S. 256; 11 Jur. 99; 10 J. P. Jo. 387; 115 E. R. 1285; *sub nom. Re ST. MARY ABBOTT'S KENSINGTON PARISH*, 16 L. J. M. C. 29.

**169. What constitutes workhouse—Cottages let by parish at undervalue—To tenants occasionally receiving relief.]**—Eight cottages were erected by the parish of W., for the better lodging the impotent & other poor, partly by means of benefactions, & partly by a fund raised under an enclosure act, according to which such fund was to be applied to the relief of the poor, & accounted for as rates. The cottages were repaired out of the poor rate. Four of these cottages were always let, at a rent under their value, to industrious labourers: these tenants paid no poor rates, & occasionally received relief; but at the time of their being admitted were likely to pay the rent, which was always collected.—*Held*: these four cottages were not workhouses for the purposes of Poor Law Amendment Act, 1834 (c. 76), Union & Parish Property Act, 1835 (c. 69).—*CANTRELL v. WINDSOR UNION* (1838), 4 Bing. N. C. 348; 1 Arn. 133; 5 Scott, 716; 7 L. J. M. C. 77; 132 E. R. 822.

**170. Alteration & enlargement of workhouse—Authorised by statute—Discretion of guardians as to nature of alterations.]**—Where, under an Act of Parliament, the parties to whom powers are delegated confine themselves within the limits prescribed them, this ct. will not interfere. Where alterations in workhouses are authorised by Act of Parliament, this ct. will not interpose with reference to the particular nature & degree of the alterations contemplated, or decide whether they

be judicious or not. The principle on which the ct. interferes in the cases of railway cos. & other like bodies. Right of comrs. under Poor Law Amendment Act, 1834 (c. 76), to alter & enlarge a parish workhouse, for the purposes of the union in which that parish is situate.

This ct. only interferes where a party or body has no power or authority given it to take a particular step or proceeding, as is frequently the case with reference to railway and other companies, where they do not keep themselves within the powers given them by Act of Parliament (*LORD COTTENHAM, C.*)—*FREWIN v. LEWIS* (1838), 4 My. & Cr. 249; 2 Jur. 175; 41 E. R. 98; *sub nom. FREWIN & SOUTHGATE v. HOLBORN UNION*, 6 Ad. & El. 73, n., L. C.

*Annotations:—**Reid. A.-G. v. Compton* (1842), 1 Y. & C. Ch. Cas. 417. *Mentid. Plin v. Wilson* (1848), 17 L. J. Ch. 428; *Oldaker v. Hunt* (1855), 6 De G. M. & G. 376; *A.-G. v. Manchester (Bp.)* (1867), L. R. 3 Eq. 436.

**171. — Guardians must submit plans & estimates—If required by authority.]**—If guardians of the poor of a parish, when about to enlarge or rebuild their workhouse in execution of powers given them by a local Act, are required by the Poor Law Comrs. to submit the plans & estimates to them, & refuse to do so, the comrs. may, under Poor Law Amendment Act, 1834 (c. 76), ss. 15, 21, make an order forbidding them to proceed in any alteration or addition to such workhouse, or apply, raise or borrow any money for that purpose, till the plans & estimates be submitted to & approved by the Comrs.—*R. v. POOR LAW COMRS., Re BRIGHTHELMSTON PARISH* (1842), 3 Q. B. 325; 3 Gal. & Dav. 616; 114 E. R. 531; *sub nom. R. v. POOR LAW COMRS., Re BRIGHTON UNION*, 6 J. P. 617; 6 Jur. 989.

**172. Acquisition of land for workhouse—Costs of completion.]**—The ct. will, under Union & Parish Property Act, 1835 (c. 69), order the guardians or overseers to pay all necessary costs incurred in completing purchases under the Poor Law Act.—*Re GUILTCROSS UNION, Ex p. ALBEMARLE (EARL)* (1838), 7 L. J. Ex. Eq. 63; 2 Jur. 415.

*Annotation:—Reid. Re Bromley Union* (1845), 4 L. T. O. S. 430.

**173. — — —.]**—Under Union & Parish Property Act, 1835 (c. 69), which enables the Poor Law Guardians to purchase, but not compulsorily, lands of persons under disability, & empowers the ct. to order the expenses attending the purchase payment into ct., or application for reinvestment, to be paid by the Poor Law Guardians, but makes no further provision for payment of the expenses of the investigation of title on a reinvestment:—*Held*: such expenses are, on the interpretation of the whole Act, payable by the Poor Law Guardians.—*Re BYRON'S (LADY) SETTLEMENT* (1853), 4 De G. M. & G. 694; 43 E. R. 679, L. J. *Annotation:—Mentid. Re Eastern Counties Ry., Ex p. Sawston* (1858), 27 L. J. Ch. 755.

**174. — In whom property vested.]**—Where a deed purported to convey “a messuage or tenement formerly used as a workhouse, in the occupation of W. with the appurtenances,” & it was shown that there was a small garden adjoining, which had been always occupied by W. as master of the workhouse:—*Held*: the garden passed, & the grantor could not afterwards be admitted to narrow the operation of his grant by



showing that the conditions of sale, signed by the vendee at the time of the sale, expressly excepted the garden; or by proving subsequent declarations of the grantee that it had not been purchased by him.

Union & Parish Property Act, 1835 (c. 19), does not transfer the legal estate in a parish workhouse from the overseers & churchwardens to the guardians of the union of which the parish forms a part, though Union & Parish Property Act, 1835 (c. 69), s. 3, authorises the guardians to "sell, exchange, let," "dispose of," "convey, assign," & "transfer" it to the purchasers.—DOE d. NORTON v. WEBSTER (1840), 12 Ad. & El. 442; 4 Per. & Dav. 270; 9 L. J. Q. B. 373; 4 Jur. 1010; 113 E. R. 879.

*Annotations* :—*Apld.* Worge v. Relf (1842), 11 L. J. M. C. 125. *Mentd.* Doe d. Hemming v. Willetts (1849), 7 C. B. 709; Watcham v. East Africa Protectorate, [1919] A. C. 533.

175. ———.—[Union & Parish Property Act, 1835 (c. 69), does not transfer the legal estate in parish property from the churchwardens & overseers to the guardians of the union, of which the parish forms a part.

Where a title, not complete in the parish officers at the time of the passing of that Act, is afterwards completed by a twenty years' possession, the legal estate so obtained vests in the churchwardens & overseers, & not in the guardians.

The possession of the agent of the guardians is the possession of the churchwardens & overseers.—WORGE v. RELF (1842), 11 L. J. M. C. 125.

176. ———.—[Conveyance to trustee for guardians—Validity of.]—By indenture, dated in 1882, B., in consideration of £30 conveyed a house to C. & his heirs, to the use of himself for life, with remainder to the use of N. & F., who were overseers of the parish of H., their heirs & assigns for ever; & it was declared that the overseers paid the £30 out of parish moneys & that the premises were conveyed to them in trust to permit the same to be used as a poor house to place paupers therein belonging to the parish of H.:—*Held*: the conveyance was not void under the Statutes of Mortmain.—BURNABY v. BARSBY (1859), 4 H. & N. 690; 33 L. T. O. S. 286; 23 J. P. 503; 7 W. R. 693; 157 E. R. 1012; *sub nom.* BARNABY v. BARDSLEY, 28 L. J. Ex. 326.

*Annotation* :—*N.F.* Webster v. Southey (1887), 36 Ch. D. 9.

177. ———.—[Charitable use.]—By a lease, dated 1747, after reciting that the inhabitants of the parish of G. had resolved to build a workhouse for the better reception & employment of the poor of the parish, & had applied to the lessor for a lease of the land, demised, & that the lessor, "in order to encourage so good a work," had consented to grant the lease, a piece of land was demised for a term of a hundred & fifty years, to commence from a day fifteen days later than the date of the lease, at the yearly rent of 1s., to several persons, one of whom was the vicar of G., in trust that the lessees might build a workhouse upon the land "for the better reception & employment, & for the lodging & entertainment only of all the poor people of the parish of G., for the time being during the said term, in such manner as they, or the major part of them, shall think fit, at the proper costs & charges of the inhabitants of the said parish of G., or otherwise, & not to be let, mortgaged for money, or assigned, to any other use, intent or purpose whatsoever." It was agreed that, if the inhabitants should discontinue the prescribed use of the building so to be erected, & should be willing to deliver it to the landlord, it should be lawful for them to do so, he paying to the churchwardens or overseers of the parish

the then value of the building. The deed was not enrolled under Charitable Uses Act, 1736 (c. 36). A workhouse was duly erected on the demised land pursuant to the lease. In 1862 the workhouse being no longer required, was pulled down, & no rent having been paid under the lease since 1776, the site was conveyed to a purchaser in fee under Union & Parish Property Act, 1835 (c. 69), enabling parish authorities to sell the sites of disused workhouses. An action having been brought by a person claiming to be the reversioner against persons—as alleged assigns of the lease—claiming under the purchase of 1862, to recover the arrears of rent:—*Held*: the lease was a lease for "charitable uses"; it failed to comply with the requirements of Charitable Uses Act, 1736 (c. 36), in that, besides non-enrolment, it did not take effect in possession, & contained reservations in favour of the grantor in the shape of rent, & something in the nature of a right of pre-emption: these defects were not cured by Poor Law (Amendment) Act, 1844 (c. 101), s. 73, that Act curing only one defect, namely, want of enrolment: & the lease was accordingly void *ab initio*, & Stat. Limitations began to run against the grantor, if not from the execution of the lease, at all events from the time the rent ceased to be paid:—*Semle*: land acquired by parish officers to enable them to perform their statutory obligations, as for instance, by providing a workhouse, is land acquired for a "charitable use."—WEBSTER v. SOUTHEY (1887), 36 Ch. D. 9; 56 L. J. Ch. 785; 56 L. T. 879; 52 J. P. 36; 35 W. R. 622; 3 T. L. R. 628.

*Annotations* :—*Mentd.* Haigh & Baxter v. West (1893), 68 L. T. 531; *Re* Vorrall, National Trust for Places of Historic Interest, or Natural Beauty v. A.-G., [1916] 1 Ch. 100.

—See CHARITIES, Vol. VIII., pp. 255, 257, Nos. 165, 186.

Necessity for fencing machinery in engine house in workhouse.]—See FACTORIES, Vol. XXIV., p. 902, No. 30.

Supply of gas to workhouse.]—See GAS, Vol. XXV., p. 478, No. 52.

Supply of water to workhouse.]—See WATER SUPPLY.

## SECT. 2.—MANAGEMENT AND CONTROL OF INMATES.

See Poor Law Act, 1927 (c. 14), ss. 48, 51–62, 231–235.

178. Permission to able-bodied pauper to quit workhouse—Leaving family in workhouse—Refusal by guardians—Liability.]—An action against guardians of the poor by an able-bodied pauper, who has been imprisoned for refusing to return to the workhouse, & who claims to be entitled to leave his pauper family in the workhouse, & to go out alone, cannot succeed in the absence of proof of malice on the part of defts.

*Qu*: whether the pauper under such circumstances has the right to leave his family in the workhouse.—BURGE v. POWER (1886), 2 T. L. R. 760.

179. Admission to workhouse—Child of lunatic mother born in asylum—Mandamus.]—*Ex p.* WYATT (SIR W.) & MIDDLESEX J.J. (1888), 4 T. L. R. 384, D. C.

180. "Misbehaviour" by inmates—Willful disobedience.]—Willful disobedience by a pauper of a lawful order of a workhouse official is not necessarily "misbehaviour" within Poor Relief Act, 1815 (c. 137), s. 5.—MILE END UNION v.

**Sect. 2.—Management and control of inmates. Part IV. Sects. 1 & 2: Sub-sects. 1 & 2.]**

**Sims**, [1905] 2 K. B. 200; 74 L. J. K. B. 647; 92 L. T. 238; 69 J. P. 145; 21 T. L. R. 241; 49 Sol. Jo. 261; 3 L. G. R. 349; 20 Cox, C. C. 807, D. C.

**Annotation** :—*Distd. Holland v. Peacock*, [1912] 1 K. B. 154.

**181. — Act of immorality.**—An act of immorality committed by a pauper in a work-

house is evidence of "misbehaviour" by the pauper within Poor Relief Act, 1815 (c. 137), s. 5.—**HOLLAND v. PEACOCK**, [1912] 1 K. B. 154; 81 L. J. K. B. 256; 105 L. T. 957; 76 J. P. 68; 10 L. G. R. 128; 22 Cox, C. C. 630, D. C.

**Annotation** :—*Mentd. Retail Dairy Co. v. Clarke*, [1912] 2 K. B. 388.

**Misconduct or negligence of officer.**—*See* Part I., Sect. 5, sub-sect. 7, B., *ante*.

## Part IV.—Relief of the Poor.

### SECT. 1.—IN GENERAL.

*See, generally*, Poor Law Act, 1927 (c. 14), ss. 34–40.

**182. Classes entitled to relief—Statutory provision.**—*A.-G. v. MERTHYR TYDFIL UNION*, No. 188, *post*.

*See, now*, Poor Law Act, 1927 (c. 14), s. 34.

**183. — Destitute person having no means to maintain himself—Person able to work.**—*A.-G. v. MERTHYR TYDFIL UNION*, No. 188, *post*.

**184. — Person able to obtain work on reasonable terms.**—*A.-G. v. MERTHYR TYDFIL UNION*, No. 188, *post*.

— **Out-relief.**—*See* Nos. 188–191, *post*.

### SECT. 2.—KINDS OF RELIEF.

#### SUB-SECT. 1.—OUT-RELIEF.

*See* Poor Law Act, 1927 (c. 14), ss. 34, 35, 63–68, 73–77, 184–189.

**185. Able-bodied pauper—Discretion of guardians in classifying.**—*WISE'S CASE* (1670), 1 Vent. 69; 86 E. R. 48.

**Annotation** :—*Refd. A.-G. v. Merthyr Tydfil Union*, [1900] 1 Ch. 516.

**186. — Person capable of light work not necessarily able-bodied—Onus of proof that discretion wrongly exercised.**—The fact that a pauper is capable of doing some work does not necessarily constitute him an able-bodied person, & the fact that he is incapable of doing full work does not necessarily constitute him a not able-bodied or infirm person.

### PART IV. SECT. 1.

**182i. Classes entitled to relief—Statutory provision.**—*BRIDGEWATER OVERSEERS v. PORT MEDWAY OVERSEERS* (1882), 16 N. S. R. (4 R. & G.) 88.—**CAN.**

**182ii. —**—*R. v. GULL LAKE TOWNSHIP* (1916), 34 W. L. R. 222; 10 W. W. R. 246.—**CAN.**

**182iii. —**—*KERRROBERT UNION HOSPITAL v. GRASS LAKE RURAL MUNICIPALITY*, No. 381, [1925] 1 D. L. R. 173; 19 Sask. L. R. 132; [1924] 3 W. W. R. 778.—**CAN.**

**182iv. —**—The intention of Hospital & Charitable Institutions Act is that every indigent person who resides in Ontario shall have proper medical treatment, & that, in case of his inability to pay, some municipality in the Province shall be chargeable with his maintenance & treatment in a hospital.—*TORONTO GENERAL HOSPITAL TRUSTEES v. RENNREW CORPN.* (1925), 58 O. L. R. 71.—**CAN.**

**182v. —**—Where an indigent person has not applied to a municipality for medical treatment or attendance & the municipality has not authorised such treatment or attendance, it cannot be made liable therefor

under Rural Municipality Act, R. S. S., 1920, c. 89, to a physician or other person who has given his services.—*SUTHERLAND v. CANWOOD RURAL MUNICIPALITY*, [1925] 3 W. W. L. 781.—**CAN.**

**182vi. —**—*NATIONAL SANITARIUM ASSOCN. v. MATTAWA CORPN.*, [1925] 2 D. L. R. 491; 56 O. L. R. 474.—**CAN.**

**182vii. —**—Hospitals & Charitable Institutions Act makes a municipality liable for payment of the hospital charges for treatment of indigent persons who, when admitted into the hospital, were actually residents of that municipality, not for the treatment of persons who may have visited the municipality for a temporary purpose.—*NATIONAL SANITARIUM ASSOCN. v. TORONTO CORPN.*, [1926] 3 D. L. R. 279; 59 O. L. R. 16.—**CAN.**

**182viii. —**—The words "any inmate or inmates of the workhouse," Poor Relief (Ireland) Act, 1862 (c. 83), s. 7, are confined in their interpretation to the destitute poor, & do not extend to persons who, although poor, are not destitute, & have been admitted to the workhouse infirmary for temporary medical or surgical relief.—*R. v. BROWNE*, [1918] 2 I. R. 583.—**IR.**

Where a son has agreed with guardians to contribute to the support & maintenance of his father "for & during so long a time as he shall be chargeable to the common fund of the said union," & the father, at the time he commences to be so supported & his son commences to contribute, is so chargeable, in an action for arrears under the agreement the *onus* is upon the son to prove that the discretion of the guardians in classing his father as still chargeable has been wrongly exercised. Proof of the mere fact that when his father was receiving 12s. a week out-relief from the guardians he was doing light work at a baker's, for which he received 13s. a week, some bread & an occasional meal, does not necessarily discharge that *onus*.—*BARNET UNION v. TILBURY* (1909), 73 J. P. 466; 7 L. G. R. 993, D. C.

**187. — Duty of overseers to find employment—Whether relief other than paid work may be given.**—Overseers of the poor are bound to endeavour to find work for the able-bodied poor who are out of employment. *Qu*: whether they can legally give relief to such persons, otherwise than by setting them to work & paying them for their labour.—*R. v. COLLETT* (1823), 2 B. & C. 324; 3 Dow. & Ry. K. B. 582; 2 Dow. & Ry. M. C. 135; 2 L. J. O. S. K. B. 44; 107 E. R. 404.

**Annotation** :—*Refd. A.-G. v. Merthyr Tydfil Union*, [1900] 1 Ch. 516.

**188. Persons entitled to relief—Not able-bodied men unemployed by reason of strike.**—(1) The classes of persons who are entitled to poor law relief are still, notwithstanding subsequent legislation, the same as those mentioned in Poor Relief Act, 1601 (c. 2), s. 1. Able-bodied men who can,

**182ix. —**—Able-bodied persons are absolutely excluded from relief out of funds raised by assessment for relief of the poor under 8 & 9 Vict. c. 83.—*JACK v. ISDALE* (1866), L. R. 1 Sc. & Div. 1.—**SCOT.**

**182x. —**—*MACPHERSON v. KILMORE & KILBRIDE PARISH COUNCIL*, [1921] S. C. 300.—**SCOT.**

**182xi. —**—*MELROSE PARISH COUNCIL v. GORDON PARISH COUNCIL*, [1924] S. C. 1034.—**SCOT.**

**182xii. —**—The wife of an able-bodied man with a known address in Scotland, who was living apart from her husband & who was destitute & unable to work owing to the state of her health, was not a proper object of parochial relief; & accordingly, that the cost of the relief which had been given to her could not be recovered by the relieving parish from the parish of the husband's settlement.—*GLASGOW PARISH COUNCIL v. RUTHERGLEN PARISH COUNCIL*, [1925] S. C. 79.—**SCOT.**

**R. Right of person gratuitously keeping destitute person—To recover cost of upkeep from corporation.**—*Re McDONAGH & LOBO CORPN.* (1861), 21 U. C. R. 80.—**CAN.**



if they choose, obtain work which will enable them to maintain themselves, their wives & families, but who, by reason of a strike or otherwise, refuse to accept that work, are not entitled to relief, except that, if they become physically incapable of working, the guardians may, to prevent their starving, give them temporary relief. But in that case the guardians ought to prosecute them under Vagrancy Act, 1824 (c. 83), s. 3, as "idle & disorderly persons." The wives & children of such men, however, are entitled to relief, though they themselves are not. *Semble*: men who are prevented from accepting work by fear of physical violence are entitled to relief.

(2) A general strike of workmen does not of itself create a case of "sudden & urgent necessity" within Poor Law (Amendment) Act, 1834 (c. 76), s. 54.

(3) The High Ct. has jurisdiction to restrain guardians from applying the poor rates improperly. But this jurisdiction does not interfere with the power of the Local Government Board under Poor Law Audit Act, 1848 (c. 91), s. 4, to remit improper payments by guardians which have been disallowed by the auditor.

Pltfs. claimed an injunction to restrain defts. from applying the rates in the relief of able-bodied men who could have obtained work, but who refused to accept it, & also a declaration of the illegality of such an application of the rates. At the trial of the action pltfs. did not ask for an injunction:—*Held*: the ct. had jurisdiction, & ought to make a declaration that any payment out of the rates for setting to work or for the relief of able-bodied men who could at the time obtain & perform work at wages sufficient to support themselves & their wives & families, if any, was unlawful & ought to be disallowed by the auditor of the guardians' accounts; but the declaration was not to include relief given to or for the wives & children of such men, & was in no way to affect the power of the Local Government Board to remit such disallowed payments, although unlawfully made, under any statute enabling them to do so.—*A.-G. v. MERTHYR TYDFIL UNION*, [1900] 1 Ch. 516; 69 L. J. Ch. 299; 82 L. T. 662; 64 J. P. 276; 48 W. R. 403; 16 T. L. R. 251; 44 Sol. Jo. 294, C. A.

*Annotations*:—*As to* (1) *Folld. A.-G. v. Bedwellty Union* (1900), 44 Sol. Jo. 328. *Appld. A.-G. v. Poplar Union* (1924), 40 T. L. R. 752. *Refd. Poplar Union v. Martin* (1904), 91 L. T. 550; *Lewisham Union v. Nice*, [1924] 1 K. B. 618. *As to* (3) *Appld. A.-G. v. Tottenham U. D. C.* (1909), 8 L. G. R. 95; *A.-G. v. East Barnet Valley U. D. C.* (1911), 75 J. P. 484. *Refd. R. v. L. G. Board, Ex p. Arlidge*, [1914] 1 K. B. 160.

189. ———.]—*A.-G. v. BEDWELTY UNION* (1900), 44 Sol. Jo. 328.

190. ———.]—A board of guardians deliberately made unlawful payments of poor relief to able-bodied strikers, & when invited by some ratepayers to admit liability & to submit to a surcharge they refused to make any admission, & an action was brought by the A.-G. against the guardians on the relation of ratepayers for a declaration that the payments were unlawful. After action brought the district auditor, on his audit, which the relators attended, surcharged the amounts on some of the guardians. At the trial defts. admitted the illegality but contended that as the relators had adopted the alternative procedure of asking the auditor to make a surcharge there was no case for a declaration:—*Held*: as defts. had before action refused to make any admission the action was, at the date of the writ, fully justified, & the fact of the audit did not affect the form of the order which the ct. had power to make, but, as defts. by their counsel admitted the illegality, the order of the ct. would be prefaced

with a statement of such admission & would be that defts. must pay the costs of the action.—*A.-G. v. BERMONDSEY UNION* (1924), 40 T. L. R. 512.

*Annotation*:—*Folld. A.-G. v. Poplar Union* (1924), 40 T. L. R. 752.

191. ——— **Availability of work for all men.]**—The guardians of a poor law union during a strike paid relief to able-bodied men although work was available for them at wages sufficient to support them & their wives & families, & an action was brought by the A.-G., on the relation of certain ratepayers, for a declaration that the payments were unlawful & ought to be disallowed by the auditor of defts.'s accounts. Defts. contended (a) that the matter was one purely for the auditor, (b) that, as a large number of men in the district obtained, in normal times, only casual work, it could not be said of any one man in receipt of relief that he could have obtained work, (c) that, as a large number of persons were deprived of unemployment insurance benefits because the stoppage of work was due to a trade dispute, the payments were lawful, & (d) that as the men were prevented by terrorism from seeking work no work was available for them:—*Held*: (1) the powers of the auditor did not oust the jurisdiction of the ct., & the principle laid down in *A.-G. v. Merthyr Tydfil Union*, No. 188, *ante*, namely, that if guardians gave outdoor relief to able-bodied men for whom work was available the guardians were doing an illegal act, was applicable generally, whether all the men could or could not have obtained work at a particular time; (2) the legislation as to unemployment insurance did not affect the principle; (3) on the evidence, terrorism did not make it impossible for the men to continue work; & therefore plff. was entitled to the declaration claimed.—*A.-G. v. POPLAR UNION* (1924), 40 T. L. R. 752.

192. ——— **Prevention by terrorism.]**—*A.-G. v. POPLAR UNION*, No. 191, *ante*.

193. ——— **Temporary relief on becoming incapable of work—Necessity for prosecutions as "idle & disorderly" persons.]**—*A.-G. v. MERTHYR TYDFIL UNION*, No. 188, *ante*.

194. ——— **Though deprived of unemployment insurance benefits—In consequence of trade dispute.]**—*A.-G. v. POPLAR UNION*, No. 191, *ante*.

195. ——— **Wives & children of strikers.]**—*A.-G. v. MERTHYR TYDFIL UNION*, No. 188, *ante*.

196. ———.]—*A.-G. v. POPLAR UNION*, No. 191, *ante*.

197. ——— **Persons intimidated from working.]**—*A.-G. v. MERTHYR TYDFIL UNION*, No. 188, *ante*.

198. **"Sudden & urgent necessity"—Not constituted by strike of workmen.]**—*A.-G. v. MERTHYR TYDFIL UNION*, No. 188, *ante*.

**Persons in receipt of relief as objects of charitable trusts.]**—*See CHARITIES*, Vol. VIII., pp. 318, 319, Nos. 996, 1001, 1003.

**Conspiracy to shift burden from one parish to another.]**—*See CRIMINAL LAW*, Vol. XIV., p. 118, No. 880.

**Criminal liability for neglect of duty to relieve.]**—*See CRIMINAL LAW*, Vol. XV., p. 795, No. 8594.

**Expenses of pauper lunatics.]**—*See LUNATICS*, Vol. XXXIII., pp. 249–252, 254, 260, 263–265, Nos. 1689–1710, 1719, 1733, 1801, 1826, 1828, 1846.

#### SUB-SECT. 2.—CASUAL RELIEF.

*See Poor Law Act, 1927* (c. 14), ss. 34–36, 69–72, 190.

199. **Duty of guardians to relieve.]**—A pauper, being casually in the parish of A., met with an

**Sect. 2.—Kinds of relief: Sub-sects. 2 & 3. Sect. 3: Sub-sect. 1, A.]**

accident which disabled her, & which required immediate medical assistance. The constable of that parish improperly removed her to her own, which was the adjoining parish, & sent for the surgeon of that parish to attend her:—*Held*: it was the duty of the parish officers of A. to have taken the pauper to the nearest convenient house in A., & to have provided medical attendance there, & they could not, by improperly removing her to another parish, relieve themselves from the liability which the law had, in the first instance, cast upon them, & they were therefore liable to pay the surgeon's bill.—*TOMLINSON v. BENTALL* (1826), 5 B. & C. 738; 8 Dow. & Ry. K. B. 493; 4 Dow. & Ry. M. C. 159; 5 L. J. O. S. M. C. 7; 108 E. R. 274. *Annotations*:—*Distd. R. v. Oldland* (1836), 4 Ad. & El. 929. *Reid. Paynter v. Williams* (1833), 3 Tyr. 894; *R. v. Radnorshire JJ.* (1840), 15 L. J. M. C. 151.

**200. Right to recover costs of relief—From adjoining parish—Where pauper suffered accident.]**—Where a pauper had his leg accidentally fractured in one parish, & was conveyed to the next house in an adjoining parish, & was confined there & visited by the overseer, & attended by the surgeon who attended the parish poor, with the knowledge of the overseer:—*Held*: the surgeon might have *assumpsit* against the overseer for the expenses of the cure; for there was not any obligation against the parish where the accident happened to pay these expenses, & the overseer's knowing of & not repudiating the surgeon's attendance was equivalent to a request.—*LAMB v. BUNCE* (1815), 4 M. & S. 275; 105 E. R. 836.

*Annotations*:—*Consd. Tomlinson v. Bentall* (1826), 5 B. & C. 738. *Distd. Paynter v. Williams* (1833), 3 Tyr. 894. *Reid. Sewell v. Nixon & Barnes* (1842), 6 J. P. 249; *R. v. Radnorshire JJ.* (1846), 15 L. J. M. C. 151. *Menda. Hawtayne v. Bourne* (1841), 7 M. & W. 595; *London School Board v. Wright* (1884), 50 L. T. 606.

**201. — From parish to which pauper belongs.]**—A pauper having met with an accident in the parish of W. where he was casual poor, the parish surgeon attended him, & in the progress of the cure, one of the overseers of the parish to which the pauper belonged, called upon the surgeon & desired him to take care of the pauper, & do what he could for him, & added "that he would see him paid"; & on a subsequent application by the parish officers of W., after the pauper was removed to his own parish, the overseer said "if it was right that they should pay the surgeon's bill, they would":—*Held*: in an action against the overseer by the surgeon for the amount of his bill, there was no legal obligation on the part of the former to pay under the circumstances stated.—*GENT v. TOMPKINS* (1822), 5 B. & C. 746, n.; 1 Dow. & Ry. K. B. 541; 108 E. R. 277. *Annotation*:—*Apld. Tomlinson v. Bentall* (1826), 5 B. & C. 738.

**202. — — —.]**—(1) An action cannot be maintained by the guardians of the poor of a union, against the guardians of another union, in respect of relief afforded to the non-resident poor of the latter union, unless the accounts of such relief have been transmitted quarterly, in conformity with the orders of the Poor Law Board, notwithstanding that the relief was duly ordered & never countermanded.

(2) *Qu.*: whether an action could be maintained against the guardians, even if the accounts had been duly transmitted.—*WYCOMBE UNION v. ETON UNION* (1857), 1 H. & N. 687; 26 L. J. M. C. 97; 28 L. T. O. S. 256; 21 J. P. 70; 5 W. R. 260; 156 E. R. 1377.

*Annotation*:—*As to* (1) *Reid. Bury & District Joint Hospital Board v. Chorlton Union* (1905), 70 J. P. 31.

—.]—*See CONTRACT*, Vol. XII., p. 217, Nos. 1767–1771

**SUB-SECT. 3.—RELIEF OF CHILDREN.**

*See Poor Law Act, 1927 (c. 14), ss. 78–102.*

**203. Duty of parish to maintain deserted child—Mandamus.]**—By the Foundling Hospital Act, 1740 (c. 29), the hospital is incorporated by the name of the Governors & Guardians of the Hospital for the Maintenance & Education of Exposed & Deserted Young Children; & has power to purchase lands, & erect or purchase buildings for such maintenance, etc.; & the lands, etc., shall be rated as in 1739; the corp. may receive, etc., as many children as they think fit; any person may bring children to be received by them in case the corporation think proper; no parochial officer is to prevent persons from so doing, nor to exercise any parochial authority in the hospital; & no settlement is gained by being received, maintained, educated, or employed therein; & the corporation has power to make bye-laws:—*Held*: (1) the hospital is not extra-parochial, (2) this power to receive children is discretionary.

Therefore, where a woman left a parcel containing a child at the hospital, but went away before the contents were ascertained, & was not again found, & the governors, acting in conformity with their rules, refused to receive it:—*Held*: on such refusal, found as a fact by the jury, on trial of a *mandamus*, under the judge's direction, the parish of St. Pancras, within the ambit of which the hospital is, was bound to maintain the child as casual poor.—*R. v. ST. PANCRAS DIRECTORS OF THE POOR* (1838), 7 Ad. & El. 750; 1 Will. Woll. & H. 96; 2 J. P. 37; 112 E. R. 652; *previous proceedings, sub nom., Ex p. FOUNDLING HOSPITAL* (1837), 5 Dow. 722.

*Annotation*:—*Generally, Reid. R. v. Newtown Union* (1864), 28 J. P. Jo. 725.

— **Illegitimate child.]**—*See BASTARDY*, Vol. III., p. 384, No. 229.

**Right to custody of deserted illegitimate child.]**—*See BASTARDY*, Vol. III., p. 383, No. 213.

**204. Education—Religious education—Removal to school of religion to which child belongs.]**—*Re WHITECHAPEL UNION* (1872), 36 J. P. Jo. 87.

**205. — — — Order by authority.]**—Where an order is made by the Local Government Board for the removal of a child not of the Established Church to a school of the religion to which such child belongs, the guardians are bound to obey that order, & have no right to question its propriety.—*R. v. MARYLEBONE UNION* (1885), 1 T. L. R. 666, D. C.

**206. — — — Mistake as to child's religion in entry on register—Appointment of guardian.]**—*Re WHITE (AN INFANT)* (1893), 9 T. L. R. 575.

**207. — — — Payment of school fees by guardians.]**—Money granted under 36 & 37 Vict. c. 86, s. 3, for the education of the children of persons receiving relief out of the workhouse, need not be paid to the parents, but may in the discretion of the guardians be directly applied in payment of the school fees.—*Re DARLINGTON UNION* (1875), 32 L. T. 320; 39 J. P. 343.

**208. Adoption by guardians—Subsequent removal of child—To union in which settled.]**—Where the guardians of a poor law union have passed a resolution under the Poor Law Act, 1899 (c. 37), that the rights & powers of the parent of a child maintained by them shall vest in them, they are not precluded by that resolution from subsequently removing the child to the union in which it has a settlement.—*WANTAGE UNION v. BRISTOL UNION*,

[1907] 1 K. B. 68; 76 L. J. K. B. 25; 96 L. T. 118; 71 J. P. 54; 23 T. L. R. 54; 51 Sol. Jo. 51; 5 L. G. R. 33, D. C.

**209. — Prosecution for inducing child to leave guardians' control—Grounds for resolution adopting child need not be shown.**—In respect of two children who were being maintained by them, the guardians of a Poor Law union passed a resolution in the following terms: "That in pursuance of the authority vested in the guardians by the Poor Law Act, 1899 (c. 37), s. 1, the undermentioned children chargeable to this union be placed under the control of the guardians of the Eastbourne Union until the children shall reach the age of eighteen years." In proceedings against a person under Poor Law Act, 1899 (c. 37), s. 2, for the offence of knowingly assisting one of the children to leave without the guardians consent, the place where the child was under that control:—*Held*: it was not necessary for the prosecution to prove, in addition to the resolution itself, that one or other of the grounds mentioned in Poor Law Act, 1899 (c. 37), s. 1 (1), existed which justified the guardians in passing the resolution.—*HURST v. NOWLAN*, [1917] 2 K. B. 863; 87 L. J. K. B. 78; 117 L. T. 664; 82 J. P. 7; 15 L. G. R. 855; 26 Cox, C. C. 87, D. C.

### SECT. 3.—COST OF RELIEF.

#### SUB-SECT. 1.—RECOVERY OUT OF PROPERTY OF PERSON RELIEVED.

##### A. In General.

See Poor Law Act, 1927 (c. 14), ss. 44, 46, 47.

**210. Whether guardians entitled to recover—At common law—Removal of lunatic to workhouse.**—A person suffering from delirium tremens became violent in his own house, used threats & broke the windows & furniture; a relieving officer of the union was sent for who ordered his removal to the workhouse where he was kept for some days. He was then examined by a doctor & brought before the magistrates as a lunatic, but as the magistrates held that he was not a lunatic he was discharged. Certain expenses were incurred by the guardians in respect of these services:—*Held*: apart from the Lunacy Acts, there was a common law liability upon such person to repay to the guardians the expenses so incurred, & the guardians therefore could recover such money as necessities expended by them.—*WEST HAM UNION v. PEARSON* (1890), 62 L. T. 638; 54 J. P. 645.

*Annotations*:—*Apld. Re Clabbon*, [1904] 2 Ch. 465; *Islington Union v. Biggenden* (1909), 79 L. J. K. B. 246. *Re Birkenhead Union v. Brookes* (1906), 70 J. P. 406; *Re J.*, [1909] 1 Ch. 574; *Pontypridd Union v. Drew*, [1927] 1 K. B. 214.

**211. — Guardians acting in discharge of statutory duty—Necessaries supplied to infant.**—The rule that, where necessities are supplied to a person who from any disability cannot himself contract, the law implies an obligation to pay for them out of his property extends to the case of an infant pauper supported by guardians in discharge of their statutory duty. This liability is not cut down by Poor Law (Amendment) Act, 1849 (c. 103), s. 16, which gives special means of recovering one year's maintenance; & the guardians can therefore recover six years' arrears of moneys expended for the maintenance of an infant pauper.—*Re CLABBON*, [1904] 2 Ch. 465; 73 L. J. Ch. 853; 91 L. T. 316; 68 J. P. 588; 53 W. R. 43; 20 T. L. R. 712; 48 Sol. Jo. 673; 2 L. G. R. 1292.

*Annotations*:—*Follid. Birkenhead Union v. Brookes* (1906), 95 L. T. 359. *Consd. Re Benson*, *Knaresborough Union*

*v. Benson* (1918), 87 L. J. Ch. 622. *Reid. St. Mary, Islington Union v. Biggenden*, [1910] 1 K. B. 105; *Pontypridd Union v. Drew*, [1927] 1 K. B. 214.

**212. — Common law obligation of pauper to repay.**—A pauper who had been maintained in the workhouse by the guardians in discharge of their statutory duty can be sued by the guardians under their common law right for the expenses of his maintenance in the workhouse, & the guardians can recover up to the amount of six years' arrears of such maintenance. The liability of the pauper to repay the guardians depends, not upon any supposed or implied contract, but upon the obligation imposed upon the pauper at common law to refund to the guardians the amount expended by them in his maintenance if he has sufficient funds to enable him to do so, & this common law right of the guardians to recover six years' arrears of maintenance is not taken away or in any way affected by Poor Law (Amendment) Act, 1849 (c. 103), s. 16, which gives special means of recovering one year's maintenance from the pauper.—*BIRKENHEAD UNION v. BROOKES* (1906), 95 L. T. 359; 70 J. P. 406; 22 T. L. R. 583; 50 Sol. Jo. 514; 4 L. G. R. 988, D. C.

*Annotations*:—*Overd. Pontypridd Union v. Drew*, [1927] 1 K. B. 214. *Reid. St. Mary, Islington Union v. Biggenden*, [1910] 1 K. B. 105.

**213. — — — — —.**—A pauper who has been maintained by the guardians of a poor law union in their infirmary is liable to pay to the guardians a reasonable sum for the necessities supplied to him. Such necessities include not only a reasonable sum for the food, clothing, drugs, coal, gas, & water supplied, but also a reasonable sum in respect of the pauper's share of the establishment expenses incurred for the purpose of keeping up the infirmary as a place of residence for the paupers, such as the salaries of the officers of the infirmary & their rations & uniforms if supplied as part of the terms of their service, the cost of the furniture, of the painting, repairs, & insurance of the building, of timber & other building materials, & the cleaning of windows, the wages of certain workmen employed therein, a sum for printing & stationery, & the parochial rates payable in respect of the infirmary, & also a sum in respect of the capital cost of the site & building.—*ST. MARY, ISLINGTON UNION v. BIGGENDEN*, [1910] 1 K. B. 105; 74 J. P. 17; *sub nom. ISLINGTON UNION v. BIGGENDEN*, 70 L. J. K. B. 246; 101 L. T. 677; 26 T. L. R. 44; 7 L. G. R. 1159.

*Annotation*:—*Consd. Pontypridd Union v. Drew*, [1927] 1 K. B. 214.

**214. — — — — — Poor relief given otherwise than by way of loan—Recipient of full age & capacity.**—Poor law guardians have no right at common law to recover from the recipient in respect of poor relief given otherwise than by way of loan, where the recipient is a person of full age & capacity to contract.—*PONTYPRIDD UNION v. DREW*, [1927] 1 K. B. 214; 95 L. J. K. B. 1080; 136 L. T. 83; 90 J. P. 169; 42 T. L. R. 677; 70 Sol. Jo. 795; 24 L. G. R. 405, C. A.

**215. Appropriation or recovery of "money or valuable security belonging to pauper"—Trust property.**—S., being about to be tried on a charge of murder, conveyed an estate in the township of H. to trustees upon certain trusts, subject to a previous mtge. to L., & was afterwards acquitted on the ground of insanity. L. then sold the estate, & after satisfying his mtge. debt & costs, there remained a balance of £100 in his hands. An order of settlement, & for the maintenance of S. in the lunatic asylum to which he had been

**Sect. 3.—Cost of relief: Sub-sect. 1, A., B., C., D., E. & F.; sub-sect. 2, A. (a), (b), (c) & (d).]**

removed, was made on the township of H. under the 3 & 4 Vict. c. 54, s. 2; & thereupon the overseers of H. obtained an order, under the same sect., for the recovery of the costs of maintenance out of the lunatic's estate, & demanded the balance in L.'s hands, which he refused to pay over:—*Held*: 3 & 4 Vict. c. 54, s. 2, did not apply to the recovery of money so held, & the order could not be enforced by *mandamus*.—*Re SIMPSON'S TRUST ESTATE, Ex p. OLD HUTTON OVERSEERS* (1851), 20 L. J. M. C. 231.

**216. — Judgment recovered in action for damages.]—**A pauper, while in the receipt of relief, brought an action in this ct., & signed judgment for a sum of money. After he had ceased to receive relief, the judgment debtor paid him the judgment debt:—*Held*: the judgment was a "valuable security for money belonging to" the pauper, within Poor Law (Amendment) Act, 1849 (c. 103), s. 16, so as to enable the guardians of the relieving union to recover from the pauper the relief given during the twelve months prior to the proceeding for the recovery.—*WEST HAM UNION v. OVENS* (1872), L. R. 8 Exch. 37; 42 L. J. M. C. 29; 27 L. T. 616; 36 J. P. 776; 21 W. R. 143.

*Annotations*:—*Reid*, *Laver v. Botham & Chesterfield Union* (1894), 64 L. J. Q. B. 110. *Mentd.* *Pontypridd Union v. Drow*, [1927] 1 K. B. 214.

**217. — Whether husband or father a "pauper"—Maintenance of wife & children.]—**A man named B. was convicted for allowing his wife & children to be chargeable to the K. poor law union. He became entitled under the trusts of a will to a share of the residuary estate. The guardians of the union took out a summons in the Ch. Div. against the trustees of the will & B. claiming a declaration that the guardians were entitled to a charge on B.'s share of the residuary estate to reimburse them for the expenses of maintenance of B.'s wife & children:—*Held*: a charge was not created on the share of the residuary estate by the operation of Poor Law (Amendment) Act, 1849 (c. 103), s. 16; (2) although by Poor Law (Amendment) Act, 1834 (c. 76), s. 56, relief given to or on account of the wife or child or children under the age of sixteen years not being blind or deaf & dumb, "shall be considered as given to the husband of such wife or to the father of such child or children," this does not make the husband or father a "pauper" within Poor Law (Amendment) Act, 1849 (c. 103), s. 16.—*Re BENSON, KNARESBOROUGH UNION v. BENSON* (1918), 87 L. J. Ch. 622; 82 J. P. 260; 16 L. G. R. 589.

**218. Whether guardians preferential or ordinary creditors—Executor's right of retainer.]—**Poor Law (Amendment) Act, 1849 (c. 103), s. 16, which gives the guardians power, in the event of the death of a pauper having property belonging to him, to reimburse themselves the expenses of the maintenance of such pauper during the twelve months previous to the decease, constitutes the guardians ordinary, & not preferential, creditors for the amount so expended by them, & the exor. of such a pauper is therefore entitled to retain a debt due from the pauper's estate to himself before satisfying the claim of the guardians.—*LAVER v. BOTHAM & SONS*, [1895] 1 Q. B. 59; 64 L. J. Q. B. 110; 71 L. T. 570; 59 J. P. 454; 43 W. R. 25; 39 Sol. Jo. 11; 15 R. 44, D. C.

*Annotation*:—*Reid*, *Re Benson, Knaresborough Union v. Benson* (1918), 87 L. J. Ch. 622.

**charge—In favour of guardians.]—***Re BENSON, KNARESBOROUGH UNION v. BENSON*, No. 217, *ante*.

**220. Period for which arrears recoverable—Six years—Pauper lunatic.]—**Under Lunatic Asylums Act, 1853 (c. 97), s. 104, the guardians of the poor of a parish to which a pauper lunatic is chargeable are entitled in the event of his becoming entitled to property to recover only six years' arrears in respect of the sums paid by them for his maintenance in an asylum.—*Re NEWBEGIN'S ESTATE, EGGLETON v. NEWBEGIN* (1887), 36 Ch. D. 477; 56 L. J. Ch. 907; 57 L. T. 390; 36 W. R. 69; 3 T. L. R. 804.

*Annotations*:—*Apld.* *Re Watson, Stamford Union v. Bartlett*, [1899] 1 Ch. 72. *Distd.* *Wandsworth Union v. Worthington*, [1906] 1 K. B. 420. *Reid*, *Laver v. Botham & Chesterfield Union* (1894), 64 L. J. Q. B. 110; *Re Tye* (1899), 81 L. T. 743; *Re Clabbon*, [1904] 2 Ch. 465; *Birkenhead Union v. Brookes* (1906), 70 J. P. 406; *Pontypridd Union v. Drow*, [1926] 1 K. B. 567. *Mentd.* *Re Rhodes, Rhodes v. Rhodes* (1890), 44 Ch. D. 94; *Winkle v. Bailey*, [1897] 1 Ch. 123.

**221. — Fund recovered after death.]—**A lunatic not so found by inquisition was maintained in a pauper lunatic asylum by the guardians of the S. union for sixteen years prior to her death in 1898. In 1895, the lunatic having become entitled to a fund, a receiver was appointed in lunacy; & thereupon the guardians gave notice of a claim for past & future maintenance to the master in lunacy, who replied that the claim would be borne in mind in dealing with the fund. The fund was, however, not recovered by the lunacy authorities till after the death of the lunatic, & was afterwards transferred to the Ch. Div. In an action by the guardians against the legal personal representative of the lunatic for arrears of maintenance:—*Held*: p'tfs. were entitled only to six years' arrears from the commencement of the action.—*Re WATSON, STAMFORD UNION v. BARTLETT*, [1899] 1 Ch. 72; 68 L. J. Ch. 21; 79 L. T. 462; 47 W. R. 359.

*Annotations*:—*Reid*, *Wandsworth Union v. Worthington*, [1906] 1 K. B. 420; *Pontypridd Union v. Drow*, [1926] 1 K. B. 567.

**222. — Notwithstanding special means of recovering one year's maintenance.]—***Re CLABRON*, No. 211, *ante*.

**223. — ]—***BIRKENHEAD UNION v. BROOKES*, No. 212, *ante*.

**224. — All past arrears—Payment on account during lifetime of pauper.]—**A lunatic not so found by acquisition was maintained in a pauper lunatic asylum by the guardians of a union from 1876 until her death in 1904 at an annual cost of about £21. The lunatic was entitled to property producing about £8 per annum. By an order in lunacy a receiver was appointed of this income of the lunatic, & was directed to apply the same in & for the maintenance & benefit of the lunatic. Pursuant to this order the receiver paid the income to the guardians from 1887 to 1903 for the maintenance of the lunatic, & the guardians in their books appropriated each payment of the receiver as a payment on account of the arrears of maintenance due to them at the date of each payment. At the death of the lunatic considerable arrears of maintenance were due to the guardians, & in an action by them against the administratrix of the lunatic for these arrears the administratrix contended that the guardians were only entitled to six years' arrears prior to the date of the writ:—*Held*: under the circumstances the payment by the receiver took the case out of Stat. Limitations, & the guardians were entitled to payment of all the arrears due to them.

*Wandsworth Union v. Worthington*, [1906]

1 K. B. 420; 75 L. J. K. B. 285; 95 L. T. 331; 70 J. P. 191; 54 W. R. 422; 22 T. L. R. 284; 50 Sol. Jo. 273; 4 L. G. R. 320.

225. *Expenses recoverable*—Reasonable sum for necessities—What included in necessities.]—*ST. MARY, ISLINGTON UNION v. BIGGENDEN*, No. 213, *ante*.

#### B. Grant of Administration to Guardian.

226. *Pauper dying intestate*—Next of kin having notice but not cited.]—The ct. granted administration to the clerk to the guardians of the estates of a husband & his widow, both of whom had died indebted to the union for maintenance, without requiring the next of kin to be cited.—*In the Goods of TEECE*, [1896] P. 6; 65 L. J. P. 41; 73 L. T. 631; 44 W. R. 400.

—[See, also, *EXECUTORS*, Vol. XXI., pp. 159, 160, Nos. 1694–1701.

227. *Administration with will annexed*.]—Testatrix left a duly executed will, but appointed no exor. She had, for some time before her death, been in receipt of outdoor relief. The ct. granted to the nominee of the guardians, as creditors, letters of administration, with the will annexed, in respect of the personal estate & effects of testatrix.—*In the Goods of BALDWIN* (1891), 55 J. P. 344.

#### C. Annuities.

228. *Payment of annuity to guardians*—Liability to account for surplus.]—A pauper lunatic became chargeable to the guardians of I. parish in 1879 & remained chargeable till her death in 1890. During that period an annuity to which she was entitled was paid to the guardians. In each of the first four years the annuity exceeded the sum expended on the lunatic's maintenance by about £7. There was not at any time a separate account kept in respect of the lunatic's estate. Pltf. took out letters of administration in 1902. On a summons by pltf. to recover the balance of the sums received in respect of the annuity from the guardians:—*Held*: the guardians received the annuity as trustees for the lunatic, & the claim was not a "debt, claim, or demand" within Poor Law (Payment of Debts) Act, 1859 (c. 49).—*SMITH v. ISLINGTON UNION* (1902), 66 J. P. 664.

#### D. Benefits from Friendly Societies.

See Poor Law Act, 1927 (c. 14), s. 47.

See FRIENDLY SOCIETIES, Vol. XXV., pp. 305, 306, Nos. 130–138.

#### E. Benefits from Trade Unions.

229. *Trade union not being a friendly society*.]—A trade union is not a "benefit or friendly society" from which guardians of the poor can claim reimbursement under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 23, in respect of the maintenance of a pauper.—*WINDER v. KINGSTON-UPON-HULL CORPN. FOR THE POOR* (1888), 20 Q. B. D. 412; 58 L. T. 583; *sub nom.* *WINDER v. HULL GOVERNORS OF THE POOR*, 52 J. P. 535.

*Annotation*.—*Reid*, *St. Mary, Islington Union v. Amalgamated Soc. of Engineers* (1902), 66 J. P. 665.

See, further, TRADE & TRADE UNIONS.

#### F. Estate of Lunatic.

See LUNATICS, Vol. XXXIII., pp. 249 *et seq.*

### SUB-SECT. 2.—LIABILITY TO MAINTAIN.

#### A. Who may be Liable.

##### (a) Child.

See Poor Law Act, 1927 (c. 14), s. 41 (1).

230. *Maintenance of mother—Where guilty of adultery*.]—*Re CONSTABLE* (1886), 31 Sol. Jo. 15.

231. —Where married again.]—A woman & her second husband became chargeable to a parish, & received from it a weekly sum as outdoor relief, which was paid to the husband:—*Held*: the children of the woman by a former husband were liable under Poor Relief Act, 1601 (c. 2), s. 7, to relieve & maintain her, & therefore to contribute towards such relief for her maintenance, & that their liability was not affected by Poor Law (Amendment) Act, 1834 (c. 76), s. 56, enacting that all relief to a wife shall be considered as given to her husband.—*ARROWSMITH v. DICKENSON* (1887), 20 Q. B. D. 252; 58 L. T. 632; 52 J. P. 308; 36 W. R. 507, D. C.

232. —Where order made against husband.]—The fact that an order has been made against the husband of a pauper lunatic, under Poor Law (Amendment) Act, 1850 (c. 101), s. 5, to pay a weekly sum to the guardians towards the cost of the wife's maintenance in an asylum does not exempt the son of the pauper lunatic from liability under Poor Relief Act, 1601 (c. 2), s. 7, to contribute towards her maintenance.—*COLE v. BROWN*, [1907] 2 K. B. 301; 76 L. J. K. B. 847; 96 L. T. 710; 71 J. P. 335; 5 L. G. R. 727, D. C.

##### (b) Child-in-Law.

233. *Whether liable*.]—A man not obliged to maintain his wife's mother.—*R. v. MUNDAY* (1719), *Portes*, Rep. 303; 1 *Str.* 190; *Cas. Sett.* 91; 92 E. R. 862.

*Annotations*.—*Apld.* *R. v. Dempson* (1733), 2 *Str.* 955; *Tubb v. Harrison* (1790), 4 *Term Rep.* 118. *Refd.* *Billingsley v. Critchet* (1783), 1 *Bro. C. C.* 268; *Stone v. Carr* (1799), 3 *Esp.* 1; *Cooper v. Martin* (1803), 4 *East*, 76; *Maund v. Mason* (1874), L. R. 9 Q. B. 254.

234. —.]—A father in law is not bound to maintain his children in law, nor a child in law his parent in law.—*R. v. BENOIER* (1726), 2 *Ld. Raym.* 1454; 92 E. R. 446; *sub nom.* *R. v. PENNOYR*, 2 *Sess. Cas.* K. B. 56; 1 *Bott.* 400.

##### (c) Executor.

235. *Liability merely personal*.]—A father may leave his children without a maintenance; & the parish have no remedy against the exor.—*RAWLINS v. GOLDFRIP* (1800), 5 *Ves.* 440; 31 E. R. 671.

236. —.]—Where the mother of a bastard child dies, leaving the child under the age of sixteen, her administrator is not bound to maintain such child out of the mother's assets, for there is no obligation at common law, & that which the poor law statutes create is personal to the mother, & dies with the person.—*RUTTINGER v. TEMPLE* (1863), 4 B. & S. 491; 3 *New Rep.* 34; 33 L. J. Q. B. 1; 9 L. T. 256; 28 J. P. 71; 9 *Jur. N. S.* 1239; 12 W. R. 9; 122 E. R. 544.

*Annotation*.—*Reid*, *Re Harrington, Wilder v. Turner* (1908), 99 L. T. 723.

##### (d) Father.

See Poor Law Act, 1927 (c. 14), s. 41.

237. *Deed of separation between husband & wife—Covenant by husband to pay to wife towards maintenance of children—Deed entered into at suggestion of guardians*.]—A father remains liable under the Acts relating to the relief of the poor to

**Sect. 3.—Cost of relief: Sub-sect. 2, A. (d), (e), (f) & (g) i.]**

maintain his lawful children, notwithstanding that, on the children becoming chargeable, the father may, at the suggestion of the guardians of the poor, & in order to avoid proceedings, have entered into a deed of separation from his wife, & covenanted thereby to pay her a certain weekly sum towards the maintenance of the children; & the guardians are not thereby debarred from subsequently taking proceedings to enforce his statutory liability.—*WESTMINSTER UNION v. BUCKLE* (1897), 61 J. P. 247, D. C.

**238. Son over sixteen—Effect of domicile.]—**A pauper of the age of twenty-four years, was found destitute in the parish of D. in Scotland. That parish relieved him & under Poor Law (Scotland) Act, 1845 (c. 83), s. 71, claimed & received repayment of the cost of that relief from the plffs. the authorities of a Scottish parish in which the pauper had a legal settlement. Subsequently the pauper was found destitute & insane in the parish of A., also in Scotland. That parish, having caused him to be examined & certified as a lunatic & removed to a asylum, recovered repayment of the expenses of so doing from pltf. under Lunacy (Scotland) Act, 1857 (c. 71), s. 76. Plffs. thenceforward paid for the maintenance of the lunatic in the asylum under Lunacy (Scotland) Act, 1857 (c. 71), s. 77. The lunatic was the son of a domiciled Englishman. On the death of the father leaving assets the plffs. claimed to recover from defts. as his exors. the sums which they had respectively paid to the parishes of D. & A. & the expenses of the lunatic's maintenance in the asylum, as being money which they had been compelled to pay & which the father had been legally compellable to pay. By Poor Law (Scotland) Act, 1845 (c. 83), s. 71, a parish relieving a pauper may recover the cost of relief from his parents or other persons who may be bound to maintain him. By the common law of Scotland a parent is legally bound to provide his children up to any age with the necessary means of subsistence. It is assumed in Lunacy (Scotland) Act, 1857 (c. 71), ss. 77, 78, though not directly enacted, that the expense of the examination, removal, & maintenance of a lunatic may be recovered from the lunatic's relations:—*Held*: even assuming that the statutes applied to a parent or relation who was a domiciled Englishman, & the latter statute conferred a right on the parish of settlement to recover from a relation where legally liable apart from that statute the liability of the parent or relation must be determined by the law of his domicile; by English law a father is not liable for the maintenance of his adult son in the absence of an order of justices under Poor Relief Act, 1601 (c. 2), & defts. were consequently under no liability to plffs.—*COLDINGHAM PARISH COUNCIL v. SMITH*, [1918] 2 K. B. 90; 87 L. J. K. B. 816; 118 L. T. 817; 82 J. P. 170; 16 L. G. R. 376; 26 Cox, C. C. 260, D. C.

**Putative father—For illegitimate children.]—**See Nos. 295, 299, *post*.

**(e) Grandchild.**

See Poor Law Act, 1927 (c. 14), s. 41 (1).

**239. Whether liable.]—**By Poor Relief Act, 1601 (c. 2), s. 7, the father & grandfather, & the mother & grandmother, & the children of every poor . . . person . . . being of sufficient ability,

shall, at their own charges, relieve & maintain every such poor person:—*Held*: the word "children" does not include grandchildren; & a grandchild is not liable for the maintenance of his grandfather.—*MAUND v. MASON* (1874), L. R. 9 Q. B. 254; 43 L. J. M. C. 62; 29 L. T. 837; 38 J. P. 583; 22 W. R. 265.

*Annotation*:—*Reid, Coleman v. Birmingham (Churchwardens & Overseers)* (1881), 50 L. J. M. C. 92.

**(f) Grandparent.**

See Poor Law Act, 1927 (c. 14), s. 41 (1).

**240. Grandfather—Father incapable.]—***R. v. JOYCE* (1707), 1 Bott. 404.

**241. ——— Whether order need set out father's incapability.]—**An order of justices directing A. to pay the churchwardens & overseers of the poor of a parish a weekly sum for the maintenance of B. & C., his grandsons, as long as they shall be chargeable to the parish, is good, without stating that the father is unable, absent, or dead.—*R. v. CORNISH* (1831), 2 B. & Ad. 498; 9 L. J. O. S. M. C. 86; 109 E. R. 1227.

*Annotation*:—*Apld. Sherwood v. Ray* (1837), 1 Moo. P. C. C. 353.

**242. ———.]—**The effect of its provisions [43 Eliz. c. 2] is that if the marriage be not set aside, the birth of a child of the marriage would impose a legal obligation on the grandfather to maintain it in the event of the child being poor, lame, or impotent & unable to work; perhaps in that event only; but certainly in the event of the father being himself unable to support his child (*per cur.*).—*SHERWOOD v. RAY* (1837), 1 Moo. P. C. C. 353; 12 E. R. 848, P. C.; *affg. sub nom. RAY v. SHERWOOD & RAY* (1830), 1 Curt. 173.

*Annotations*:—*Reid, Bevan v. M'Mahon* (1859), 2 Sw. & Tr. 58. *Mentd. Harrison v. Sparrow* (1842), 3 Curt. 1; *Sanders v. Head* (1843), 2 Notes of Cases, 355; *Brookes v. Cresswell* (1846), 4 Notes of Cases, 429; *Fenton v. Livingstone* (1856), 27 L. T. O. S. 18; *Ditcher v. Donison* (1857), 11 Moo. P. C. C. 325; *Brook v. Brook* (1861), 9 H. L. Cas. 193; *Wells v. Cottam* (1864), 3 Sw. & Tr. 364; *Martin v. Mackonochie, Flamank v. Simpson* (1868), L. R. 2 A. & E. 116; *Sheppard v. Phillimore* (1869), L. R. 2 P. C. 450; *Winchester (Bp.) v. Wix* (1869), L. R. 3 A. & E. 19; *Elphinstone v. Purchas* (1870), L. R. 3 P. C. 245; *Fagg v. Lee* (1873), L. R. 4 A. & E. 135; *Lee v. Ridsdale* (1873), 37 J. P. 804; *R. v. Oxford (Bp.)* (1879), 4 Q. B. D. 525; *The Holenslea, The Catalonia* (1881), 7 P. D. 57; *Lowe v. Lowe* (1899), 80 L. T. 575.

**243. ———.]—**Under Poor Relief Act, 1601 (c. 2), s. 7, the grandfather & grandmother may be called upon to maintain a pauper grandchild not able to work.—*BEVAN v. M'MAHON & BEVAN* (1859), 2 Sw. & Tr. 58; 28 L. J. P. & M. 127; 2 L. T. 255; 23 J. P. 472; 5 Jur. N. S. 686; 8 W. R. 453; 164 E. R. 913.

**244. Grandmother.]—***BEVAN v. M'MAHON & BEVAN*, No. 243, *ante*.

**245. ——— Wife with husband living—& separate estate.]—**A woman whose husband is alive is not liable under the Poor Law Acts to contribute to the support of her grandchildren, even though she has separate estate & is able, independently of her husband, to support them.—*COLEMAN v. BIRMINGHAM OVERSEERS* (1881), 6 Q. B. D. 615; 50 L. J. M. C. 92; 44 L. T. 578; 45 J. P. 521; 29 W. R. 715, D. C.

**Liability to maintain illegitimate grandchildren.]—**See Sub-sect. 2, D., *post*.

**(g) Husband.**

**i. Maintenance of Wife.**

**246. No power to imprison husband.]—***R. v. BRAMBLEY* (1710), 1 Sess. Cas. K. B. 9; 93 E. R. 3. See Poor Law Act, 1927 (c. 14), ss. 41, 42.

**PART IV. SECT. 3, SUB-SECT. 2.—A. (g) i.**

**1. Wife deserting husband—Subsequently becoming insane—Liability of husband.]—***CAPE BRETON MUNICIPALITY v. JOST* 1895), 40 N. S. R. 79.—*CAN.*



**247. Wife resident with husband.]**—An order cannot be made to compel the husband to allow to the maintenance of his wife & family while resident with them.—*R. v. DAVISON* (1710), 11 Mod. Rep. 268; 88 E. R. 1032.

**248. Wife deserted by former husband—Bigamy.]**—The guardians having applied for an order on D., the husband, under Poor Law (Amendment) Act, 1868 (c. 122), s. 33, to contribute towards the relief of his wife, it was proved that she had married a former husband in 1840; he left her in 1845, she then received a letter that he had died in a ship on a voyage abroad, but she had not been able to trace the exact truth. She married D. in 1849, & the former husband had not been heard of since then:—*Held*: the justices were justified on such evidence in assuming that D. was her lawful husband, & in making an order upon him accordingly.—*DEAKIN v. DEAKIN* (1869), 33 J. P. 805.

**249. Necessity for proof of marriage.]**—In proceedings by guardians of a parish or union against a husband under Poor Law (Amendment) Act, 1868 (c. 122), s. 33, for enforcing relief of his wife who has become chargeable, it is not necessary to give strict evidence of the marriage, & cohabitation is good *prima facie* evidence of the marriage as in civil actions against a husband for the wife's debts.—*STARGOT v. WESTBURY UNION* (1873), 37 J. P. 695.

**250. Lunatic wife—Holding protection order.]**—Justices at the petty sessions refused an application by appts. to make an order, under Poor Law (Amendment) Act, 1850 (c. 101), s. 5, upon resp. to maintain or contribute toward the maintenance of his wife, who was a lunatic chargeable to appts. union, on the ground that a protection order, which she had obtained under Matrimonial Causes Act, 1857 (c. 85), s. 21, & which had not been discharged, absolved him from such liability. Upon a case stated:—*Held*: in the circumstances, resp was liable, & the justices were wrong.—*OXFORD UNION v. BARTON* (1875), 33 L. T. 375; 30 J. P. 725, D. C.

**251. Wife leaving husband on reasonable grounds.]**—A man having been summoned under Poor Law (Amendment) Act, 1868 (c. 122), s. 33, it appeared that his wife had left him sixteen years before on account of his ill-usage, from the effects of which she was still suffering; & she had lately received parish relief, & was still chargeable. The husband had not contributed to her support during the separation, but had applied to her to return to cohabitation. At the hearing he offered to receive her back at his house, & promised not to ill-use her. But she refused to return on account of the brutality she had previously received. The justices were satisfied by evidence that it was dangerous to the health of the wife to return to cohabitation; & they made an order on the husband to pay a weekly sum towards the relief of the wife:—*Held*: the order was rightly made, notwithstanding the husband's offer, as the justices had found in effect, which was a question for them, that the wife was justified in leaving & refusing to return to the husband's house.—*THOMAS v. ALSOP* (1870), L. R. 5 Q. B. 151; 39 L. J. M. C. 43; 21 L. T. 715; 34 J. P. 580; 18 W. R. 454.

*Annotations*:—*Apld.* *Fordham v. Young* (1888), 53 J. P. 133; *Richards v. Coleman* (1918), 88 L. J. K. B. 813.

**252. —**—*Mrs. Y.*, a month after marriage, left *Y.* for using obscene & abusive language to her. Later, she offered to return on conditions not accepted. After four years, the guardians applied, under Poor Law (Amendment) Act, 1868 (c. 122), s. 33, for an order of maintenance against

*Y.*:—*Held*: the magistrate was wrong in granting such order without first deciding whether her refusal to return to *Y.* was reasonable.—*FORDHAM v. YOUNG* (1888), 53 J. P. 133; *sub nom.* *R. v. FORDHAM*, 5 T. L. R. 27, D. C.

*Annotations*:—*Refd.* *Jones v. Newtown & Llanidloes Union* (1920), 89 L. J. K. B. 1161; *Biggs v. Burridge* (1924), 89 J. P. 75.

**253. —**—*Poor Law (Amendment) Act, 1868* (c. 122), s. 33, provides that where guardians of a union have granted relief to a married woman who requires relief, they may apply to the justices having jurisdiction in such union, & the justices may summon the husband to show cause why an order should not be made upon him to maintain his wife. The duty of the justices, on the hearing of such summons, is not merely ministerial, but judicial, namely, to investigate the facts & form their own opinion as to whether the wife is in "need" of relief, apart from any conclusion arrived at by the guardians. Where, therefore, guardians granted relief to a wife on her representation that her husband had refused & neglected to maintain her, & they summoned the husband before a stipendiary magistrate to show cause why he, the husband, should not maintain her, & the magistrate, after hearing the evidence, found as a fact that the wife did not require relief in the sense of needing it, because, although the husband was able & willing to maintain her, she had acted unreasonably in refusing to live with him, & the magistrate accordingly dismissed the summons:—*Held*: there was evidence to support the findings of the magistrate, & he had properly exercised his jurisdiction.—*RICHTARDS v. COLEMAN* (1918), 88 L. J. K. B. 813; 83 J. P. 133; 63 Sol. Jo. 193; 17 L. G. R. 166, D. C.

**254. — Lunacy after desertion.]**—Where a wife leaves her husband without justification his obligation to support her is, except where she has been guilty of adultery, not put an end to, but only suspended so long as she continues wilfully to absent herself, & if during her absence she becomes a lunatic then, as she is no longer capable of volition, her continued absence is not wilful, & her husband's liability to maintain her will revive.—*JONES v. NEWTOWN & LLANIDLOES UNION*, [1920] 3 K. B. 381; 89 L. J. K. B. 1161; 124 L. T. 23; 84 J. P. 237; 36 T. L. R. 758; 18 L. G. R. 481, D. C.

*Annotations*:—*Consd.* *Llewellyn v. Turner* (1922), 126 L. T. 532; *Biggs v. Burridge* (1924), 89 J. P. 75.

**255. Adulterous wife.]**—A man is not liable to the penalty of Vagrancy Act, 1824 (c. 83), s. 3, for neglecting & refusing to maintain his wife, who has left him & committed adultery, although he himself has been guilty of adultery since her departure.

I do not see the distinction attempted between the parish & an individual supplying necessities. If the husband is not obliged to answer for the wife's contracts, or to receive her into his house, it cannot be said that he is "legally bound to maintain her" (*LITTLEDALE, J.*).—*R. v. FLINTAN* (1830), 1 B. & Ad. 227; 9 L. J. O. S. M. C. 33; 109 E. R. 771.

*Annotations*:—*Foldl.* *Culley v. Charman* (1881), 7 Q. B. 11, 88. *Consd.* *Mitchell v. Torrington Union* (1897), 76 J. P. 734. *Apld.* *Selby v. Atkins* (1926), 135 L. T. 45. *Refd.* *Thomas v. Alsop* (1870), 21 L. T. 715; *Jones v. Newtown & Llanidloes Union*, [1920] 3 K. B. 381. *Mentd.* *Seaver v. Seaver* (1840), 2 Sw. & Tr. 663; *Hope v. Hope* (1858), 1 Sw. & Tr. 94; *Cooper v. Lloyd* (1859), 6 C. B. N. S. 519; *Wilson v. Glossop* (1887), 19 Q. B. D. 379; *Stimpson v. Wood* (1888), 57 L. J. Q. B. 484; *Jones v. Davies*, [1901] 1 K. B. 118; *Brooking-Phillips v. Brooking-Phillips*, [1913] P. 80; *Wickins v. Wickins* (No. 2), [1918] P. 282; *Durnford v. Baker*, [1924] 2 K. B. 587.

**256. —**—A husband is not liable to be ordered, under Poor Law (Amendment) Act, 1868 (c. 122), s. 33, to maintain a wife with whom he has

*Sect. 3.—Cost of relief: Sub-sect. 2, A. (g) i., ii. & iii., (h) & (i), B. & C. (a) & (b).]*

ceased to cohabit in consequence of her adultery.—*CULLEY v. CHARMAN* (1881), 7 Q. B. D. 89; 50 L. J. M. C. 111; 45 L. T. 28; 45 J. P. 708; 29 W. R. 803, D. C.

*Annotations:—*Consd. *Birmingham Union v. Timmins*, [1918] 2 K. B. 189. *Reid. Jones v. Newtown & Llanidloes Union*, [1920] 3 K. B. 381. *Mentd. Jones v. Davies* (1900), 70 L. J. Q. B. 38; *Wickins v. Wickins* (No. 2), [1918] P. 282.

257. —[In 1862, applt. married F. They lived together a few months & then the husband joined the marines. Nothing more was heard of him, & in 1889, F. married R. & lived with him as his wife. On hearing applt. was alive the wife still continued to live with R. F. became chargeable to the T. union in 1896, & the guardians applied for an order against the husband, applt., which the magistrates made:—*Held*: the wife was guilty of adultery, & the applt. could not be compelled to support F., his wife.—*MITCHELL v. TORRINGTON UNION* (1897), 76 L. T. 724; 61 J. P. 598, D. C.

*Annotation:—*Mentd. *Wickins v. Wickins* (No. 2), [1918] P. 282.

258. — *Previous maintenance order rescinded on ground of wife's adultery—Justices bound by order rescinding on subsequent application.*—A maintenance order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), was made by justices against applt. on the ground of desertion, but the order was afterwards rescinded by a stipendiary magistrate under sect. 7, on the ground that applt.'s wife had committed adultery since the making of the order. Subsequently applt.'s wife became chargeable to the guardians of the poor, & applt. was summoned under Poor Law Amendment Act, 1868 (c. 122), s. 33, to show cause why an order should not be made against him to maintain his wife. At the hearing of this summons the wife admitted that the order of rescission had been made on the ground of her adultery, but she denied that she had in fact committed adultery; & the justices being of opinion that they were not bound in law by the decision of fact of another ct. of co-ordinate jurisdiction as to the alleged adultery of the wife, held that applt. was liable to contribute to his wife's support, & they made an order against him for a weekly payment:—*Held*: the justices were not entitled to disregard the order rescinding the order for maintenance, & the order for a weekly payment must be set aside.—*SELBY v. ATKINS* (1920), 135 L. T. 45; 90 J. P. 117; 42 T. L. R. 475; 24 L. G. R. 366; 28 Cox, C. C. 202, D. C.

*Deserted wife.*—*See* Poor Relief Act, 1718 (c. 8), ss. 1, 2; Poor Law Act, 1927 (c. 14), s. 43 (1).

259. — *Form of order.*—An order of two justices, founded on Poor Relief Act, 1718 (c. 8), for providing for the families of absconding men out of their estates, should state how much of the goods or rents of the fugitive should be seized by the parish officers; & the subsequent order of confirmation by the sessions should specify the quantum of relief to be appropriated out of the goods & rents so seized, & limit a period for such appropriation; supposing such prospective order to be good, & that the order is not to be confined to the discharge of expenses already incurred by the parish. *Qu.*: if the original order be defective in the particular mentioned, whether the sessions can make it good by an order of confirmation directing the parish officers "to receive £7 16s. rent of the rents & profits, etc., towards the discharge of the parish for providing for the party's wife," etc. But, at any rate, a payment of one sum of £7 16s. is a sufficient compliance with such order on the

only ground of construction on which it can be supported. The tenant in whose hands the rent was seized cannot justify, in covenant by his landlord for rent in arrear, the retaining a second sum of £7 16s. out of the second year's rent, upon the supposition that such order of sessions extended to enable the parish officers to receive so much annually out of the rents; for in that view the order would be bad in law upon the face of it, as an indefinite order for the annual payment of such a sum, without any limitation of time, or until further order, etc.—*STABLE v. DIXON* (1805), 6 East, 163; 2 Smith, K. B. 278; 1 Bott. 410; 102 E. R. 1249.

260. *Discretion of justices as to amount of relief.*—It is not a condition precedent to the power of justices under Poor Law Amendment Act, 1868 (c. 122), s. 33, to order the husband to pay for the maintenance of his pauper wife, that the guardians should have fixed the sum for her relief. Therefore, although the guardians have not fixed any sum for her future relief, but have given her a small weekly sum, the justices may, under sect. 33, order the husband to pay for her maintenance such weekly sum as, considering the condition of the husband & all the circumstances, may be proper, although it may exceed the amount of the relief previously given to her by the guardians.—*DINNING v. SOUTH SHIELDS UNION* (1884), 13 Q. B. D. 25; 53 L. J. M. C. 90; 50 L. T. 446; 48 J. P. 708, C. A.

261. *Existence of maintenance order against husband—Whether a bar to proceedings by guardians—Summary Jurisdiction (Married Women) Act, 1895 (c. 39).*—Where a wife has obtained a maintenance order against her husband under above Act, & he has ceased to make any payments under the order & his wife has subsequently become chargeable to the union, the mere fact of the existence of a maintenance order which the husband is no longer obeying does not disentitle the guardians to obtain an order against him under Poor Law (Amendment) Act, 1868 (c. 122), s. 33.—*BIRMINGHAM UNION v. TIMMINS*, [1918] 2 K. B. 189; 87 L. J. K. B. 1096; 119 L. T. 146; 82 J. P. 279; 16 L. G. R. 625, D. C.

*Annotations:—*Reid. *Richards v. Coleman* (1918), 88 L. J. K. B. 813; *Llewellyn v. Turner* (1922), 126 L. T. 532.

262. *Husband acting in bonâ fide belief in absence of liability.*—When resp. was contributing to the maintenance of his wife in a lunatic asylum, her relatives, during his absence on military service, & without consulting him, obtained her release on giving an undertaking under Lunacy Act, 1890 (c. 5), s. 79, that she should be no longer chargeable to any union & should be properly taken care of. Resp. afterwards declined to maintain his wife on the ground that he was relieved from his obligation by her relatives, having taken the responsibility upon themselves. Ultimately she became chargeable to the union, & on a summons against him for wilful neglect to maintain her, whereby she became so chargeable, the justices held that he was not guilty of wilful neglect, inasmuch as he acted in the *bonâ fide* belief that he was relieved from his obligation, & they dismissed the summons:—*Held*: resp.'s belief, being erroneous, was immaterial, & the justices ought to have convicted.—*ROBERTS v. REGNART* (1921), 126 L. T. 667; 86 J. P. 77; 20 L. G. R. 142; 27 Cox, C. C. 198, D. C.

*Annotation:—*Consd. *Biggs v. Burridge* (1925), 89 J. P. 75.

*See, also*, No. 1623, *post*.

## ii. Maintenance of Wife's Children.

*See* Poor Law Act, 1927 (c. 14), ss. 41, 42.

263. *Children by former husband.*—*R. v. St.*



284. — [Person unable to work.]—An order for maintenance of a poor relation must state that the party was unable to work.—*R. v. GUILY* (1715), 10 Mod. Rep. 307; 1 Bott. 400; 1 Sess. Cas. K. B. 90; Sett. & Rem. 72; *Foley's Poor Laws*, 3rd ed. 61; 88 E. R. 740.

*Sect. 3.—Cost of relief: Sub-sect. 2, C. (b), (c) & (d), & D. Part V. Sects. 1 & 2: Sub-sects. 1 & 2.]*

**285. — Person in need of relief—& entitled.]**—*R. v. GULLY* (1715), 10 Mod. Rep. 307; 1 Bott. 400; 1 Sess. Cas. K. B. 90; Sett. & Rem. 72; *Poley's Poor Laws*, 3rd ed., 61; 88 E. R. 740.

**286. — ———.]**—*R. v. LITTON* (1718), Sett. & Rem. 85.

**287. — Person chargeable to parish.]**—*R. v. TRIPPING* (1717), 1 Bott. 399.

(c) *Enforcement of Order.*

See Poor Law Act, 1927 (c. 14), s. 43 (2).

**288. Imprisonment in default — Whether bankruptcy a protection.]**—Bkpt., who had obtained an order of protection under 12 & 13 Vict. c. 106, s. 112, was arrested on a warrant of commitment, for not obeying an order made on him under Poor Relief Act, 1601 (c. 2), s. 7, for payment of a weekly sum to the guardians of a union for the support of his mother:—*Held*: the process under which pltf. was arrested was of a criminal nature & not for a debt; & he was, therefore, not protected from arrest under 12 & 13 Vict. c. 106, s. 113.—*BANCROFT v. MITCHELL* (1807), L. R. 2 Q. B. 540; 8 B. & S. 558; 36 L. J. Q. B. 257; 16 L. T. 558; 15 W. R. 1132; *sub nom.* *BANKROFT v. MITCHELL*, 31 J. P. 693.

*Annotations:—Refd. R. v. Ireland* (1868), 37 L. J. Q. B. 73. *Mentd. R. Prince, Ex p. Graves* (1868), 3 Ch. App. 642; *Myers v. Veltch* (1869), 20 L. T. 847; *R. v. Master* (1869), L. R. 4 Q. B. 285.

**289. — Ability to pay must be proved.]**—Money due under an order of justices made upon a person for the maintenance of his father under Poor Relief Act, 1601 (c. 2), s. 7, is recoverable before a court of summary jurisdiction as a civil debt & not as a penalty; & an order of justices for the payment of the money so due cannot be enforced by imprisonment in default of distress, unless it be proved that the person in default has since the date of the latter order had the means to pay the sum in respect of which he has made default.—*Re GAMBLE*, [1899] 1 Q. B. 305; 68 L. J. Q. B. 195; 79 L. T. 642; 63 J. P. 101; 15 T. L. R. 123; 43 Sol. Jo. 128; 19 Cox, C. C. 225, D. C.

*Annotations:—Refd. R. v. Webber & St. Thomas' Union, Ex p. Wheaton* (1890), 43 Sol. Jo. 826. *Mentd. R. v. Richardson, Ex p. Sherry* (1909), 79 L. J. K. B. 13.

(d) *Appeals.*

**290. Appeal to quarter sessions.]**—An order of a Metropolitan police magistrate to pay 2s. 6d. weekly towards the relief & maintenance of a certain pauper for & during so long a time as she shall be chargeable is not an order in which the sum adjudged to be paid is more than £3, so as to give a right of appeal to quarter sessions under Metropolitan Police Courts Act, 1839 (c. 71), s. 50.—*R. v. LONDON JJ., Ex p. GREENWICH UNION*, [1900] 1 Q. B. 438; 69 L. J. Q. B. 364; 82 L. T. 296; 64 J. P. 357; 48 W. R. 319; 44 Sol. Jo. 245, D. C.

*D. Illegitimate Children.*

See Poor Law Act, 1927 (c. 14), s. 41 (2) (3); & *BASTARDY*, Vol. III., pp. 384–387, Nos. 229–252.

**291. Liability of parish of settlement.]**—A bastard living with its mother for nurture, but having a different settlement, must be maintained

by the parish in which it is settled.—*R. v. HEM-LINGTON (INHABITANTS)* (1777), Cald. Mag. Cas. 6; 1 Doug. K. B. 9, n.; 99 E. R. 8.

*Annotation:—Consd. R. v. Wendron* (1838), 3 Nev. & P. K. B. 62.

**292. Liability of mother.]**—*BROWN'S CASE* (1631), 2 Bulst. 350; 80 E. R. 1177.

**293. Not within statute—Liability of reputed grandfather.]**—*R. v. REVE* (1631), 2 Bulst. 344; 80 E. R. 1172.

*Annotation:—Mentd. Horner v. Horner* (1799), 1 Hag. Con. 337.

**294. ———.]**—If the child to be relieved be a bastard child, this is clearly out of Poor Relief Act, 1601 (c. 2) (*per CUR.*).—*WESTMINSTER (CITY) v. GERRARD* (1632), 2 Bulst. 346; 80 E. R. 1174.

*Annotations:—Apld. R. v. Maude* (1842), 11 L. J. M. C. 120. *Consd. Woolwich Union v. Fulham Union* (1906), 75 L. J. K. B. 675. *Refd. Manby v. Scott* (1863), 1 Keb. 383; *R. v. Munden* (1719), 1 Stra. 190; *R. v. Kompson* (1733), Kel. W. 288.

**295. Liability of husband for wife's children — Born before marriage.]**—By Poor Law (Amendment) Act, 1834 (c. 76), s. 57, the putative father of a bastard child born before the passing of Poor Law (Amendment) Act, 1834 (c. 76), whose mother is married to another person, is no longer liable on an order of justices for the maintenance of such child; at least while the husband is of ability to maintain it.—*LANG v. SPICER* (1836), 1 M. & W. 129; 1 Gale, 426; 3 Nev. & M. M. C. 556; 5 L. J. M. C. 60; 150 E. R. 374; *sub nom.* *LAING v. SPICER*, Tyr. & G. 358.

*Annotations:—Consd. Hardy v. Atherton* (1881), 7 Q. B. D. 264. *Distd. Plymouth Gdns. v. Gibbs*, [1903] 1 K. B. 177. *Refd. R. v. Wendron* (1838), 7 Ad. & El. 819; *Stacey v. Lintell* (1878), 4 Q. B. D. 291; *Davies v. Evans* (1882), 51 L. J. M. C. 132; *Boyce v. Cox* (1921), 38 T. L. R. 51. *Mentd. Re South Lady Bertha Mining Co.* (1862), 2 John. & H. 376.

**296. ———.]**—Where an illegitimate child is being maintained by the guardians of a union or parish justices have jurisdiction, upon the application of the guardians, to make an affiliation order against the putative father of the child under Bastardy Laws (Amendment) Act, 1873 (c. 9), s. 5, notwithstanding that the child's mother has married & her husband is able to maintain it.—*PLYMOUTH UNION v. GIBBS*, [1903] 1 K. B. 177; 72 L. J. K. B. 33; 87 L. T. 685; 67 J. P. 61; 51 W. R. 157; 19 T. L. R. 11; 47 Sol. Jo. 32; 1 L. G. R. 48, D. C.

*Annotation:—Refd. Boyce v. Cox* (1921), 38 T. L. R. 51.

**297. — Born during marriage — Proof of paternity—Limitation of time under Summary Jurisdiction Act, 1848 (c. 43).]**—On a summons for maintenance of children against P., the father, P., denied the paternity, his wife having been living apart during their birth. Evidence of non-access was given, & P. was allowed as witness to disprove an alleged admission by him of paternity to which another witness testified, but the justices on consideration struck out P.'s evidence, as they said there was sufficient evidence of non-access to disprove paternity without P.'s evidence:—*Held*: the limitation of time in above Act, s. 11, was not applicable to this case, which was one of a continuing liability.—*ULVERSTONE UNION v. PARK* (1889), 53 J. P. 629, D. C.

**298. Liability of putative father for illegitimate child — Mother married to another person.]**—*LANG v. SPICER*, No. 295, *ante*.

**299. — Enforcement by guardians—Absence**

**PART IV. SECT. 3, SUB-SECT. 2.—**  
C. (c).

**a. Whether right to distress—(Given by statute.)**—Where the wife or infant child of a resident within the area controlled by a local authority is

admitted to a hospital therein. Hospitals Act, s. 8, & Municipal District Act, R. S. A., 1922, c. 110, s. 203, do not give the local authority the right to collect from the husband or father of such wife or infant the amount of

the public ward charge by means of suit, distress, or registration against his lands.—*RED DEER MUNICIPAL HOSPITAL DISTRICT, No. 15 v. PRAIRIE CREEK MUNICIPAL DISTRICT, No. 343* (Alta.), [1924] 3 W. W. R. 802.—CAN.

of mother abroad—**Bastardy Laws (Amendments) Act, 1872 (c. 65), s. 7.**—The mother of an illegitimate child had obtained from justices an order against applt., as the putative father, for the payment of a weekly sum for the maintenance of the child. The mother afterwards left the country & went to America, & the child became chargeable to the union. The mother was still alive, was of sound mind, & was not under any of the incapacities mentioned in Poor Law (Amendment) Act, 1844 (c. 101), s. 5. Upon an information by the guardians of the union in which the child was chargeable against applt. under Bastardy Laws (Amendment) Act, 1872 (c. 65), s. 7, for the

recovery of sums due & becoming due under the order, a magistrate made an order in favour of the guardians:—*Held*: the guardians were entitled under Bastardy Laws (Amendment) Act, 1872 (c. 65), s. 7, to recover from applt. the sums due & becoming due under the order, notwithstanding that the mother was still alive & was under none of the incapacities specified in Poor Law (Amendment) Act, 1844 (c. 101), s. 5.—*JONES v. MERTHYR TYDFIL UNION* (1911), 105 L. T. 203; 75 J. P. 390; 9 L. G. R. 767; 22 Cox, C. C. 551.

**Bond to indemnify parish.**—*See* **BASTARDY**, Vol. III., pp. 384, 385, Nos. 233–235; **BONDS**, Vol. VII., pp. 221, 241, Nos. 636, 834.

## Part V.—Settlement.

### SECT. 1.—IN GENERAL.

*See* Poor Law Act, 1927 (c. 14), ss. 109–119.

**300. Impossibility of two settlements at one time.**—Where a settlement by renting a tenement is completed during the time that the tenant has an estate of his own, & the tenant afterwards resides upon his estate, if the time of his residence subsequent to the completion of such settlement by renting a tenement, added to the time of his residence upon his estate before such completion, make up forty days in the whole, the settlement by estate displaces the settlement by renting a tenement.

There cannot be two settlements at the same time, but there may be a fluctuating settlement, & what is done before a dividing line at which a particular settlement is gained may attach to what is done afterwards in favour of a different settlement (*LOID CAMPBELL, C.J.*).—*R. v. KNARESBOROUGH (INHABITANTS)* (1851), 16 Q. B. 446; 4 New Sess. Cas. 455; 20 L. J. M. C. 147; 16 L. T. O. S. 386; 15 J. P. 259; 15 Jur. 398; 117 E. R. 950.

**Settlement of lunatic.**—*See* **LUNATICS**, Vol. XXXIII., pp. 260–265, Nos. 1800–1849.

### SECT. 2.—ALTERATION OF PARISH.

#### SUB-SECT. 1.—IN GENERAL.

*See* Poor Law Act, 1927 (c. 14), ss. 2, 3; & generally, **LOCAL GOVERNMENT**, Vol. XXXIII., pp. 24–28.

**301. By order under Local Government Act, 1894 (c. 73).**—No objection to legality of order after six months from confirmation—**Local Government Act, 1894 (c. 73), s. 42.**—A joint committee of a county council & of the council of a county borough made an order with regard to a parish which, at the passing of Local Government Act, 1894 (c. 73), was situate in more than one urban district, which order, in providing for the union of part of the parish with another parish & the constitution of the remaining part into a separate parish, further provided that the alteration of the parish should not have the effect of destroying settlements already acquired therein prior to the coming into operation of the order:—*Held*: whether the order was made under Local Government Act, 1888 (c. 41), or Local Government Act,

1894 (c. 73), & whether or not there was originally jurisdiction to insert in the order the provision dealing with pauper settlements, sect. 42 of the Act of 1894, applied, & no objection to the legality of the order could be entertained, more than six months having elapsed since its confirmation by the Local Government Board.—*R. v. MIDDLESEX J.J.*, *Ex p. WALSALL UNION*, [1907] 2 K. B. 581; 76 L. J. K. B. 839; 96 L. T. 798; 71 J. P. 393; 23 T. L. R. 524; 51 Sol. Jo. 482; 5 L. G. R. 1232, C. A.

**302. What is a “union.”**—A union means something made one which was not made one before (*COLERIDGE, J.*).—*R. v. LEMDS TOWNSHIP* (1851), 4 New Sess. Cas. 717; 17 L. T. O. S. 142.

**303. Settlement lost by division—Whether revived on amalgamation of districts into parish.**—A pauper having acquired a settlement by residence in the parish of B. that parish was by the Local Government Act, 1894 (c. 73), divided, part remaining the parish of B. & part becoming the parish of W. The pauper had resided in that portion that became the parish of W.

In 1902, by a provisional order made by the Local Government Board & duly confirmed by a statute, the parish of W., part of the parish of B., together with other parishes, were amalgamated to form the new parish of W., & it provided that “for all purposes of settlement & removal residence prior to the commencement of this order in any part of the existing parishes of B., H., W., T., or W., shall have been deemed to have been residence in the parish in which the part is included by this order”:—*Held*: the settlement of the pauper in the old parish of B. having been destroyed in 1894, it was not revived by the order of 1902, & the pauper had not acquired a settlement in the new parish of W.—*PRESTON UNION v. LEWISHAM UNION* (1904), 91 L. T. 498; *sub nom.* *EAST PRESTON UNION v. LEWISHAM UNION*, 68 J. P. 404; 2 L. G. R. 1077, D. C.

#### SUB-SECT. 2.—EFFECT OF DIVISION.

**304. General rule.**—Where an existing parish is divided into separate parishes under Local Government Act, 1894 (c. 73), s. 1 (3), a settlement acquired in the undivided parish before the division is not extinguished; & a person who was born or had resided in the undivided parish so as to acquire a settlement must be held to have a settlement in

#### PART V. SECT. 2, SUB-SECT. 2.

**b. Whether settlement previously gained retained after division.**—*ANTIGONISH CORPN. v. ARISAIG OVERSEERS* (1906),

38 N. S. R. 112.—**CAN.**

**c. —.**—*J. JOGINS CORPN. v. CUMBERLAND POOR DISTRICT OVERSEERS*, [1925] 2 D. L. R. 663; 58 N. S. R. 76.—**CAN.**

**d. Authority of county court judge to arbitrate on dispute—As to distribution of paupers.**—*Re WOODSTOCK TOWN* (1887), 26 N. B. R. 362.—**CAN.**

**Sect. 2.—Alteration of parish: Sub-sects. 2 & 3.**  
**Sect. 3: Sub-sects. 1 & 2.]**

whichever of the newly created parishes his place of birth or residence is situated.—**WEST HAM UNION v. EDMONTON UNION**, [1908] A. C. 1; 77 L. J. K. B. 85; 98 L. T. 1; 72 J. P. 9; 24 T. L. R. 108; 52 Sol. Jo. 75; 6 L. G. R. 39, H. L.

*Annotation*.—**Meatd. Bourne v. Keane**, [1919] A. C. 815.

**305. Whether settlement previously gained retained after division—Settlement by birth.**—In 1822, the pauper was born a bastard in one of several townships in a parish, which had only one set of overseers for the common maintenance of its poor. Subsequently each of the townships had its own set of overseers for the separate maintenance of its poor:—**Held**: the pauper had not gained a settlement in the township of his birth, so as to be removable thereto from a foreign parish.—**R. v. Tipton (Inhabitants)** (1842), 3 Q. B. 215; 2 Gal. & Dav. 92; 11 L. J. M. C. 89; 6 J. P. 568; 6 Jur. 760; 114 E. R. 489.

*Annotations*.—**Apld. R. v. Hunnington** (1843), 5 Q. B. 273; **R. v. Acton** (1845), 8 Q. B. 108. **Distd. R. v. St. Martin, New Sarum** (1846), 9 Q. B. 241. **Folld. Stourbridge Union v. Droitwich Union** (1871), L. R. 6 Q. B. 769. **Apld. Dorking Union v. St. Saviour's Union**, [1898] 1 Q. B. 594. **Distd. West Ham Union v. L. C. C.**, [1904] A. C. 40. **Consd. West Ham Union v. Edmonton Union**, [1908] A. C. 1. **Refd. Worcester Union v. Birmingham Union** (1887), 65 J. P. 771; **R. v. Middlesex JJ., Ex p. Walsall Union** (1906), 75 L. J. K. B. 784; **Gloucester Union v. Woolwich Union**, [1917] 2 K. B. 374.

**306. ———.**—Where a parish consisting of several townships has maintained its own poor, & afterwards separate overseers are appointed for each township under Poor Relief Act, 1862 (c. 12), s. 21, the parish is, for the purposes of settlement, destroyed, & a settlement gained in it by birth in one of the townships before the appointment is wholly lost, & the pauper does not acquire a fresh settlement in the particular township. So held on the authority of decided cases. This has not been altered by Union Changeability Act, 1865 (c. 79), as that Act, in referring to an order of removal of a pauper settled in any parish, applies only to a parish actually existing for the purposes of settlement at the time when the order of removal is made.—**STOURBRIDGE UNION v. DROITWICH UNION** (1871), L. R. 6 Q. B. 769; 40 L. J. M. C. 186; 25 L. T. 411; 35 J. P. 694.

*Annotations*.—**Distd. West Ham Union v. L. C. C.**, [1904] A. C. 40. **Refd. Worcester Union v. Birmingham Union** (1887), 65 J. P. 771; **Dorking Union v. St. Saviour's Union**, [1898] 1 Q. B. 594; **West Ham Union v. Edmonton Union**, [1908] A. C. 1.

**307. ———.**—The decision in **R. v. Tipton (Inhabitants)**, No. 305, *ante*, as to the settlement of paupers, established the rule that the settlement in a parish gained by birth therein is a settlement in the parish as an entity, & not in any particular township of it, & if after a birth settlement has been gained in it the parish is divided by Act of Parliament into two or more separate parishes, so that it ceases to exist as one entire parish, the birth settlement gained in the old parish ceases to exist also.—**DORKING UNION v. ST. SAVIOUR'S UNION**, [1898] 1 Q. B. 594; 62 J. P. 308; 46 W. R. 309; 14 T. L. R. 213; 42 Sol. Jo. 252; *sub nom. ST. SAVIOUR'S UNION v. DORKING UNION*, 67 L. J. Q. B. 408; 78 L. T. 29, C. A.

*Annotations*.—**Apld. Preston Union v. Lewisham Union** (1904), 91 L. T. 498. **Distd. West Ham Union v. L. C. C.**, [1904] A. C. 40; **R. v. Middlesex JJ., Ex p. Walsall Union**, [1906] 2 K. B. 365. **Refd. Rochdale Union v. Haslingden Union** (1898), 67 L. J. Q. B. 846; **Calne Union v. St. Mary, Islington Union** (1900), 69 L. J. Q. B. 400; **West Ham Union v. Edmonton Union**, [1908] A. C. 1; **Gloucester Union v. Woolwich Union**, [1917] 2 K. B. 374.

**308. ———.**—**WEST HAM UNION v. EDMONTON UNION**, No. 304, *ante*.

**309. — Settlement by hiring & service.]—**

A parish consisted of eight townships. Overseers were appointed annually, sometimes one for each township, sometimes one for two or more townships & others for the rest, & sometimes four for the whole district. There were churchwardens for the whole parish. An equal poor rate was always agreed to, at a general parish vestry, by the churchwardens & overseers; & the rate of allowances to paupers was settled at such vestries. Separate poor rates were made, allowed & published, & the money collected by the overseers in the townships for which they acted, & paid by them to the poor of their districts respectively. Those who had a surplus brought it to the parish vestry, & it was applied in aid of those who were deficient; if any balance remained, it was placed to the general account, & handed to the new overseers for the next year's expenses. In 1833, under a *mandamus*, the townships were divided, & became entirely separate in the appointment of overseers & management of the poor. Pauper, in 1815, gained a settlement by hiring & service; everything which conferred the settlement taking place in G., one of the above townships. From 1815 to 1844 she received relief from G., while residing elsewhere. On appeal against an order made in 1844, removing her to G., the sessions quashed the order subject to a case raising the question whether, on the above facts, the pauper was settled in G.:—**Held**: the settlement gained in 1815 did not confer a settlement in the newly separated district of G., & relief given by G. was only evidence, on which the judgment of the sessions was conclusive. Order of sessions confirmed: though the notice of grounds of appeal was signed only by the overseers of G., & not by the churchwardens of the parish in which the eight districts lay, & the sufficiency of the signature was a question submitted in the case.—**R. v. ACTON (Inhabitants)** (1845), 8 Q. B. 108; 2 New Sess. Cas. 183; 1 New Mag. Cas. 420; 15 L. J. M. C. 21; 6 L. T. O. S. 146; 10 J. P. 150; 9 Jur. 1097; 115 E. R. 815.

*Annotations*.—**Refd. R. v. St. Martin** (1846), 2 New Sess. Cas. 416; **Stourbridge Union v. Droitwich Union** (1871), 35 J. P. 694.

**310. — Settlement by residence.]—****WORCESTER UNION v. BIRMINGHAM UNION** (1887), 65 J. P. 771; 3 T. L. R. 756, C. A.

**311. ———.]—****PRESTON UNION v. LEWISHAM UNION**, No. 303, *ante*.

**312. ———.]—****WEST HAM UNION v. EDMONTON UNION**, No. 304, *ante*.

**313. Whether gaining of settlement interrupted—Insufficient residence before division.]—**An order of the Local Government Board dividing an existing parish into two separate parishes, which provides (*inter alia*) that, as between the two new parishes, every person who has acquired, or shall on or before a given date acquire, a settlement in the existing parish shall be deemed to have acquired such settlement in either of the separate parishes, does not apply to persons who are in the process of acquiring a settlement in the existing parish. Accordingly, a pauper who had resided in the old parish for two years & ten months up to the given date, & continued his residence in one of the new parishes for eighteen months after the given date, cannot add the two periods of residence together & claim to have acquired a settlement in the new parish.—**CALNE UNION v. ST. MARY, ISLINGTON UNION** (1900), 69 L. J. Q. B. 400; 82 L. T. 121; 64 J. P. 246, D. C.

*Annotations*.—**Refd. R. v. Middlesex JJ., Ex p. Walsall Union**, [1906] 2 K. B. 365; **Gloucester Union v. Woolwich Union**, [1917] 2 K. B. 374.

## SUB-SECT. 3.—EFFECT OF UNION.

**314. Retention of settlement gained previous to union.]**—A pauper gained a settlement in parish J. Afterwards, by Act of Parliament, J. was united, for all but ecclesiastical purposes, with parish B. by the title of the United Parishes of J. & B.:—*Held*: the pauper was settled in the united parishes.—*R. v. St. MARTIN, NEW SARUM (INHABITANTS)* (1846), 9 Q. B. 241; 2 New Sess. Cas. 416; 1 New Mag. Cas. 554; 15 L. J. M. C. 123; 7 L. T. O. S. 227; 10 J. P. 581; 10 Jur. 594; 115 E. R. 1286.

*Annotations*:—*Dbd.* Stourbridge Union v. Droitwich Union (1871), L. R. 6 Q. B. 769. *Consd.* West Ham Union v. L. C. C., [1902] 1 K. B. 562; West Ham Union v. Edmonton Union, [1908] A. C. 1. *Reid.* Bootle Union v. Whitehaven Union, [1903] 2 Ch. 142.

**315. —**—[Parish A., to the area of which an addition has been made out of parish B., by an order under the Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 64), does not lose its identity, & the settlement of a pauper in parish A. is not affected.]—*WEST HAM UNION v. LONDON COUNTY COUNCIL*, [1904] A. C. 40; 73 L. J. K. B. 85; 89 L. T. 614; 68 J. P. 145; 52 W. R. 465; 20 T. L. R. 127; 2 L. G. R. 301, H. L.

*Annotations*:—*Consd.* Bootle Union v. Whitehaven Union, [1903] 2 Ch. 142. *Reid.* R. v. Middlesex JJ., *Ex p.* Walsall Union, [1906] 2 K. B. 365; West Ham Union v. Edmonton Union (1907), 24 T. L. R. 108.

## SECT. 3.—DERIVATIVE SETTLEMENTS.

## SUB-SECT. 1.—IN GENERAL.

*See, now*, Poor Law Act, 1927 (c. 14), s. 110.

**316. Origin of doctrine.]**—The doctrine of derivative settlement of legitimate children unemancipated is not laid down by any positive statute, but is the result of the construction put by cts. of justice on the Poor Laws, the provisions of which must be construed so as to meet the ordinary social wants of those for whose benefit they were made.—*ADAMSON v. BALBOUR* (1853), 1 Macq. 376; 21 L. T. O. S. 145; 1 W. R. 539, H. L.

*Annotations*:—*Reid.* Reigate Union v. Croydon Union, Highworth & Swindon Union v. Westbury-on-Severn Union, Medway Union v. Bedminster Union (1889), 38 W. R. 295; *Rutherglen Parish Council v. Glasgow Parish Council*, [1902] A. C. 360.

**Settlement by marriage.]**—*See* Sub-sect. 3, *post*.

**Settlement by parentage.]**—*See* Sub-sect. 4, *post*.

## SUB-SECT. 2.—RESTRICTION ON DERIVATIVE SETTLEMENTS.

*See, now*, Poor Law Act, 1927 (c. 14), s. 110.

**317. Restriction of doctrine—General statement of restriction.]**—(1) After Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), came into operation a pauper's father acquired a settlement in Penge, & his wife & child thereupon took his settlement & never acquired any subsequent settlement in their own right. The pauper's mother was born in Reigate, which was her maiden settlement. After the father's death, an order was made adjudging the last legal settlement of the pauper, then under the age of sixteen, to be in Penge:—*Held*: under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, the widow did not upon her husband's death revert to her maiden settlement, & the pauper upon her father's death did not take the maiden settlement of her widowed mother, but retained her father's settlement in Penge & the order was right.

(2) A pauper was born in 1861 at her father's birthplace in Wanborough. He died in 1868,

& his widow married again. After her father's death, the pauper, who was always physically incapable of work, resided with her mother in Rhydgwern without receiving relief till June, 1880, when she became chargeable. In June, 1880, the pauper had so resided at Rhydgwern for more than three years since Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), came into operation (Aug. 15, 1876); viz. more than one year before she attained the age of sixteen (Oct. 1877) & more than two years after attaining that age. An order having been made adjudging the last legal settlement of the pauper to be in Wanborough:—*Held*: the order was wrong; the pauper had by her residence under the age of sixteen coupled with her residence over that age "resided for the term of three years" in Rhydgwern so as to render her irremovable within sect. 34 of the Act & had therefore acquired a statutory settlement in that parish; & this result was not affected by the provisions of sect. 35.

(3) A pauper resided with her husband in a parish for more than three years continuously, & after his death continued to reside as a widow in the same parish for three months:—*Held*: the settlement of the pauper & her children, who were all under six years of age was in that parish, not on the ground that the pauper had acquired a settlement in her own right under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, but on the ground that the husband had at the time of his death acquired a settlement in the parish under sect. 34 & his widow & children took that settlement under sect. 35.

(4) The object of the enactment was to impose a limit upon parentage settlements by double derivation. . . . The provisions of the clause [Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 (3)] have, in my opinion, no application to children under the age of sixteen (LORD WATSON).—*REIGATE UNION v. CROYDON UNION, HIGHWORTH & SWINDON UNION v. WESTBURY-ON-SEVERN UNION, MEDWAY UNION v. BEDMINSTER UNION* (1889), 14 App. Cas. 465; 59 L. J. M. C. 29; 61 L. T. 733; 53 J. P. 580; 38 W. R. 295; 5 T. L. R. 716, H. L.; *revers* (1888), 20 Q. B. D. 597, C. A.; *affg.* (1888), 21 Q. B. D. 278, C. A.; *reversg. sub nom.* CROYDON UNION v. REIGATE UNION (1887), 19 Q. B. D. 385, C. A.

*Annotations*:—*As to* (2) *Apld.* Llanelly Union v. Neath Union, [1893] 2 Q. B. 38. *Reid.* Wayland Union v. Mitford Union (1889), 62 L. T. 69; West Ham Union v. St. Matthew, Bethnal Green, [1892] 2 Q. B. 676; St. Olave's Union v. Canterbury Union, [1897] 1 Q. B. 682. *As to* (3) *Distd.* Tewkesbury Union v. Birmingham Union, [1904] 2 K. B. 395. *Consd.* St. Matthews, Bethnal Green Union v. Paddington Union, [1912] 2 K. B. 335. *Reid.* Barton Regis Union v. St. Pancras Union (1887), 57 L. J. M. C. 6, n.; Dorchester Union v. Poplar Union (1888), 21 Q. B. D. 88; Birmingham Union v. Tewkesbury Union (1904), 53 W. R. 268. *As to* (4) *Follw.* West Derby Union v. Aitcham Union (1889), 24 Q. B. D. 117. *Consd.* Manchester Overseers v. Ormskirk Union (1890), 24 Q. B. D. 678. *Apld.* West Ham Union v. St. Giles-in-the-Fields Overseers (1890), 25 Q. B. D. 272. *Follw.* Christchurch Union v. St. Mary, Islington Union (1906), 70 J. P. 247. *Consd.* Woolwich Union v. Fulham Union, [1906] 2 K. B. 240. *Dbd.* Tending Union v. Braintree Union, [1920] 2 K. B. 647; Loxdon & Winstree Union v. Windsor Union, [1921] 2 K. B. 143. *Apld.* Wycombe Union v. Barton-upon-Irwell Union, [1927] A. C. 217. *Reid.* Bath Union v. Berwick-upon-Tweed Union, [1892] 1 Q. B. 731; Plymouth Union v. Axminster Union, [1898] 1 Q. B. 586; West Ham Union v. Holbeach Union, [1905] A. C. 450; Kingston-upon-Hull Incorporation of the Poor v. Hackney Union, [1911] 1 K. B. 748; Poplar Borough Union v. West Ham Union (1914), 78 J. P. Jo. 281. *Generally, Reid.* Newark Union v. Maidstone Union (1905), 93 L. T. 602.

**318. — Reservation to widow—Of settlement derived from husband.]**—(1) M. was born in Liverpool, & died, leaving his widow & five children surviving him. M. never acquired a settlement for

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himself, & there was no evidence of his having derived a settlement from his father. The widow, who was the mother of the five children, had no other settlement than that acquired by her marriage with M., & had acquired none since. None of the children were born in Liverpool. The children were all under the age of sixteen:—*Held*: the mother & the children took M.'s birth settlement under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, & therefore were settled in Liverpool.

(2) The enactment seems to me to mean that if there is a child without a settlement & unmarried, or married without having acquired a settlement through her husband, because he never had one, & the settlement of the child cannot be found out without inquiring into the derivative settlement of the father—that is, without going back a step in the pedigree beyond the father—the legislative cuts it short, & says, you shall not go back that step & inquire into the derivative settlement of the father (LORD COLERIDGE, C.J.).—*LIVERPOOL UNION v. PORTSEA OVERSEERS* (1884), 12 Q. B. D. 303; 53 L. J. M. C. 58; 50 L. T. 296; 48 J. P. 406; 32 W. R. 494, D. C.

*Annotations*:—As to (1) *Consd. Headington Union v. St. Olave's Union* (1884), 13 Q. B. D. 293. As to (2) *Refd. Edmonton Union v. St. Mary, Islington Union* (1885), 15 Q. B. D. 95.

319. ————.]—*REIGATE UNION v. CROYDON UNION, HIGHWORTH & SWINDON UNION v. WESTBURY-ON-SEVERN UNION. MEDWAY UNION v. BEDMINSTER UNION*, No. 317, *note*.

320. ———— *Reservation to child after attaining sixteen.—Of settlement derived from parent.*—By Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, & in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, & shall retain the settlement so taken until it shall acquire another. . . . If any child in this sect. mentioned shall not have acquired a settlement for itself, or being a female shall not have acquired a settlement from her husband, & it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born:—*Held*: the wife of a man who had while under the age of sixteen & before the passing of Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), derived a settlement from his father, took this derivative settlement of her husband, & not his birth settlement; for the settlement which a son while under the age of sixteen derives from his father is excluded from the operation of the sect. so far as it abolishes derivative settlements.—*GREAT YARMOUTH v. LONDON (CITY)* (1878), 3 Q. B. D. 232; 47 L. J. M. C. 61; 37 L. T. 712; 42 J. P. 486; 26 W. R. 283, D. C.

*Annotations*:—*Consd. R. v. Bridgnorth Union* (1882), 9 Q. B. D. 765; *R. v. Marylebone Union* (1884), 13 Q. B. D. 15. *Refd. Tenterden Union v. St. Mary, Islington Union* (1878), 47 L. J. M. C. 81; *Westbury-on-Severn v. Barrow-in-Furness* (1878), 3 Ex. D. 88.

321. ————.]—Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 (1), which abolishes derivative settlements, except in the case of a wife from her husband, & of a child under the age of sixteen from its parent, is to be

read retrospectively as well as prospectively, both in the enacting part & in the exception.

A pauper born in 1841 had while under the age of sixteen & before the passing of Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), derived a settlement from his father who had acquired a settlement by estate, & the pauper never acquired any settlement of his own:—*Held*: though the enacting part of Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 (1), would, but for the exception, have destroyed the derivative settlement, the case fell within the exception, & the pauper therefore retained the derivative settlement after the Act.—*WESTBURY-ON-SEVERN v. BARROW-IN-FURNESS* (1879), 3 Ex. D. 88; 47 L. J. M. C. 79; 38 L. T. 315; 42 J. P. 152; 26 W. R. 372, D. C.

*Annotations*:—*Fold. Hereford Union v. Warwick Union* (1879), 48 L. J. M. C. 111. *Consd. R. v. Bridgnorth Union* (1882), 9 Q. B. D. 765. *Refd. Tenterden Union v. St. Mary, Islington Union* (1878), 47 L. J. M. C. 81; *Bath Union v. Berwick-upon-Tweed Union*, [1892] 1 Q. B. 731.

322. ————.]—A pauper, born in 1840, in appt. union, had never acquired a settlement in her own right. The pauper's father was born in the L. union, & he had never acquired a settlement elsewhere:—*Held*: Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, was retrospective in its operation & therefore the pauper at the age of sixteen acquired her father's settlement, which was a birth settlement, & could be ascertained without inquiry into his derivative settlement.—*HEREFORD UNION v. WARWICK UNION* (1879), 48 L. J. M. C. 111; 40 L. T. 588; 27 W. R. 506; *sub nom. R. v. Hereford Union*, 43 J. P. 335, D. C.

*Annotation*:—*Refd. R. v. St. Mary, Islington Union* (1885), 15 Q. B. D. 95.

323. ————.]—The wife of A. left her husband who had been residing with her in a parish in appt. union, & was settled therein, & went to live with another man in another union. In different parishes therein she gave birth to the paupers, three children, one legitimate & the others illegitimate. Eventually she & the children came to & resided for more than twelve months in resp. union, when she deserted them, & they became chargeable to that union. The latter obtained an order adjudging the settlement of all three children to be in the above parish in appt. union, all three being under sixteen years of age. The wife was never deserted by her husband:—*Held*: (1) as regards the legitimate child, his settlement was that of his father in the above parish in appt. union, his derivative settlement being preserved under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, & he was not irremovable from resp. union under the proviso to Poor Removal Act, 1848 (c. 111), s. 1, because his father, who had never resided in resp. union, had, consequently, not acquired a status of irremovability therein; (2) as regards the illegitimate children, inasmuch as they took the settlement of their mother under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 (2), which under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 (1), remained derivatively that of the father, their place of settlement could not be shown without inquiring into the derivative settlement of the mother, & consequently, under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 (3), they must be deemed to be settled in the parish in which they were respectively born, neither of which was in appt. union.

(3) I do not think the House of Lords ever intended to support the dictum of LORD WATSON



in *Reigate Union v. Croydon Union*, No. 317, *ante*, that the third paragraph has no application to children under sixteen (LORD READING, C.J.).—TENDRING UNION v. BRAINTREE UNION, [1920] 2 K. B. 647; 90 L. J. K. B. 300; 123 L. T. 391; 84 J. P. 193; 36 T. L. R. 512; 18 L. G. R. 359, D. C.

*Annotations*.—As to (3) *Overd*. Wycombe Union v. Barton-upon-Irwell Union, [1927] A. C. 217. *Reid*. Lexden & Winstree Union v. Windsor Union, [1921] 2 K. B. 143.

**324.** ———— Parent's derivative settlement not inquired into.]—LIVERPOOL UNION v. PORTSEA OVERSEERS, No. 318, *ante*.

**325.** ————.]—The father of children who were born after Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, came into operation, but who was himself born before that date, had acquired no settlement for himself since he attained the age of sixteen years, & his father's settlement was a derivative one. The children having become chargeable to the parish while under sixteen & during their father's lifetime :—*Held* : the children took the settlement of their father, & since it could not be shown what settlement he derived from his father without inquiring into the derivative settlement of his father, the children must be taken to be settled in the parish in which their father was born.—BATH UNION v. BERWICK-UPON-TWEED UNION, [1892] 1 Q. B. 731; 61 L. J. M. C. 137; 66 L. T. 258; 56 J. P. 296; 40 W. R. 414; 8 T. L. R. 303; 36 Sol. Jo. 256, D. C.

—When illegitimate children thrown back on birth settlement.]—See Sect. 4, sub-sect. 2, B. (a), *post*.

**326.** ———— Whether person over sixteen can derive settlement from parent.]—A pauper who has acquired no settlement of her own was born in the parish of Enfield in the union of Edmonton. The birth settlement of her father had been in Canterbury, & he had acquired no other. An order having been made for her removal to the Edmonton union, by reason of her having been born at Enfield, was quashed at quarter sessions on the ground that, by Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, she must be deemed to have derived her settlement from her father. On appeal, the Div. Ct. held that the pauper, being more than sixteen years old at the time of the inquiry as to her settlement, could not within Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, be deemed to have derived a settlement from her father, & therefore took her birth settlement. On appeal :—*Held* : the decision of the Div. Ct. was right.—R. v. ST. MARY, ISLINGTON UNION (1885), 15 Q. B. D. 339; 54 L. J. M. C. 146; 1 T. L. R. 640, C. A.

*Annotations*.—N.F. Dorchester Union v. Poplar Union (1888), 21 Q. B. D. 88. *Reid*. Maidstone Union v. Holborn Union (1886), 17 Q. B. D. 817.

**327.** ———— No derivative settlement from mother—While father living.]—A pauper whose father is living, but is an alien with no settlement in this country, cannot take a derivative settlement from his or her mother under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, because the mother is not "widowed." In these circumstances, which appear to be a *casus omissus*, the pauper, in the absence of a settlement acquired by residence, retains the settlement of birth.—NORWICH UNION v. HENSTED UNION (1927), 91 J. P. 111; 43 T. L. R. 553; 25 L. G. R. 329, D. C.

**328.** ———— Whether child legitimate or illegitimate under sixteen can take parent's derivative settlement—Derived from widowed mother.]—The last part of Divided Parishes & Poor Law J.—VOL. XXXVII.

(Amendment) Act, 1876 (c. 61), s. 35, must be read consistently with the first part, & legitimate children under sixteen who have a widowed mother take the settlement of their widowed mother, though such settlement is a derivative one.—HOLLINGBOURN UNION v. WEST HAM UNION (1881), 6 Q. B. D. 580; 50 L. J. M. C. 74; 44 L. T. 520; 45 J. P. 634; 29 W. R. 629, D. C.

*Annotations*.—*Consd*. R. v. Bridgnorth Union (1882), 9 Q. B. D. 765. *Reid*. R. v. Portsea Union (1881), 7 Q. B. D. 384; R. v. Marylebone Union (1884), 13 Q. B. D. 15; Reigate Union v. Croydon Union, Highworth & Swindon Union v. Westbury-on-Severn Union, Medway Union v. Bedminster Union (1889), 14 App. Cas. 465; Lexden & Winstree Union v. Windsor Union, [1921] 2 K. B. 143.

**329.** ————.]—R. v. BRIDGNORTH UNION, No. 340, *post*.

**330.** ————.]—LIVERPOOL UNION v. PORTSEA OVERSEERS, No. 318, *ante*.

**331.** ————.]—REIGATE UNION v. CROYDON UNION, HIGHWORTH & SWINDON UNION v. WESTBURY-ON-SEVERN UNION, MEDWAY UNION v. BEDMINSTER UNION, No. 317, *ante*.

**332.** ————.]—In determining the settlement of a pauper under the age of sixteen the father's settlement could not be ascertained & it could not be shown what settlement the pauper derived from his mother without inquiring into her derivative settlement :—*Held* : the prohibition in that sect. as to inquiry into the derivative settlement of a parent had no application to the case of children under the age of sixteen, & did not prevent the inquiry as to the mother's settlement.—WEST DERRY UNION v. ATCHAM UNION (1889), 24 Q. B. D. 117; 59 L. J. M. C. 17; 54 J. P. 485; 38 W. R. 361; 6 T. L. R. 5, C. A.

*Annotations*.—*Consd*. Wycombe Union v. Barton-upon-Irwell Union, [1927] A. C. 217. *Reid*. Manchester Overseers v. Ormskirk Union (1890), 24 Q. B. D. 678; Lexden & Winstree Union v. Windsor Union, [1921] 2 K. B. 143.

**333.** ————.]—TENDRING UNION v. BRAINTREE UNION, No. 323, *ante*.

**334.** ————.]—(1) The pauper, an illegitimate child, was born in a parish in applt. union in May, 1914, & was shortly afterwards taken to the house of his mother's parents in resp. union, where he resided until Dec. 30, 1919, when he became chargeable to that union. In July, 1914, the mother of the pauper went to reside in the parish of Ross, in the Ross union, where she remained until Nov. 1915, when she married a man who had acquired a settlement in that parish, & who never acquired a subsequent settlement. In May, 1920, an order was made adjudging that the pauper's settlement was in the parish of his birth & ordering his removal to applt. union. Upon appeal to quarter sessions the order was quashed :—*Held* : inasmuch as under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 (3), the settlement of the pauper's mother, being derived from her husband, could not be inquired into, the pauper must be deemed to be settled in the parish in which he was born, & the removal order was therefore properly made.

(2) Dictum of LORD WATSON in *Reigate Union v. Croydon Union*, No. 317, *ante*, that the third paragraph of Poor Law Amendment Act, 1876 (c. 61), s. 35, does not apply to children under sixteen disapproved.—LEXDEN & WINSTREE UNION v. WINDSOR UNION, [1921] 2 K. B. 143; 90 L. J. K. B. 678; 124 L. T. 630; 85 J. P. 117; 19 L. G. R. 123; *sub nom*. WINDSOR UNION v. LEXDEN & WINSTREE UNION, 37 T. L. R. 321, D. C.

*Annotation*.—As to (2) *Overd*. Wycombe Union v. Barton-upon-Irwell Union, [1927] A. C. 217.

**335.** ————.]—An illegitimate child was born in Lambeth in Sept. 1905. In Feb. 1909, she was sent by her mother to live in the Barton-upon-Irwell Union, where she resided without

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relief & without interruption until June, 1920. In Mar. 1909, the mother married, & from Dec. 1913, to Dec. 1924, resided with her husband in the Wycombe union & acquired a settlement in that union. In Oct. 1924, the child became chargeable to the guardians of the Wycombe union, without having acquired any settlement in the period from June, 1920, to Oct. 1924:—*Held*: (1) inasmuch as the mother was at all times removable from the Barton-upon-Irwell Union, the child, by virtue of the proviso to Poor Removal Act, 1846 (c. 66), s. 1 (amended by Poor Removal Act, 1848 (c. 111), s. 1), never became irremovable from that union, & consequently could not be deemed to be settled therein under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34; (2) being under the age of sixteen years & not having acquired a settlement in her own right, the child, by Poor Law (Amendment) Act, 1834 (c. 76), s. 71, retained the settlement of her mother in the Wycombe union & was not to be deemed to be settled in the parish in which she was born, notwithstanding Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 (3), & the fact that the mother's settlement was derivative; (3) the provisions of Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 (3), have no application to children under the age of sixteen. — **BARTON-UPON-IRWELL UNION v. WYCOMBE UNION**, [1926] 2 K. B. 3; 95 L. J. K. B. 434; 134 L. T. 522; 90 J. P. 85; 42 T. L. R. 349; 70 Sol. Jo. 444; 24 L. G. R. 207, C. A.; *affd. sub nom. WYCOMBE UNION v. BARTON-UPON-IRWELL UNION*, [1927] A. C. 217; 43 T. L. R. 89; 70 Sol. Jo. 1180; 90 J. P. Jo. 698, H. L.

*See, now*, Poor Law Act, 1927 (c. 14), s. 110.

**Derivative settlement of wife.**—*See* Sect. 3, sub-sect. 3, A., *post*.

*See, also*, Sect. 4, sub-sect. 2, A. & B., *post*.

**SUB-SECT. 3.—SETTLEMENT BY MARRIAGE.**

**A. In General.**

*See, now*, Poor Law Act, 1927 (c. 14), s. 110 (2).

**336. What settlement wife takes—Cannot acquire independent settlement in husband's lifetime.**—**BERKHAMSTEAD v. ST. MARY, NORTH-CHURCH** (1735), 2 Bott, 22.

**337. Settlement of husband.**—Adjudication of husband's settlement sufficient to send the wife with him.—**HOBEY PARISH v. KINGSBURY PARISH** (1722), 1 Stra. 527; 93 E. R. 678.

**338. —**—(1) If a person born in the parish of A. be put apprentice in the parish of B. & after serving two years of his time, on his master becoming bankrupt, he return to the parish of A., marries, has children, & dies without having gained a settlement there, his widow & children are settled in the parish of B. although neither of them were ever there during the lifetime of the husband & father.

(2) A legitimate child obtains a settlement by birth in the place in which it is born, if its parents

have no settlement.—**ST. GILES', READING PARISH v. EVERSLEY, BLACKWATER PARISH** (1723), 8 Mod. Rep. 169; 2 Ld. Raym. 1332; 2 Sess. Cas. K. B. 116; Sett. & Rem. 112; 1 Stra. 580; 88 E. R. 124; *sub nom. EVERSLEY, BLACKWATER v. ST. GILES (INHABITANTS)*, Fortes. Rep. 320.

*Annotations*:—*As to* (1) **Consd. R. v. St. Matthew's Ipswich** (1729), 1 Barn. K. B. 167; **Souton Parish v. Sidberry** (1738), 2 Sess. Cas. K. B. 211.

**339. — Derivative settlement.**—**GREAT YARMOUTH v. LONDON (CITY)**, No. 320, *ante*.

**340. —**—*Under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, abolishing, in general derivative settlements, an order of removal of a wife, & three children under the age of sixteen, is not justified by proof that the father of the wife's husband was born in the union to which the removal was made, & that neither the husband nor his father acquired a settlement in his own right.*—**R. v. BRIDGNORTH UNION** (1883), 11 Q. B. D. 314; 48 L. T. 600; 31 W. R. 938; *sub nom. MADELEY UNION v. BRIDGNORTH UNION*, 52 L. J. M. C. 314; 47 J. P. 452, C. A.

*Annotations*:—*Fold. R. v. St. Mary, Islington Union* (1885), 15 Q. B. D. 339; *Appl. Maidstone Union v. Holborn Union* (1886), 17 Q. B. D. 817; *St. Pancras Union v. Norwich Union* (1887), 18 Q. B. D. 521; *Dorchester Union v. Poplar Union* (1888), 21 Q. B. D. 88. *Dist. Reigate Union v. Croydon Union*, *Highworth & Swindon Union v. Westbury-on-Tyeme Union*, *Medway Union v. Westminster Union* (1889), 14 App. Cas. 465. *Reid. R. v. Preston Union* (1883), 11 Q. B. D. 113; *R. v. Marylebone Union* (1884), 13 Q. B. D. 15; *Croydon Union v. Reigate Union* (1887), 19 Q. B. D. 385; *West Ham Union v. St. Giles-in-the-Fields Overseers* (1890), 63 L. T. 496; *Llanely Union v. Neath Union*, [1893] 2 Q. B. 38; *Tewkesbury Union v. Birmingham Union* (1904), 90 L. T. 787.

**341. —**—*In determining the settlement of a married woman, it appeared that her husband had never acquired a settlement for himself; but the birth settlements of the husband & of the husband's father were shown:*—*Held*: the pauper's husband took his father's settlement, it not being derivative, & therefore the pauper took the same settlement, & not the birth settlement of her husband.—**WEST HAM UNION v. ST. GILES-IN-THE-FIELDS OVERSEERS** (1890), 25 Q. B. D. 272; 59 L. J. M. C. 144; 63 L. T. 496; 54 J. P. 520; 38 W. R. 736, D. C.

**342. Retention of maiden settlement.**—**BERKHAMSTEAD v. ST. MARY, NORTH-CHURCH** (1735), 2 Bott, 22.

**Husband having no settlement.**—*See* Sub-sect. 3, C., *post*.

**Husband's settlement unknown.**—*See* Sub-sect. 3, D.

**B. Validity of Marriage.**

*See, now*, Poor Law Act, 1927 (c. 14), s. 110 (2).

**343. No settlement gained by invalid marriage.**—A marriage contracted with the daughter of the sister of a deceased wife is void, & no settlement can be derived through such a marriage. It makes no difference whether the sister of the deceased wife be or be not legitimate.—**R. v. BRIGHTON (INHABITANTS)** (1861), 1 B. & S. 447; 30 L. J. M. C. 197; 5 L. T. 56; 25 J. P. 630; 9 W. R. 831; 121 E. R. 782.

*Annotation*:—*Mentd. Re Phillips, Re Howard, Charter v. Ferguson*, [1919] 1 Ch. 128.

**PART V. SECT. 3, SUB-SECT. 3.—A.**

**3371. What settlement wife takes—Settlement of husband.**—By the law of Scotland a wife deserted by her husband is not in the position of a widow, & cannot acquire a settlement for herself, but is remitted to her husband's settlement.—**RUTHERGLEN PARISH COUNCIL v. GLASGOW PARISH COUNCIL** (1902), 86 L. T. 607, H. L.—**SCOT.**

**PART V. SECT. 3, SUB-SECT. 3.—B.**

**3431. No settlement gained by invalid marriage.**—A woman went through a form of marriage with a married man in the *bona fide*, but erroneous, belief that he was a widower. Several children were born of the union. The man having died, the children, who were in pupillage, became chargeable on the parish. In a question between

the parish of the mother's settlement & the parish of the father's settlement:—*Held*: as the mother could not acquire a derivative settlement from her putative husband, the parish of her settlement, & not the parish of his settlement, was liable for the support of the children.—**KIRKCALDY & DY-SART PARISH COUNCIL v. TRAUQUAIR PARISH COUNCIL**, [1915] S. C. 1124.—**SCOT.**



**344. Proof of marriage—Sufficiency.]**—No occasion to show, that banns were actually published, or the marriage register regularly signed, to establish a marriage, *quoad* a parish settlement.

—*ST. DEVEREUX v. MUCH DEW CHURCH* (1762), 1 Wm. Bl. 367; 96 E. R. 205; *sub nom.* *R. v. ST. DEVEREUX* (INHABITANTS), Burr. S. C. 506.

**345. —**—*R. v. ABERDARON* (INHABITANTS) (1844), 1 New Mag. Cas. 51; 8 J. P. Jo. 373.

**Validity of marriage—Proof of—Admissibility of evidence.]**—*See EVIDENCE*, Vol. XXII., pp. 164, 356, 400, Nos. 1399, 3611, 4064, 4065.

—**Prohibited degrees.]**—*See HUSBAND & WIFE*, Vol. XXVII., pp. 41–43, Nos. 185–218.

—**False names & descriptions.]**—*See HUSBAND & WIFE*, Vol. XXVII., pp. 46–49, 51, 52, Nos. 246–298, 318–325.

—**Consents in case of minors.]**—*See HUSBAND & WIFE*, Vol. XXVII., pp. 55–57, Nos. 349–386.

### C. Husband having No Settlement.

*See, now*, Poor Law Act, 1927 (c. 14), s. 110 (2).

**346. Wife retains maiden settlement.]**—*DUNSFOLD* (INHABITANTS) *v.* *DUNSFOLD WINDSOROUGH GREEN* (INHABITANTS) (1713), Gilb. 97; Sett. & Rem. 22; 93 E. R. 272.

**347. —**—*A woman does not lose her settlement by marrying a man who has none.*—*R. v. RISBOROUGH GREEN* (INHABITANTS) (1714), Fortes. Rep. 314; 92 E. R. 868.

**348. —**—*Woman marries a man without a settlement, does not lose her own on his death.*—*ST. GILES'S v. ST. MARGARET'S, WESTMINSTER* (1717), 1 Sess. Cas. K. B. 104; Sett. & Rem. 76; 93 E. R. 31.

**349. —**—*Woman's settlement before marriage remains, if husband has no settlement.*—*WESTHAM PARISH v. CHIDDINGTON PARISH* (1726), 2 Stra. 683; 93 E. R. 782; *sub nom.* *CHIDDERTON PARISH v. WESTAM PARISH*, 2 Sess. Cas. K. B. 115; *sub nom.* *R. v. WESTERHAM*, 2 Bott, 68.

*Annotation:—*Refd. *R. v. St. Mary, Beverley* (1830), 1 B. & Ad. 201.

**350. —**—*A woman's settlement is not suspended by marrying a man who has no settlement in England.*—*R. v. ST. BOTOLPH, BISHOPSGATE* (INHABITANTS) (1755), Say. 198; Burr. S. C. 367; 2 Bott, 69; 96 E. R. 851.

*Annotation:—*Consd. *R. v. Cottingham* (1827), 7 B. & C. 615.

**351. —**—*R. v. CARLETON* (1775), Burr. S. C. 813.

*Annotation:—*Refd. *R. v. Garstang Poor Law Union* (1883), 52 L. J. M. C. 97.

**352. —**—*An order of justices removing "M. wife of P. a scotsman, who never gained a settlement in England" & their children to the place of her last legal settlement; which order was stated on the face of it to be made on examination of the husband, & with the consent of him & his wife; was holden good.*—*R. v. ELTHAM* (INHABITANTS) (1804), 5 East, 113; 102 E. R. 1012.

*Annotations:—*Distd. *R. v. Leeds* (1821), 4 B. & Ald. 498; *R. v. St. Mary, Beverley* (1830), 1 B. & Ad. 201; *R. v. Skogumber* (1839), 1 Per. & Dav. 409; *R. v. Leeds* (1844), 5 Q. B. 916; *R. v. Preston Union* (1883), 11 Q. B. D. 113.

**353. —**—*The wife of an Irishman, who has no settlement in England, may, if deserted by him, be removed to her maiden settlement.*—*R. v. COTTINGHAM* (INHABITANTS) (1827), 7 B. & C. 615; 1 Man. & Ry. K. B. 439; 1 Man. & Ry. M. C. 130; 6 L. J. O. S. M. C. 37; 108 E. R. 852.

*Annotations:—*Consd. *R. v. All Saints, Derby* (1849), 14 Q. B. 207. *Appl. Much Hoole Overseers v. Preston Overseers* (1851), 17 Q. B. 548; *R. v. St. Marylebone* (1851), 16 Q. B. 353. *Consd. Poor Law Comrs. of Ireland v. Liverpool Vestry* (1869), L. R. 6 Q. B. 79.

**354. — No proof of acquisition of any other.]**

—*On removal of a wife, it is enough in the first instance to prove her maiden settlement.*—*R. v. RYTON* (INHABITANTS) (1778), Cald. Mag. Cas. 39.

**355. —**—*On removal of a widow, it is enough in the first instance to prove her maiden settlement.*—*R. v. WOODSFORD* (INHABITANTS) (1783), Cald. Mag. Cas. 236; 2 Bott, 75.

*Annotations:—*Distd. *R. v. St. Mary, Beverley* (1830), 1 B. & Ad. 201. *Consd. R. v. Yelvertoft* (1845), 6 Q. B. 801. *Appl. Headington Union v. Ipswich Union* (1890), 24 Q. B. D. 414.

**356. — Wife deserted by husband.]**—*A female pauper had married when above the age of sixteen, & had been deserted by her husband, who never had a settlement: she had never acquired a settlement of her own:—Held: the pauper retained the derivative settlement which she had taken from her father while under the age of sixteen.*—*DORCHESTER UNION v. POPLAR UNION* (1888), 21 Q. B. D. 88; 57 L. J. M. C. 78; 59 L. T. 687; 52 J. P. 435; 36 W. R. 706; 4 T. L. R. 570, C. A.

*Annotation:—*Refd. *Kingston-upon-Hull Incorporation for the Poor v. Hackney Union*, [1911] 1 K. B. 748.

### D. Husband's Settlement Unknown.

*See, now*, Poor Law Act, 1927 (c. 14), s. 110 (2).

**357. Wife retains maiden settlement.]**—*A married woman, or a widow, may be removed to her maiden settlement, the husband's settlement not appearing, without any proof that any inquiry has been made by the removing parish into the settlement of the husband.*—*R. v. BIRMINGHAM* (INHABITANTS) (1846), 8 Q. B. 410; 1 New Mag. Cas. 451; 2 New Sess. Cas. 283; 15 L. J. M. C. 65; 6 L. T. O. S. 479; 10 J. P. 295; 10 Jur. 406; 115 E. R. 930.

*Annotations:—*Consd. *R. v. Watford* (1846), 9 Q. B. 626. *Refd. R. v. St. Mary in Bungay* (1849), 12 Q. B. 38; *R. v. Ruyton* (1861), 1 B. & S. 534.

### E. Effect of Death of Husband.

*See, now*, Poor Law Act, 1927 (c. 14), s. 110 (2).

**358. Retention by widow of settlement of husband.]**—*LIVERPOOL UNION v. PORTSEA OVERSEERS*, No. 318, ante.

**359. —**—*Upon appeal against an order for the removal of a widow it appeared that her husband was at the time of his death settled in a parish in applt. union, & that she had acquired no settlement since his death:—Held: the term "wife" in Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, did not include a widow; the pauper did not therefore take the settlement of her deceased husband, & the order for her removal must be quashed.*—*MAIDSTONE UNION v. HOLBORN UNION* (1886), 17 Q. B. D. 817; 56 L. J. M. C. 91; 51 J. P. 54; 2 T. L. R. 592, D. C.

*Annotations:—*Apprvd. *Croydon Union v. Belgate Union* (1887), 19 Q. B. D. 385. *Fold. Kingsbridge Union v. East Stonehouse Union* (1887), 18 Q. B. D. 528. *Distd. Medway Union v. Bodminster Union* (1887), 57 L. J. M. C. 4.

**360. —**—*A widow & her legitimate children, under the age of sixteen, became chargeable to resp. parish, & an order was made for their removal into applt. union, where deceased husband & father had been settled:—Held: the word "wife" in Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, does not include a widow, & therefore, as the widow's settlement became the subject of inquiry after her husband's death, she did not take his settlement, & under the words "shall take the settlement of its father, or of its widowed mother as the case may be," the children took their mother's birth settlement, & therefore, the order must be*

**Sect. 3.—Derivative settlements: Sub-sect. 3, E.; sub-sect. 4, A. (a), (b) i., ii. & iii., & (c) i., ii., iii. & iv.]**

quashed.—**KINGSBRIDGE UNION v. EAST STONEHOUSE UNION** (1887), 18 Q. B. D. 528; 56 L. J. M. C. 83; 56 L. T. 333; 51 J. P. 470; 35 W. R. 580, D. C.

**Annotation:—***Apprvd.* **Croydon Union v. Reigate Union** (1887), 19 Q. B. D. 385.

**361. —**—**BARTON REGIS UNION v. ST. PANCRAS UNION** (1887), 57 L. J. M. C. 6, n., D. C.

**362. —**—**REIGATE UNION v. CROYDON UNION, HIGHWORTH & SWINDON UNION v. WESTBURY-ON-SERVERN UNION, MEDWAY UNION v. BEDMINSTER UNION**, No. 317, *ante*.

**Whether widow can complete qualification of husband—Settlement by renting.**—*See* No. 865, *post*.

**363. Admissibility of declaration by husband.**—*Qu.*: whether the declaration of the husband, who is dead, as to facts concerning his settlement, are admissible. If the settlement depends on a written instrument, it must be shown that due inquiry has been made after the written instrument before parol evidence can be admitted.—**R. v. ST. SEPULCHRE (INHABITANTS)** (1785), 4 Doug. K. B. 336; 99 E. R. 910.

**Annotation:—***Refd.* **It. v. Eriswell** (1790), 3 Term Rep. 707.

#### SUB-SECT. 4.—SETTLEMENT BY PARENTAGE.

##### A. Legitimate Children under Sixteen.

###### (a) In General.

*See, now*, Poor Law Act, 1927 (c. 14), s. 110.

**364. General rule—Child takes settlement of parents.**—A legitimate child follows the settlement of the parent, & where parent has no settlement then the place of child's birth fixes the child's settlement.—**WHITE CHAPPELL PARISH v. STEPNEY PARISH** (1688), Sett. & Rem. 201.

**365. —**—**ST. GILES' READING PARISH v. EVERSLEY BLACKWATER PARISH**, No. 338, *ante*.

**366. Paternal settlement preferred to maternal.**—**R. v. ST. MARGARET'S, WESTMINSTER (INHABITANTS)**, No. 1370, *post*.

**367. Proof of marriage of parents as condition precedent—Presumptive proof from cohabitation.**—**R. v. STOCKLAND (INHABITANTS)** (1762), Burr. S. C. 508.

**Annotation:—***Mentd.* **Russell v. Russell**, [1924] C. C. 687.

**Parents having no settlement—Child takes birth settlement.**—*See* Sect. 4, sub-sect. 1, *post*.

**368. When adjudication necessary.**—**R. v. MIDDLEHAM (INHABITANTS)** (1710), 1 Sess. Cas. K. B. 1; 93 E. R. 1.

**Reservation of right to derive settlement from father.**—*See* Sub-sect. 2, *ante*.

###### (b) Settlement during Lifetime of Father.

###### i. Father having Settlement.

*See, now*, Poor Law Act, 1927 (c. 14), s. 110.

**369. Settlement of father is settlement of child.**—**ST. GILES' READING PARISH v. EVERSLEY BLACKWATER PARISH**, No. 338, *ante*.

**370. —**—**HARD'S CASE** (1696), 2 Salk. 427; 91 E. R. 371.

**371. —**—**ANON.** (1699), 12 Mod. Rep. 322; 88 E. R. 1352.

**372. —**—A child follows his father's settlement.—**CUMNER PARISH v. MILTON PARISH** (1703), 6 Mod. Rep. 87; 87 E. R. 845; *sub nom.* **CUMNER (INHABITANTS) v. MILTON, BERKS (INHABITANTS)**, 2 Salk. 528; 3 Salk. 259; Holt, K. B. 578; Sett.

& Rem. 239; *sub nom.* **R. v. CUMNER & MILTON (INHABITANTS)**, Portes. Rep. 322.

**Annotations:—***Apprvd.* **Adamson v. Barbour** (1853), 21 L. T. O. S. 145. *Refd.* **R. v. Bridgnorth Union** (1882), 9 Q. B. D. 765.

**373. —**—**R. v. MIDDLEHAM (INHABITANTS)** (1710), 1 Sess. Cas. K. B. 1; 93 E. R. 1.

**374. —**—A legitimate child is part of the father's family & must be settled with him; but if the father's settlement cannot be found, then the place of its birth is its settlement (**POWELL, J.**).—**ST. SAVIOUR'S SOUTHWARK PARISH v. CRIPPLEGATE PARISH** (1710), 11 Mod. Rep. 267; 88 E. R. 1031; *sub nom.* **CRIPPLEGATE (INHABITANTS) v. ST. SAVIOUR'S SOUTHWARK**, 2 Bott. 12; *Foley's Poor Laws*, 3rd ed. 305.

**375. —**—Birth only gives settlement to a child legitimate when the father's settlement is not known.—**R. v. ST. GILES PARISH** (1711), 1 Sess. Cas. K. B. 16; 93 E. R. 5.

**376. —**—(1) Where it is not in the power of the justices to remove a person for forty days, he gains a settlement, except in the case of a certificate which is specially provided for by the statute; for if a man hires a tenement of £10 *per annum*, & unless he keeps it forty days, it is no settlement (**PARKER, C.J.**).

(2) A child does not take its settlement from its father as an inheritance, but from its cohabitation with him (**PARKER, C.J.**).—**HARROW PARISH v. EDGAR** (1712), 1 Sess. Cas. K. B. 39; 93 E. R. 12.

**Annotation:—***As to* (1) & (2) *Consd.* **R. v. Sowton, Devonshire** (1738), Andr. 345.

**377. —**—The settlement of the father is *prima facie* the settlement of his children.—**NEWARK PARISH v. WIRKSWORTH, DERBYSHIRE PARISH** (1714), 10 Mod. Rep. 272; 88 E. R. 724; *sub nom.* **NEWARK PARISH v. RUCKWORTH**, 1 Sess. Cas. K. B. 84.

**378. —**—**KING'S LANGLEY (INHABITANTS)**, No. 1197, *post*.

**379. —**—(1) The children are always to follow the settlement of their father, if it can be known; & if it can be known, then the mother's settlement is quite out of the case (*per CUR.*).

(2) Birth gives even a legitimate child a settlement, if the parents of it had none (*per CUR.*).—**R. v. ST. MATTHEW, BETHNAL GREEN (INHABITANTS)** (1759), Burr. S. C. 482.

**Annotations:—***As to* (1) *Consd.* **R. v. St. Mary, Leicester** (1835), 3 Ad. & El. 644; *It. v. Yelvertoft* (1845), 6 Q. B. 801.

**380. —**—The son of a man who purchases under £30, consideration, born during his father's residence on such purchase, is settled at his father's prior settlement, though the father still continues to reside on the purchased estate.—**OVER-NORTON v. SALFORD** (1764), 1 Wm. Bl. 455; 96 E. R. 263; *sub nom.* **R. v. SALFORD (INHABITANTS)**, Burr. S. C. 516.

**381. —**—A husband may gain a settlement by residing on an estate vested in trustees for the separate use of the wife. The settlement of a child of five years old, leaving the father's family & living with different relations till ten, follows that of the father, if he has not gained any settlement in his own right.—**R. v. OFFCHURCH (INHABITANTS)** (1789), 3 Term Rep. 114; 100 E. R. 484.

**Annotation:—***Consd.* **R. v. Lytchet Matraverse** (1827), 7 B. & C. 226.

**382. —**—The settlement of a person attained, acquired before the attainder, is communicated to his children born afterwards.—**R. v. ST. MARY, CARDIGAN (INHABITANTS)** (1794), 6 Term Rep. 116; 101 E. R. 465.

**Annotations:—***Refd.* **R. v. Haddenham** (1812), 15 East, 463; **Stourbridge Union v. Droitwich Union** (1871), 35 J. P. 694.

**383.** —.]—Proof of the father's settlement is sufficient to establish the settlement of the son in the same parish, if nothing appear to contradict it.—*R. v. STONE (INHABITANTS)* (1794), 6 Term Rep. 56; 101 E. R. 433.

*ii. Father having no Settlement.*

*See, now, Poor Law Act, 1927 (c. 14), s. 110.*

**384. Child takes mother's settlement.**—*DUNSFOLD (INHABITANTS) v. DUNSFOLD WINDSBOROUGH GREEN (INHABITANTS)* (1713), Gilb. 97; Sett. & Rem. 22; 93 E. R. 272.

**385.** —.]—Where the father being a foreigner has no settlement, the children should have the benefit of the mother's settlement, for that her right should descend to them, & they should not be sent to the place of their birth.—*R. v. ST. PAUL'S, SHADWELL (INHABITANTS)* (1722), 2 Sess. Cas. K. B. 119; 93 E. R. 161.

— *Whether relegated to birth settlement.*—*See Part V., Sect. 4, sub-sect. 2, A., post.*

— *Whether inquiry into mother's derivative settlement permissible.*—*See Sub-sect. 2, ante.*

*iii. Father's Settlement Unknown.*

*See, now, Poor Law Act, 1927 (c. 14), s. 110.*

**386. Whether child takes mother's maiden settlement.**—*R. v. LEEDS (INHABITANTS)* (1844), 5 Q. B. 910; Dav. & Mer. 304; 1 New Mag. Cas. 52; 1 New Sess. Cas. 257; 13 L. J. M. C. 107; 3 L. T. O. S. 179; 8 J. P. 517; 8 Jur. 534; 114 E. R. 1493.

*Annotations:—Refd. R. v. Yelvertoft* (1845), 6 Q. B. 801; *Poor Law Comrs. for Ireland v. Liverpool Vestry* (1869), 39 L. J. M. C. 25.

**387.** —.]—*NORWICH UNION v. HENSTEAD UNION, No. 327, ante.*

**Child takes birth settlement—Settlement of both parents unknown.**—*See Part V., Sect. 4, sub-sect. 1.*

*(c) After Death of Father.*

*i. In General.*

*See Poor Law Act, 1927 (c. 14), s. 110.*

**388. Posthumous child—Inherits father's settlement.**—A legitimate child though born after the father's death shall inherit his settlement.—*R. v. CLIFTON* (1707), 2 Bott, 17.

*See, also, No. 382, ante.*

**Reservation of derived settlement from widowed mother.**—*See Sub-sect. 2, ante.*

*ii. Widow acquiring New Settlement.*

*See, now, Poor Law Act, 1927 (c. 14), s. 110.*

**389. Child takes mother's settlement.**—*ST. GEORGE PARISH v. ST. KATHARINE'S, SOUTHWARK, No. 396, post.*

**390.** —.]—If a widow gains a settlement after her husband's death, such of her children as have never been emancipated, will be settled in the place in which she gains such settlement, & not in the place in which the husband was settled.—*WOODEND (INHABITANTS) v. PAULSPURY (INHABITANTS)* (1727), 2 Ld. Raym. 1473; 92 E. R. 458; *sub nom. PAULESBERRY PARISH v. WOODEND*, 2 Sess. Cas. K. B. 124; 2 Stra. 746; *sub nom. R. v. WOODEND, NORTHAMPTON (INHABITANTS)*, Fortes. Rep. 328; *sub nom. R. v. PAULSPERRY (INHABITANTS)*, 1 Barn. K. B. 11.

**391.** —.]—There is not any difference between a settlement derived from the father or mother; but wherever a child would have gained a settlement under the father, if he had been living, such child would do the same under the mother.—*BARTON TUFF v. HAPPEBSBURGH* (1735), 1 Sess. Cas. K. B. 399; 93 E. R. 117.

**392.** —.]—A certificate man purchased a freehold cottage in the township to which he was certificated, & died, leaving a widow & three children residing in the cottage at the time of his death, & who continued to reside there for ten weeks:—*Held*: the widow acquired a settlement in right of her quarantine, which she communicated to her children.—*R. v. LONG WITTENHAM (INHABITANTS)* (1784), 4 Doug. K. B. 193; 2 Bott, 569; 99 E. R. 836.

*Annotation:—Refd. R. v. Great Driffield* (1828), 8 B. & C. 684.

*iii. Widow acquiring No New Settlement.*

*See, now, Poor Law Act, 1927 (c. 14), s. 110.*

**393. Child retains father's settlement.**—*LIVERPOOL UNION v. PORTSEA OVERSEERS, No. 318, ante.*

**394.** —.]—*REIGATE UNION v. CROYDON UNION, HIGHWORTH & SWINDON UNION v. WESTBURY-ON-SEVERN UNION, MEDWAY UNION v. BEDMINSTER UNION, No. 317, ante.*

*iv. Widow remarrying.*

*See, now, Poor Law Act, 1927 (c. 14), s. 110.*

**395. Child gains no settlement.**—*R. v. SAX-MUNDHAM* (1700), Fortes. Rep. 307; 92 E. R. 864. *Annotation:—Apld. R. v. Hemlington* (1777), 1 Doug. K. B. 9, n.

**396.** —.]—(1) The mother in her widowhood may gain a settlement for the children under seven years of age.

(2) There is no distinction between the settlement of children with the father or mother, for they are as much hers as the father's, & nature obliges her as much as the father, to provide for them; so does the law & every argument that holds for their settlement with the father, holds as to their settlement with the mother.

The reason why children shall not gain a settlement where the wife gains a settlement only by intermarriage, is because it is not her family, but her husband's, & she cannot give the children any sustenance without the husband's leave.

Since she is equally punishable with her husband for deserting her children, & therefore could not leave them behind her, they must gain a settlement with her (*PARKER, C.J.*).—*ST. GEORGE PARISH v. ST. KATHARINE'S, SOUTHWARK* (1714), 1 Sess. Cas. K. B. 73; *Foley*, 3rd ed. 291; Fortes. Rep. 218; 93 E. R. 22.

*Annotations:—As to (2) Apld. PAULESBERRY PARISH v. WOODEND* (1726), 2 Sess. Cas. K. B. 124. *Consd. R. v. St. Mary, Newington* (1843), 12 L. J. M. C. 68.

**397.** —.]—If a widow having children marries a man of another parish, the children shall not go with the mother but for nurture, & after they gain a competent age, they shall be sent back to the parish where the mother was settled; for she cannot gain a settlement for them in this last parish, because under coverture, & having a settlement there herself as part of her husband's family,

**PART V. SECT. 3, SUB-SECT. 4.—**  
**A. (c) ii.**

**399 i. Child takes mother's settlement.**—*ST. JOHN COUNTY HOSPITAL v. PECK*, [1924] 2 D. L. R. 103; 51 N. B. R. 324.—*CAN.*

**399 ii.** —.]—A legitimate child was

born in the parish of C., which was also the parish of his father's birth. His father died, without having acquired a residential settlement elsewhere, while the child was still in pupilarity. Thereafter the mother who did not marry again, & with whom the child continued to live, acquired a residential settle-

ment in her own right in the parish of G. before the child reached puberty:—*Held*: the child, on reaching puberty, took the residential settlement of his mother, & not his own birth settlement.—*GLASGOW PARISH COUNCIL v. CROMDALE PARISH COUNCIL*, [1924] S. G. 862.—*SCOT.*

**Sect. 3.—Derivative settlements: Sub-sect. 4, A. (c) w. & v., & (d), B. & C. (a) & (b). Sect. 4: Sub-sect. 1.]**

from whom she cannot be severed.—*R. v. ST. GILES PARISH (INHABITANTS) (1732)*, Kel. W. 217; 25 E. R. 577.

398. —.]—On the marriage of a widow, having children under the age of sixteen, such children do not acquire the settlement of the second husband, by Poor Law Amendment Act, 1834 (c. 76), s. 57.—*R. v. WALTHAMSTOW (INHABITANTS) (1837)*, 6 Ad. & El. 301; 1 Nev. & P. K. B. 460; Nev. & P. M. C. 178; Will. Woll. & Dav. 23; 6 L. J. M. C. 52; 1 J. P. 5; 1 Jur. 39; 112 E. R. 115.

*Annotations*.—*Consd. R. v. Stafford, R. v. Costock (1839)*, 10 Ad. & El. 417. *Reid. R. v. Wendon (1838)*, 7 Ad. & El. 819; *R. v. St. Mary, Newington (1843)*, 4 Q. B. 581; *Llanelly Union v. Neath Union, [1893] 2 Q. B. 38*.

399. —.]—Under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, which enacts that no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, & in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, & shall retain the settlement so taken until it shall acquire another; children under the age of sixteen gain no settlement by a second marriage of their widowed mother.—*KEYNSHAM UNION v. BEDMINSTER UNION (1878)*, 3 Q. B. D. 344; 47 L. J. M. C. 73; 38 L. T. 507; 42 J. P. 597; 26 W. R. 591.

*Annotations*.—*Reid. R. v. Bridgnorth Union (1882)*, 9 Q. B. D. 765; *Llanelly Union v. Neath Union, [1893] 2 Q. B. 38*.

400. —.]—Under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, as interpreted by the House of Lords in *Reigate Union v. Croydon Union*, No. 317, *ante*, the children under sixteen years of age of a first marriage do not follow the settlement derived by their mother from a second husband.—*LLANELLY UNION v. NEATH UNION, [1893] 2 Q. B. 38*; 62 L. J. M. C. 112; 69 L. T. 194; 57 J. P. 694, D. C.

**v. Father's Settlement Unknown.**

*See now*, Poor Law Act, 1927 (c. 14), s. 110.

401. Children take settlement of mother.]—*WEST DERRY UNION v. ATCHAM UNION*, No. 332, *ante*.

Whether restriction of derivative settlements applies.]—*See Sect. 3, sub-sect. 2, ante*.

**(d) Children gaining own Settlement.**

*See Part V., Sect. 5, sub-sect. 3, A., post*.

**B. Illegitimate Children under Sixteen.**

*See now*, Poor Law Act, 1927 (c. 14), s. 110.

402. Follow mother's settlement.]—A bastard born in L., pending an order of removal of his mother from S. to L., which was afterwards quashed, was held to be settled in S., & relief given to him by the parish officers of the parish which was the birth settlement of the mother, was held not to raise a presumption, under the circumstances of his settlement there.—*R. v. GREAT SALKELD (INHABITANTS) (1817)*, 6 M. & S. 408; 105 E. R. 1295.

*Annotations*.—*Consd. R. v. Basingstoke (1850)*, 14 Q. B. 611. *Reid. R. v. Marylebone (1851)*, 15 J. P. 258.

403. —.]—A bastard, born since the passing of Poor Law (Amendment) Act, 1834 (c. 76), attaining the age of sixteen without having acquired any settlement of its own, is settled in the

place of its birth, though the mother is settled elsewhere, & the bastard, till sixteen, had & followed the mother's settlement (*per Cur.*).—*BODENHAM OVERSEERS v. ST. ANDREWS OVERSEERS (1853)*, 1 E. & B. 465; 118 E. R. 510; *sub nom. ST. ANDREW'S, WORCESTER (CHURCHWARDENS & OVERSEERS) v. BODENHAM (CHURCHWARDENS & OVERSEERS)*, 22 L. J. M. C. 39; 17 J. P. 360; *sub nom. R. v. ST. ANDREW, WORCESTER (CHURCHWARDENS)*, 20 L. T. O. S. 221; 17 Jur. 206; 1 W. R. 129.

*Annotations*.—*Consd. R. v. Sutton le Brailles (1850)*, 5 E. & B. 814; *Tenterden Union v. St. Mary, Islington Union (1878)*, 47 L. J. M. C. 81; *R. v. Bridgnorth Union (1882)*, 9 Q. B. D. 765; *Northwich Union v. St. Pancras Union (1888)*, 22 Q. B. D. 164; *Poplar Borough Union v. West Ham Union (1914)*, 78 J. P. Jo. 281. *Reid. Salford Union v. Manchester Overseers (1882)*, 10 Q. B. D. 172; *R. v. Marylebone Union (1884)*, 13 Q. B. D. 15; *Reigate Union v. Croydon Union, Highworth & Swindon Union v. Westbury-on-Severn Union, Medway Union v. Bedminster Union (1889)*, 14 App. Cas. 465.

404. —.]—E., a single woman, residing in parish C. in the S. union, being about her confinement, went to the relieving officer of the union for an order to the workhouse, which he promised her when she should be nearer her confinement; but being suddenly seized with labour, she went to the workhouse & was admitted, & a child was born. The workhouse, though out of the union, was by statute deemed within it:—*Held*: at the time of E. going to the workhouse she was chargeable to the C. parish, & therefore the child's settlement was in C., & the mother being separated from the child, it was removable to C., though under age of nurture.—*ST. CLEMENT DANES (CHURCHWARDENS) v. ST. GILES-IN-THE-FIELDS (CHURCHWARDENS) (1862)*, 27 J. P. 212.

405. —.]—*TENTERDEN UNION v. ST. MARY, ISLINGTON UNION*, No. 443, *post*.

406. —.]—Under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, an illegitimate, like a legitimate, child cannot gain a settlement for itself while under the age of sixteen, but must follow the settlement of its mother.—*MANCHESTER OVERSEERS v. ORMSKIRK UNION (1890)*, 24 Q. B. D. 678; 59 L. J. M. C. 103; 62 L. T. 661; 54 J. P. 487; 38 W. R. 778, D. C.

*Annotations*.—*Dbtd. West Ham Union v. Holbeach Union, [1903] 2 K. B. 627*; *Woolwich Union v. Fulham Union, [1906] 2 K. B. 240*.

407. — Mother dying before child sixteen.]—Under Poor Law (Amendment) Act, 1834 (c. 76), s. 71, a bastard child, whose mother has acquired a settlement different from the birth settlement of the child, & then died whilst the child is under sixteen, keeps the settlement of the mother till attaining the age of sixteen.—*R. v. SUTTON LE BRAILLES (INHABITANTS) (1850)*, 5 E. & B. 814; 25 L. J. M. C. 57; 26 L. T. O. S. 199; 20 J. P. 502; 2 Jur. N. S. 210; 4 W. R. 206; 119 E. R. 684.

Whether relegated to birth settlement—Mother's derivative settlement—Derived from subsequent marriage.]—*See Nos. 433–438, post*.

—.]—*See Nos. 439–441, post*.

— Reservation of derived settlement generally.]—*See Sub-sect. 2, ante*.

**C. Persons over Sixteen.**

**(a) Legitimate.**

408. Child not having gained independent settlement—Takes father's settlement by estate.]—*DEDDINGTON PARISH v. DUNFREW PARISH (1743)*, 2 Stra. 1193; 93 E. R. 1122; *sub nom. R. v. DEDDINGTON (INHABITANTS)*, Burr. S. C. 220.

*Annotations*.—*Apld. R. v. Leek Wootton (1812)*, 16 East, 118. *Reid. R. v. Groat Driffield (1826)*, 8 B. & C. 684.

409. ———.]—The children of all parents must have the settlement of the father, till they acquire another for themselves. Here, the son is not stated to have acquired one of his own: Therefore he had such as he derived from his father (LORD MANSFIELD, C.J.).—*R. v. COLD ASHTON (INHABITANTS)* (1758), Burr. S. C. 444.

*Annotations*:—*Apld.* *R. v. Leek Wootton* (1812), 16 East, 118. *Refd.* *R. v. Tarrant Launceston* (1782), Cald. Mag. Cas. 209; *R. v. Offchurch* (1789), 3 Term Rep. 114; *R. v. Horsley* (1807), 8 East, 403; *R. v. Great Driffield* (1828), 8 B. & C. 684; *R. v. Okeford Fitzpaine* (1830), 1 B. & Ad. 254; *R. v. Rothwell* (1845), 14 L. J. M. C. 159. *Mentd.* *R. v. Butterton* (1796), 6 Term Rep. 554; *R. v. Canford Magna* (1817), 6 M. & S. 355.

410. ———.]—*R. v. EDGEWORTH (INHABITANTS)*, No. 533, *post*.

411. ———]—Takes father's settlement by residence.]—A legitimate child left the parish of his birth, & went with his father into another parish, where the father resided & acquired a settlement while the child was under sixteen, & where the child resided with his father until he was over sixteen. Afterwards they left that parish, & the child became chargeable as a pauper:—*Held*: the pauper while under the age of sixteen had acquired a derivative settlement from his father in the parish in which they had resided, & not having afterwards acquired any other settlement, he retained such derivative settlement.—*ST. PANCRA'S UNION v. NORWICH INCORPORATION GUARDIANS* (1887), 18 Q. B. D. 521; 56 L. J. M. C. 37; 56 L. T. 311; 51 J. P. 343; 35 W. R. 547, D. C.

*Annotation*:—*Consd.* *Kingston-upon-Hull Incorporation for the Poor v. Hackney Union*, [1911] 1 K. B. 748.

Inability to derive settlement from mother—During lifetime of father.]—*See* No. 327, *ante*.

#### (b) *Illegitimate*.

*See, now*, Poor Law Act, 1927 (c. 14), s. 110.

Whether relegated to birth settlement—Mother's settlement derivative.]—*See* Sect. 4, sub-sect. 2, B. (a), *post*.

### SECT. 4.—SETTLEMENT BY BIRTH.

#### SUB-SECT. 1.—PRESUMPTION OF.

*See, now*, Poor Law Act, 1927 (c. 14), s. 110.

412. Place of birth *prima facie* place of settlement.]—The place of birth is *prima facie* the place of settlement.—*R. v. HEATON NORRIS (INHABITANTS)* (1796), 6 Term Rep. 653; 101 E. R. 754.

*Annotation*:—*Apld.* *Headington Union v. Ipswich Union* (1890), 24 Q. B. D. 414.

413. ———]—Slightest possible evidence of settlement.]—Evidence of the relief of a pauper's father & his family by the overseers of the poor of parish A. forty years back, the pauper being thirty-eight years of age, & such paupers, so relieved, being resident in another parish B. at the time, so as to negative their being relieved by the parish A. as casual poor, is evidence of the settlement of the pauper, notwithstanding the pauper was born at another parish:—*Semble*: the place of birth is the slightest possible evidence of settlement; it is only evidence of the local residence of the mother at the time.—*R. v. WAKEFIELD (INHABITANTS)* (1804), 5 East, 335; 1 Smith, K. B. 512; 102 E. R. 1099.

414. ———]—Without residence of forty days.]—(1) Under a statement, as ground of objection to an order of removal, that the pauper does not

appear by the exam nations to have been "actually chargeable to your said parish" when the order was made, appts. cannot object that the pauper does not appear by the examinations to have been resident in the removing parish at the time. Birth confers a settlement without a residence of forty days. Where an order of removal described the pauper as a widow, & the examination mentioned the name of her deceased husband, but did not show whether he had any settlement, nor that any inquiry has been made on the subject:—*Held*: she might be removed to the place of her birth settlement. (2) An order of removal stated that it was made on the complaint of the overseers of the removing parish, not mentioning the churchwardens:—*Held*: sufficient.—*R. v. WATFORD (INHABITANTS)* (1840), 9 Q. B. 626; 2 New Mag. Cas. 13; 2 New Sess. Cas. 400; 10 L. J. M. C. 1; 8 L. T. O. S. 136; 11 J. P. 30; 10 Jur. 1053; 115 E. R. 1413.

*Annotation*:—*Generally*, *Refd.* *R. v. Hartpury* (1847), 2 New Mag. Cas. 185.

415. ———]—Pauper children born in England of Irish parents who have no settlement in England cannot be removed to Ireland under Poor Removal Act, 1845 (c. 117), s. 2, if their parents are dead or have deserted them; but may be removed to the place of their birth.

*Prima facie* every English-born subject has a settlement, and that settlement is the place of birth. . . . As soon as it is shown that the father or mother have a settlement, that becomes the settlement of the children; but if the father or mother have none, or their settlement cannot be ascertained, then that which is always potentially in existence takes effect; the birth settlement comes into operation, because not displaced by any other settlement (COLERIDGE, J.).—*R. v. ALL SAINTS, DERBY (INHABITANTS)* (1849), 14 Q. B. 207; 3 New Mag. Cas. 231; 3 New Sess. Cas. 653; 19 L. J. M. C. 14; 14 L. T. O. S. 152; 14 J. P. 23; 13 Jur. 1100; 117 E. R. 84.

*Annotations*:—*Apld.* *R. v. Newchurch* (1802), 3 B. & S. 107; Poor Law Comrs. of Ireland v. Liverpool Vestry (1869), L. R. 5 Q. B. 79. *Consd.* *R. v. Headington Union* (1884), 50 L. T. 444. *Apld.* *Headington Union v. Ipswich Union* (1890), 62 L. T. 547. *Refd.* *R. v. St. Giles without Cripplegate* (1851), 17 Q. B. 636; *R. v. St. Marylebone* (1851), 16 Q. B. 352; *R. v. St. Marylebone, Re Lawrence* (1851), 15 Jur. 289.

416. ———]—Legitimate children.]—*WHITE CHAPPELL PARISH v. STEPNEY PARISH*, No. 304, *ante*.

417. ———]—The legitimate child of persons having no settlement is settled where it is born, & may be removed thither, unless that parish can show that it is settled elsewhere.—*SPITTLEFIELDS v. ST. ANDREWS, HOLBOURN* (1700), 1 Ld. Raym. 567; Fortes. Rep. 307; 12 Mod. Rep. 383; 91 E. R. 1279.

418. ———]—Father still living.]—*R. v. WHITLEY* (1785), 2 Bott. 13.

*Annotations*:—*Apld.* *Headington Union v. Ipswich Union* (1890), 24 Q. B. D. 414. *Refd.* *R. v. St. Mary, Leicester* (1835), 3 Ad. & El. 644.

419. Presumption made absolute—Parent having no settlement or settlement unascertainable—Legitimate children.]—*WHITE CHAPPELL PARISH v. STEPNEY PARISH*, No. 304, *ante*.

420. ———]—*ST. SAVIOUR'S SOUTHWARK PARISH v. CRIPPLEGATE PARISH* (1710), 11 Mod. Rep. 267; 88 E. R. 1031; *sub nom.* *CRIPPLEGATE (INHABITANTS) v. ST. SAVIOUR'S SOUTHWARK*, 2 Bott. 12; *Foley's Poor Laws*, 3rd ed. 305.

421. ———]—*R. v. ST. GILES' PARISH*, No. 375, *ante*.

#### PART V. SECT. 4, SUB-SECT. 1.

e. *Whether birth settlement lost—By acquisition of Canadian domicile.*]—*GLASGOW PARISH COUNCIL v. RUTHERGLEN PARISH COUNCIL*, [1925] S. C. 79.—SCOT.

**Sect. 4.—Settlement by birth: Sub-sects. 1 & 2, A. & B. (a).]**

**422.** ————.] — **ST. GILES' READING PARISH v. EVERSLEY BLACKWATER PARISH**, No. 338, *ante*.

**423.** ————.] — **R. v. ST. MATTHEW, BETHNAL GREEN (INHABITANTS)**, No. 379, *ante*.

**424.** ———— **Of Irish parents.**] — A pauper, born in England of Irish parents who have no settlement in England, acquires a birth settlement there, to which he and his family may be removed after his emancipation. 3 & 4 Will. 4, c. 40, does not affect such right of settlement.—**R. v. PRESTON (INHABITANTS)** (1840), 12 Ad. & El. 822; Arn. & H. 116; 4 Per. & Dav. 509; 10 L. J. M. C. 22; 5 J. P. 133; 5 Jur. 289; 113 E. R. 1026.

**Annotations:**—**Apld.** **R. v. All Saints, Derby** (1849), 14 Q. B. 207. **Foll.** **R. v. Newchurch** (1862), 3 B. & S. 107. **Refd.** **R. v. Cookham Union** (1882), 47 J. P. 116.

**425.** ———— **Of foreign parents.**] — Every child born in England has *prima facie* a birth settlement, if no other has been acquired from its parents. F., the child of Irish parents, neither of whom had a settlement in England, was born in England in parish N., & lived with his parents in another parish beyond the age of sixteen, when, being a lunatic, he was sent to an asylum:—**Held:** the order of maintenance was properly made on the parish of N., & not on the county.—**R. v. NEWCHURCH (INHABITANTS)** (1862), 3 B. & S. 107; 1 New Rep. 23; 32 L. J. M. C. 19; 7 L. T. 271; 9 Jur. N. S. 536; 11 W. R. 24; *sub nom.* **NEWCHURCH OVERSEERS v. TOTTINGTON LOWER END OVERSEERS**, 27 J. P. 245.

**426.** ———— **Illegitimate children—Of Irish parents.**] — **R. v. ST. BOTOLPH, ALDGATE** (1841), 13 Jur. 1102, n.

**427.** ————.] — An illegitimate child born in England of a woman having no settlement & not being chargeable, is removable to the place of its birth, although under the age of sixteen.—**R. v. ST. GILES IN THE FIELDS (INHABITANTS)** (1854), 2 C. L. R. 1486; 23 L. T. O. S. 112; 18 J. P. 522; 2 W. R. 419.

**SUB-SECT. 2.—REBUTTAL OF PRESUMPTION.**

**A. Legitimate Children.**

*See, generally,* Poor Law Act, 1927 (c. 14), s. 110.

**428. Rebuttal upon proof of settlement of either parent.**] — To do away with a birth settlement by proof of the mother's settlement, it is not necessary to show previously that the father's settlement cannot be found.—**R. v. ST. MARY, LEICESTER (INHABITANTS)** (1835), 3 Ad. & El. 644; 1 Har. & W. 330; 5 Nev. & M. K. B. 215; 3 Nev. & M. M. C. 241; 4 L. J. M. C. 95; 111 E. R. 557.

**Annotations:**—**Foll.** **R. v. Strand Union** (1872), 37 J. P. 101. **Refd.** **R. v. Yolvertoft** (1845), 6 Q. B. 801.

**429. Under sixteen years of age—Restriction on application of derivative settlements—Whether relegated to birth settlement—Parent's settlement derivative.**] — L., a child, was born in S. union, & lived with its parents more than three years, when first the father, then the mother died. The child was then taken by a relative to the E. union, within which was the mother's maiden settlement, & there the child became chargeable. The father's settlement was unknown:—**Held:** the child could not be removed to the S. union, for its settlement was that of the mother, which was within E. union.—**R. v. STRAND UNION** (1872), 37 J. P. 101.

**430.** ————.] — Where in order to ascertain the settlement of a child within the

exceptions mentioned in Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, it is necessary to ascertain the settlement of the father, it is not sufficient to show merely the father's birth settlement where he has a derivative settlement, but such derivative settlement may be inquired into to repel the presumption arising from birth settlement; & as soon as it appears that the father's settlement is derivative, Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, provides that such child shall be deemed to be settled in the parish in which he or she was born.—**WOODSTOCK UNION v. ST. PANCRAS** (1878), 4 Q. B. D. 1; 48 L. J. M. C. 1; 39 L. T. 256; 43 J. P. 5; *sub nom.* **R. v. ST. PANCRAS (CHURCHWARDENS, ETC.)**, 27 W. R. 229, D. C.

**Annotations:**—**Dist.** **Hereford Union v. Warwick Union** (1879), 48 L. J. M. C. 111. **Consd.** **R. v. Bridgnorth Union** (1882), 9 Q. B. D. 765.

**431.** ————.] — Where neither the father nor mother of a pauper child has acquired a settlement in his or her own right, & after the father has died the widowed mother has deserted such child, who is under the age of sixteen, & has not acquired a settlement for itself, such child is by Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, to be deemed to be settled in the parish in which it was born, & an order for its removal to a parish in which it was not born but in which its father was born was quashed, because, in that case, it could not be shown what settlement such child derived from its father or mother without inquiring into the derivative settlement of such parent, which was prohibited by Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35.—**HEADINGTON UNION v. ST. OLAVE'S UNION** (1884), 13 Q. B. D. 293; 53 L. J. M. C. 91; 48 J. P. 647; *sub nom.* **R. v. HEADINGTON UNION**, 50 L. T. 444; 32 W. R. 738, C. A.

**Annotation:**—**Refd.** **Plymouth Union v. Axminster Union** (1898), 67 L. J. Q. B. 871.

**432.** ————.] — **BARTON-UPON-IRWELL UNION v. WYCOMBE UNION**, No. 335, *ante*.

**Follows settlement of parent.**] — *See* Sect. 3, sub-sect. 4, A. (a), *ante*.

**Relegation to birth settlement where parent's settlement unknown or non-existent.**] — *See* Sub-sect. 1, *ante*.

**B. Illegitimate Children.**

**(a) In General.**

*See, now,* Poor Law Act, 1927 (c. 14), s. 110.

**433. Whether relegated to birth settlement where mother's settlement derivative—Under sixteen years of age—Settlement derived from subsequent marriage.**] — Bastard children born since the passing of Poor Law (Amendment) Act, 1834 (c. 76), will, under sect. 71, take not only such settlements as their mother may acquire in her own right, but also the settlement of the husband whom she may subsequently marry.—**R. v. ST. MARY, NEWINGTON (INHABITANTS)** (1843), 4 Q. B. 581; 2 Gal. & Dav. 686; 12 L. J. M. C. 68; 1 L. T. O. S. 107; 7 J. P. 321; 7 Jur. 440; 114 E. R. 1017.

**Annotations:**—**Consd.** **R. v. Bridgnorth Union** (1882), 9 Q. B. D. 765; **Relgate Union v. Croydon Union, High-worth & Swindon Union v. Westbury-on-Severn Union, Medway Union v. Bedminster Union** (1889), 14 App. Cas. 465. **Refd.** **R. v. Sutton-under-Brallies** (1856), 25 L. J. M. C. 57; **Salford Union v. Manchester Overseers** (1882), 10 Q. B. D. 172; **Llanely Union v. Neath Union**, [1895] 2 Q. B. 38.

**434.** ————.] — The mother of an illegitimate child now under sixteen was a married woman, who was divorced from her husband three years before the birth of such child, & the mother's

settlement was that of her husband in B., she having acquired no other since the divorce:—*Held*: the child's settlement was not the settlement acquired from the mother, but was that of the child's own place of birth.—**MANCHESTER OVERSEERS v. ST. PANCRA'S UNION** (1879), 4 Q. B. D. 409; 41 L. T. 218; 43 J. P. 800; 27 W. R. 885, D. C.

*Annotations*:—**Fold. R. v. Portsea Union** (1881), 7 Q. B. D. 384. **Consd. R. v. Bridgnorth Union** (1882), 9 Q. B. D. 785; **R. v. Marylebone Union** (1884), 13 Q. B. D. 15; **Woolwich Union v. Fulham Union**, [1905] 2 K. B. 203. **Relf. Fulham Union v. Portsea Union** (1881), 50 L. J. M. C. 144; **Hollingbourn Union v. West Ham Union** (1881), 6 Q. B. D. 580; **Salford Union v. Manchester Overseers** (1882), 10 Q. B. D. 172.

**435.** ———.]—Under Divided Parishes & Poor Law (Amendment) Act 1876 (c. 61), s. 35, an illegitimate child under sixteen, born after the passing of that Act, whose mother has since its birth acquired a derivative settlement, does not take the settlement which its mother had at the time of its birth, but is to be deemed to be settled in the place where it was born.—**NORTHWICH UNION v. ST. PANCRA'S UNION** (1888), 22 Q. B. D. 164; 58 L. J. M. C. 73; 60 L. T. 444; 53 J. P. 196; 37 W. R. 206; 5 T. L. R. 100, C. A.

**436.** ———.]—An illegitimate child under the age of sixteen can acquire an independent settlement under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34.

An order of justices adjudged the pauper, an illegitimate child, aged about two years, to be settled in the West Ham union. E., the mother of the pauper, herself an illegitimate child, M. C., the mother of E., & A. C., who married M. C. after the birth of E., all resided together in the parish of West Ham, in the West Ham union, for three years, in such a manner & under such circumstances in each of such years as would, in accordance with the several statutes in that behalf, render them irremovable. During the whole period of such residence E. was under the age of sixteen years:—*Held*: (1) E., although under the age of sixteen years, had acquired an independent status of irremovability, & consequently under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, was deemed to be settled in the parish of West Ham; (2) the pauper took the settlement of his mother, E., under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, & the order of justices must stand.—**WEST HAM UNION v. HOLBEACH UNION**, [1905] A. C. 450; 74 L. J. K. B. 808; 93 L. T. 557; 69 J. P. 442; 54 W. R. 137; 21 T. L. R. 713; 3 L. G. R. 1179, H. L.; *affg.*, [1904] 2 K. B. 121, C. A.

*Annotations*:—*As to* (1) **Consd. Birmingham Union v. Tewkesbury Union** (1904), 53 W. R. 268; **Woolwich Union v. Fulham Union**, [1906] 2 K. B. 240. *Apld.* **Kingston-upon-Hull Incorporation for the Poor v. Hackney Union**, [1911] 1 K. B. 748. **Consd. Paddington Union v. Westminster Union**, [1915] 2 K. B. 644; **Tendring Union v. Braintree Union**, [1920] 2 K. B. 647; **Barton-upon-Irwell Union v. Wycombe Union**, [1926] 2 K. B. 3. *Relf.* **Tewkesbury Union v. Birmingham Union**, [1904] 2 K. B. 395; **Hackney Union v. Kingston-upon-Hull Incorporation for the Poor**, [1912] A. C. 475; **Paddington Union v. St. Matthews, Bethnal Green Union**, [1913] 1 K. B. 508; **Daventry Union v. Coventry Union**, [1917] 1 K. B. 289; **Lexden & Winstree Union v. Windsor Union**, [1921] 2 K. B. 143.

**437.** ———.]—**LEXDEN & WINSTREE UNION v. WINDSOR UNION**, No. 334, *ante*.

**438.** ———.]—**BARTON-UPON-IRWELL UNION v. WYCOMBE UNION**, No. 335, *ante*.

**439.** ———.]—Under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 16), an illegitimate child under sixteen does not take the settlement of its mother, where such settlement has been derived from the mother's father, but such child is remitted to its birth settlement.—**R.**

**v. MARYLEBONE UNION** (1884), 13 Q. B. D. 15; 50 L. T. 442; 48 J. P. 566; *sub nom.* **MARYLEBONE UNION v. WYCOMBE UNION**, 53 L. J. M. C. 88, C. A.

*Annotations*:—**Consd. Headington Union v. St. Olave's Union** (1884), 13 Q. B. D. 293. *N.F.* **Barton-upon-Irwell Union v. Wycombe Union**, [1926] 2 K. B. 3. *Relf.* **Northwich Union v. St. Pancras Union** (1888), 22 Q. B. D. 164.

**440.** ———.]—**REIGATE UNION v. CROYDON UNION, HIGHWORTH & SWINDON UNION v. WESTBURY-ON-SEVERN UNION, MEDWAY UNION v. BEDMINSTER UNION**, No. 317, *ante*.

**441.** ———.]—**TENDRING UNION v. BRAINTREE UNION**, No. 323, *ante*.

**442.** ——— **Persons over sixteen years of age.**]—**BODENHAM OVERSEERS v. ST. ANDREWS OVERSEERS**, No. 403, *ante*.

**443.** ———.]—The settlement of an illegitimate child, twenty years old when Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), came into operation, is its birth settlement, the mother's settlement having been lost when the child became sixteen. Sect. 35 of the Act is limited to the case of children having a derivative settlement at the time the Act came into operation.—**TENTERDEN UNION v. ST. MARY, ISLINGTON UNION** (1878), 47 L. J. M. C. 81; 38 L. T. 485; 42 J. P. 247, D. C.

*Annotation*:—**Distd. R. v. Portsea Union** (1881), 7 Q. B. D. 384.

**444.** ———.]—On inquiry as to the place of settlement of an illegitimate pauper, it was proved that the pauper was born in P. & the pauper's mother in S., & that neither of them had acquired a settlement of her own. Facts were proved upon which the ct. held that the father of the pauper's mother had a settlement & that the pauper's mother derived that settlement from him, but did not make the necessary inquiries to ascertain what that settlement was, & adjudged that the pauper's settlement was in P. where she was born:—*Held*: the adjudication was right; the case came within Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 (3), & since it could not be shown what settlement the pauper derived from her mother without inquiring into the derivative settlement of the mother, the pauper must be deemed to be settled in the parish where she was born.—**PLYMOUTH UNION v. AXMINSTER UNION**, [1898] A. C. 586; 67 L. J. Q. B. 871; 79 L. T. 4; 62 J. P. 612; 47 W. R. 33; 14 T. L. R. 533, H. L.; *affg.* **S. C. sub nom.** **AXMINSTER UNION v. PLYMOUTH UNION**, 61 J. P. 228, C. A.

**445. Birth in extra-parochial place.**]—Where a district previously extra-parochial, was by Act of Parliament made a township; & it was provided, that from thenceforth it should maintain its own poor & repair its own roads, & have the like powers, privileges, & immunities, & be subject to the same regulations as other townships within the county:—*Held*: this clause was prospective only, & a bastard born within the district previously to passing the Act was not settled there.—**R. v. OAKMERE (INHABITANTS)** (1822), 5 B. & Ald. 775; 1 Dow. & Ry. K. B. 427; 1 Dow. & Ry. M. C. 109; 106 E. R. 1374.

*Annotations*:—**Consd. R. v. Oldbury** (1835), 4 Ad. & El. 167; **R. v. Tipton** (1842), 3 Q. B. 215; **R. v. Hunnington** (1843), 5 Q. B. 273. **Distd. R. v. St. Martin, New Sarum** (1846), 9 Q. B. 241. **Consd. Worcester Union v. Birmingham Union** (1887), 65 J. P. 771.

**446.** ———.]—An illegitimate child born in an extra-parochial place does not follow the settlement of its mother.—**R. v. ST. NICHOLAS, LEICESTER (INHABITANTS)** (1824), 2 B. & C. 889;



*Sect. 4.—Settlement by birth: Sub-sect. 2, B. (a), (b) & (c); sub-sect. 3, A. & B. Sect. 5: Sub-sect. 1.]*

4 Dow. & Ry. K. B. 402; 2 Dow. & Ry. M. C. 253; 107 E. R. 612.

*Annotations:—***Refd.** R. v. Wilson (1834), 4 L. J. M. C. 19; **Salford Union v. Manchester Overseers** (1882), 10 Q. B. D. 172.

(b) *Removal of Mother before Birth.*

447. *Necessity for fraud—To render removal inoperative.*—**R. v. ASTLEY** (INHABITANTS), No. 460, *post*.

448. *Whether child's settlement that of mother before removal—Fraudulent removal.*—**TREWKS-BURY PARISH v. TWYNING** (1632), 2 Bulst. 349; 80 E. R. 1176.

*Annotations:—***Consd.** R. v. Mattersey (1832), 4 B. & Ald. 211. **Distd.** R. v. Wilson (1834), 2 Ad. & El. 230.

449. ————]—**ANON.** (*circa* 1714), cited in 1 Sess. Cas. K. B. p. 72; 93 E. R. 21.

450. ————]—**MASTERS v. CHILD** (1699), 3 Salk. 66; 91 E. R. 695.

*Annotations:—***Distd.** R. v. Wilson (1834), 2 Ad. & El. 230. **Refd.** R. v. Mattersey (1832), 4 B. & Ald. 211.

451. ———— **Fraud of parish officers.**—If a woman pregnant of a bastard be fraudulently removed by parish officers, for the purpose of preventing the bastard from becoming chargeable to their parish, the child is settled in the parish from which the mother was so removed; but not if the mother be so fraudulently removed by a parishioner liable to pay rates, not being a parish officer.—**R. v. MATTERSEY** (INHABITANTS) (1832), 4 B. & Ald. 211; 1 Nev. & M. K. B. 49; 2 L. J. M. C. 16; 110 E. R. 435.

*Annotation:—***Apld.** R. v. Wilson (1834), 2 Ad. & El. 230.

452. ———— **Fraud of parishioner.**—**R. v. MATTERSEY** (INHABITANTS), No. 451, *ante*.

453. ———— **Removal under illegal order.**—Bastard born pending an illegal order of removal from A. is settled in A.—**MUCH-WALTHAM** (INHABITANTS) **v. PERAM** (INHABITANTS) (1696), 2 Salk. 474; Sett. & Rem. 276; 91 E. R. 408.

454. ————]—Bastard born in B. pending an illegal order of removal of the mother from A. to B., which is after reversed, is settled in A.—**WOOD'S CASE** (1698), 1 Salk. 121; Sett. & Rem. 149; 91 E. R. 114.

455. ————]—If a woman with child be fraudulently removed from A. to B. & be delivered at B. & the order is afterwards quashed, the child is not settled at B.—**WESTBURY** (INHABITANTS) **v. CORTHAM** (INHABITANTS) (1704), 6 Mod. Rep. 213; 1 Salk. 121; 2 Salk. 592; Holt, K. B. 580; Sett. & Rem. 148; 87 E. R. 965.

456. ———— **Removal under legal order—Fraudulent return of mother.**—Where a woman with child of a bastard is removed from A. to B. & privately returns to A. & is there delivered, the settlement of the bastard is in B.—**LANDINABOE PARISH v. MUCH BIRCH PARISH** (1721), 1 Stra. 476; 93 E. R. 644.

*Annotation:—***Distd.** R. v. Halifax (1831), 2 B. & Ald. 211.

457. ————]—It was held in Holt's time if a poor person was legally removed, & afterwards by stealth or contrivance of the officers got into another parish, & was there delivered, the child was esteemed to belong to the parish to which the mother had been legally removed & not to that where born (**RAYMOND, C.J.**).—**R. v. TOWCESTER OVERSEERS** (1728), 1 Sess. Cas. K. B. 339; 93 E. R. 99; *sub nom.* **ALDENHAM PARISH v. TOLCHISTER**, 1 Sess. Cas. K. B. 404.

458. ————]—An unmarried pregnant pauper was removed by an order of justices from H. to M., & received by the parish officers there. On the following day she clandestinely, &

of her own accord, returned to H., where she was delivered of a bastard, before the time for appealing against the order of removal had expired. The bastard was settled where born.—**R. v. HALIFAX** (INHABITANTS) (1831), 2 B. & Ald. 211; 9 L. J. O. S. M. C. 131; 109 E. R. 1122.

459. **Mother casually in parish—Persuaded to remove.**—**MASTERS v. CHILD** (1699), 3 Salk. 66; 91 E. R. 695.

*Annotations:—***Apld.** R. v. Mattersey (1832), 4 B. & Ald. 211. **Distd.** R. v. Wilson (1834), 2 Ad. & El. 230.

460. **Mother allowed to leave in search of putative father.**—A woman pregnant with a child likely to be born a bastard, goes with the consent of the officers of the township where she is settled to inquire after the father, in order to give intelligence of him to the overseers. On her return she is delivered of the bastard in another township:—*Held*: the settlement of the bastard is in the latter township.

There must in general be circumstances of fraud to prevent the place of a bastard's birth becoming the place of his settlement.—**R. v. ASTLEY** (INHABITANTS) (1785), 4 Doug. K. B. 389; 2 Bott. 5; Cald. Mag. Cas. 559; 99 E. R. 937.

*Annotation:—***Refd.** R. v. St. Marylebone (1851), 20 L. J. M. C. 173.

(c) *Birth in Prison, Hospital or Workhouse.*

**Child born in gaol.**—*See now*, Poor Law Act, 1927 (c. 14), s. 117 (2).

461. ———— **Settlement of mother taken.**—**ANON.** (1638), 2 Bulst. 358; 80 E. R. 1183.

462. ————]—Bastard born in a gaol settled with the mother.—**ELSLING PARISH v. HERFORDSHIRE COUNTY GAOL** (1716), 1 Sess. Cas. K. B. 99; 10 Mod. Rep. 334; 2 Bott. 3; 93 E. R. 29.

**Child born in lying-in hospital.**—*See* Poor Law Act, 1927 (c. 14), s. 117.

463. ———— **What is lying-in hospital—Room in workhouse appropriated to such purpose—Expense charged to general workhouse charges.**—A room in a parish workhouse, licensed pursuant to Lying-in Hospitals Act, 1773 (c. 82), & appropriated to the reception of & used for the purpose of delivery of pregnant women resident within the parish, whether settled there or elsewhere, & the expense of which room was defrayed, in common with the general expenses of the workhouse out of the parish rates, is not an hospital or place within Lying-in Hospitals Act, 1773 (c. 82).—**R. v. MANCHESTER** (INHABITANTS) (1821), 4 B. & Ald. 504; 106 E. R. 1022.

**Child born in workhouse.**—*See* Poor Law Act, 1927 (c. 14), s. 117 (1).

#### SUB-SECT. 3.—EVIDENCE.

##### A. *Place of Birth.*

464. **Sufficiency of proof—Early recollections of childhood.**—**R. v. TROWBRIDGE** (INHABITANTS), No. 944, *post*.

465. ———— **Supported by certificate of baptism.**—Upon an application to two justices for an order for the removal of a pauper more than sixty years old, who was said to have a birth settlement in township A., the pauper proved that as early as he could recollect he had lived with his mother's father in township A. & a certificate of the pauper's baptism was produced, bearing date about the time of the pauper's supposed birth, & copied from a register of baptisms for township A. found in the register book of the church of the parish of which A. was a township:—*Held*: this was some evidence that the pauper was born in township A.—**R. v. OVENDEN** (INHABITANTS)



(1848), 3 New Mag. Cas. 27; 11 L. T. O. S. 222; 12 J. P. 565.

**466.** — Of sister of pauper—Supported by evidence of marriage of parents & baptism of children.]—For the purpose of showing a birth settlement in C., a witness was called who proved that she was the sister of the pauper's mother, who was the witness's senior by ten years; that the witness first remembered herself & the pauper's mother living with their parents in C. It was also proved that the father & mother of the pauper's mother were married in C., & that the witness afore-mentioned, the pauper's mother, & another sister, were baptised in C.:—*Held*: sufficient evidence.—*R. v. CREDITON (INHABITANTS)* (1858), E. B. & E. 231; 27 L. J. M. C. 265; 31 L. T. O. S. 114; 22 J. P. 722; 4 Jur. N. S. 926; 6 W. R. 517; 120 E. R. 494.

*Annotations*.—*Reid*. *R. v. Liverpool, Re Lancaster* (1860), 24 J. P. 646; *Faversham v. Isle of Thanet* (1862), 2 B. & S. 275.

**467.** — Entry in regimental book—Made up from attestation papers.]—An entry in the description book of a regiment of the Guards, dated 1709, which book was made up from the attestation of recruits, but as to which book 24 & 25 Vict. c. 7, did not make it evidence as to the matters contained in it, is not admissible evidence of the birth of the soldier there mentioned, either on the ground that the original was to be presumed to be made on oath, or on the ground that the book was kept by a public officer in the course of his duty.—*R. v. SUDBURY GOVERNORS OF THE POOR* (1863), 27 J. P. 823.

**468.** — Statement in attestation paper.]—A soldier in a military hospital, being found to be a lunatic pauper, was sent to the county asylum. His attestation paper stated that he said he was born in C. parish. There was no corroboration of the fact of the pauper's birth in C.:—*Held*: the attestation paper was not *prima facie* evidence, & the result being that the settlement could not be ascertained, the justices ought to have made an order on the county under Lunacy Act, 1890 (c. 5), s. 290.—*CHERTSEY UNION v. SURREY CLERK OF THE PEACE* (1893), 69 L. T. 384; 57 J. P. 807; 5 R. 532.

**Admissibility of hearsay evidence.]**—See EVIDENCE, Vol. XXII., p. 119, No. 930.

**Documentary evidence—Baptismal certificates & parish registers.]**—See EVIDENCE, Vol. XXII., p. 337, Nos. 3370, 3375.

#### B. Illegitimacy

See generally, *BASTARDY*, Vol. III., pp. 364–368, Nos. 54–97.

**In settlement cases.]**—See *BASTARDY*, Vol. III., pp. 365–368, Nos. 60, 74, 87, 88.

### SECT. 5.—SETTLEMENT BY RESIDENCE.

#### SUB-SECT. 1.—IN GENERAL.

See Poor Law Act, 1927 (c. 14), s. 111.

**469.** What amounts to residence—Residence not in ordinary place of abode.]—To constitute a residence, within Poor Removal Act, 1846 (c. 66), s. 1, as amended by Poor Removal Act, 1861 (c. 55), s. 1, it is not necessary that the residence should be in a house or ordinary place of abode.

A woman, after sixteen years' residence in resp. parish, was compelled by poverty to sell her furniture, & give up her lodgings. Being destitute,

she wandered about the parish in the daytime, & slept for twenty-one nights in a refuge for the homeless poor situate in an adjoining parish, returning to the respondent parish by day:—*Held*: no break of residence.—*R. v. ST. LEONARD, SHOREDITCH (INHABITANTS)* (1865), L. R. 1 Q. B. 21; 6 B. & S. 784; 35 L. J. M. C. 48; 13 L. T. 278; 29 J. P. 728; 14 W. R. 55; 122 E. R. 1382; *sub nom.* *ST. DIONIS, BACKCHURCH, OVERSEERS v. ST. LEONARD, SHOREDITCH (INHABITANTS)*, 12 Jur. N. S. 292.

*Annotations*.—*Distd. R. v. Glossop Union* (1866), 13 L. T. 872. *Consd. Guildford Union v. St. Olave's Union* (1871), 25 L. T. 803. *Distd. Newark Union v. Glanford Brigg Union* (1877), 36 L. T. 793. *Appl. R. v. Stepney Union* (1884), 54 L. J. M. C. 12. *Reid. R. v. Whitby Union* (1870), L. R. 5 Q. B. 325; *R. v. St. Ives Union* (1872), L. R. 7 Q. B. 467.

**470.** — Constructive residence.]—Though not bodily present, a person may be constructively resident in a parish, but that is only when the *prima facie* presumption arising from absence is rebutted, & in order to rebut it the party who seeks to do so must give some evidence for that purpose (*COLERIDGE, J.*).—*R. v. MANCHESTER OVERSEERS* (1857), 29 L. T. O. S. 247; 21 J. P. 436; 4 Jur. N. S. 9.

**471.** — Occasional visits—Seaman staying with parent between voyages.]—A pauper, who was born in applt. union, from 1876 up to the time of his application for relief was a sailor in the merchant navy, serving on board different ships & on different voyages. Between the different voyages he always returned to his mother's house in resp. union, remaining there on an average for four or five weeks in each year. In 1881 he also obtained jobs on shore which lasted about three months, during which time he came to his mother's house in resp. union, from Saturday to Monday in each week. When away he invariably left some of his clothes & other belongings at her house, & also brought to her a portion of his earnings as a contribution towards the expenses of the house, but he had no separate bedroom or bed there. In 1853 the pauper became afflicted with blindness, returned to his mother's house, & then sought parish relief. The justices made an order that he was settled in applt. union, & directed that he should be removed there:—*Held*: the justices were right in holding that the pauper had not a residence, & therefore had not acquired a settlement in resp. union, & had not become irremovable from there, & he was settled in applt. union.—*R. v. STEPNEY UNION* (1884), 54 L. J. M. C. 12; 52 L. T. 959; 49 J. P. 164; 1 T. L. R. 144, C. A.; *affg. S. C. sub nom. MERTHYR TYDVIL UNION v. STEPNEY UNION*, 53 L. J. M. C. 183.

*Annotations*.—*Consd. Great Yarmouth Union v. St. Matthews, Bethnal Green Union* (1907), 51 Sol. Jo. 607. *Reid. Holborn Union v. Chertsey Union* (1884), 14 Q. B. D. 289.

**472.** — Married woman living apart from husband—Constructive desertion.]—A married woman, after being turned out of her husband's house for adultery, resided for more than three years with another man in resps. union in such a manner as would, if she were a widow, render her exempt from removal, the husband's settlement being in applts. union:—*Held*: the woman was irremovable under Poor Removal Act, 1861 (c. 55), s. 3, having been for the purpose of this sect. deserted by her husband; she had therefore acquired a settlement by residence in resps. union under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34.—*R. v. MAIDSTONE*

#### PART V. SECT. 5, SUB-SECT. 1.

1. What amounts to residence—Three years' residence in charitable institution.

tion.]—A person who had for three years continuously resided in a charitable institution in applt. parish, &

during that period had not had recourse to common begging & did not apply for parochial relief, had acquired a

**Sect. 5.—Settlement by residence: Sub-sects. 1 & 2, A., B. & C.]**

UNION (1879), 5 Q. B. D. 31; 49 L. J. M. C. 25; 23 W. R. 183; *sub nom.* MAIDSTONE UNION v. MEDWAY UNION, 41 L. T. 586; 44 J. P. 440, D. C. *Annotations*.—*Distd. R. v. Cookham Union* (1882), 9 Q. B. D. 622. *Apprvd. Southwark Union v. City of London Union*, [1906] 2 K. B. 112. *Consd. Eastbourne Union v. Croydon Union*, [1910] 2 K. B. 16; *Paddington Union v. St. Matthew, Bethnal Green Union*, [1913] 1 K. B. 508. *Mentd. R. v. Birwistle, etc.*, JJ. (1889), 58 L. J. M. C. 158.

**473. ——— Desertion.]**—A deserted wife can, under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, acquire a settlement by residence in a parish for three years in such manner & under such circumstances in each of those years as would render her irremovable therefrom.—*PADDINGTON UNION v. ST. MATTHEW, BETHNAL GREEN UNION*, [1913] 1 K. B. 508; 77 J. P. 113; *sub nom.* ST. MATTHEW, BETHNAL GREEN UNION v. PADDINGTON UNION, 83 L. J. K. B. 43; 107 L. T. 841; *sub nom.* BETHNAL GREEN UNION v. PADDINGTON UNION, 29 T. L. R. 114; 57 Sol. Jo. 171, C. A.

**474. ——— Desertion not proved.]**—A husband & wife lived together in one parish from 1901 to 1906. In 1906 the husband took lodgings for his wife & children in the parish of C. in appts.' union, the husband contributing to their support, but not living there. The wife & three children resided continuously in that parish until the end of 1913, when she & her children went to reside in a place in resps.' union, & a few months afterwards they all became chargeable to resps.' union, the children being under the age of sixteen. Upon an application by resps.' union to remove the wife & children to appts.' union it was found as a fact that the husband had not deserted his wife & quarter sessions held that, as the wife had not been deserted, she had not acquired a settlement in appts.' union but that the children had, & they ordered the removal of the children to that union:—*Held*: the wife not being a deserted wife & the inference being that the husband had a settlement elsewhere neither the wife nor the children had, during their residence in the parish on appts.' union, acquired the status of irremovability in that parish, & therefore had not acquired a settlement in appts.' union & the children were not removable to that union.—*HAMBLETON UNION v. CUCKFIELD UNION* (1914), 84 L. J. K. B. 1265; 112 L. T. 911; 79 J. P. 217; 13 L. G. R. 491, D. C.

**In case of children.]**—*See* Sub-sect. 3, A. & B., *post*.

**475. Capacity of foreigner.—To acquire settlement by residence.]**—A foreigner, although, as such, having no place of settlement, can acquire a status of irremovability & consequently, a settlement by residence under the provisions of s. 34 of the Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), as amended.—*WILLESDEN UNION v. WESTMINSTER UNION*, [1926] 2 K. B. 356; 95 L. J. K. B. 1011; 135 L. T. 54; 90 J. P. 142; 42 T. L. R. 521; 24 L. G. R. 376, D. C.

**Residence in two places.]**—*See* Sub-sect. 4, *post*.

**SUB-SECT. 2.—PERIOD OF RESIDENCE.**

**A. In General.**

*See* Poor Law Act, 1927 (c. 14), ss. 108, 111, 121 (b).

**476. Statutory provision.—Three consecutive**

residential settlement, & that the fact that during the whole time of her residence she suffered from mental weakness

& chronic physical disease, which made her incapable of maintaining herself, did not take her out of the enactment.

**years.—Sufficient in each year to give irremovability.]**—*DORCHESTER UNION v. WEYMOUTH UNION*, No. 489, *post*.

**477. Inclusion of different parishes in one union.]**—“Parish” in Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, does not include “union.” A pauper resided for more than three years in a union, residing continuously for more than two & less than three years of the period in one parish of the union & for more than one & less than two years of the period in another parish of the same union, in such manner & under such circumstances, as would, in accordance with the several statutes in that behalf, render her irremovable:—*Held*: such a residence did not constitute a settlement within Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34.—*PLOMESGATE UNION v. WEST HAM UNION* (1881), 6 Q. B. D. 576; 50 L. J. M. C. 51; 44 L. T. 610; 45 J. P. 633; 29 W. R. 630, D. C.

*Annotation*:—*Apld. Sunderland Union v. Sussex Clerk of the Peace* (1881), 8 Q. B. D. 99.

**478. ———]**—A person who had resided in a parish for a term of three years, but had removed before the passing of Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, did not acquire a settlement therein, notwithstanding that he continued to reside in the same union, but in another parish, until after the passing of the Act.—*SUNDERLAND UNION v. SUSSEX CLERK OF THE PEACE* (1881), 8 Q. B. D. 99; 51 L. J. M. C. 33; 46 L. T. 98; 46 J. P. 375; 30 W. R. 337.

**479. ———]**—By local Acts eighteen parishes are incorporated for maintenance of the poor of Bristol:—*Held*: a pauper who has resided for three years, not in one, but in two separate parishes of the area, acquired a settlement in the area within the meaning of Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34.—*BRISTOL INCORPORATION OF THE POOR v. BARTON REGIS UNION* (1891), 66 L. T. 190; 56 J. P. 311, D. C.

**480. “Pauper removed” — Pauper at time Act passed.]**—Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, gives a settlement in a parish by three years' continuous residence therein; & Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 36, provides that “the provisions relating to settlement shall not apply to any pauper removed under any order or removal . . . before the passing of this Act”:—*Held*: these words in Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 36, “any pauper removed,” applied only to a person who was a pauper at the time the Act was passed & so long as he remained a pauper; & therefore, they did not operate to deprive of the benefit of Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, a person who had been removed under an order of removal in 1866, but who was not a pauper at the time the Act was passed, & who had resided continuously in one parish from 1870 to 1881.—*BRIGHTON PARISH UNION v. STRAND UNION*, [1891] 2 Q. B. 156; 60 L. J. M. C. 105; 64 L. T. 722; 55 J. P. 743; 39 W. R. 581; 7 T. L. R. 552, C. A.

**481. Provisional order confirmed by statute.—Added area.—Effect of special provision protecting settlements in course of acquisition.]**—By a provisional order duly confirmed by statute, part of the parish of Upton St. Leonards was added to the parish of Gloucester, art. 31 of the order provided, *inter alia*, that “for all purposes of settlement & removal residence prior to the commencement of this order in any area added by this order to the

—*KILMALCOLM PARISH COUNCIL v. GLASGOW PARISH COUNCIL*, [1906] A. C. 344.—*SCOT*.

parish of Gloucester . . . shall be deemed to have been residence in the parish" of Gloucester:—*Held*: this provision applied only to those persons who at the commencement of the order were in course of acquiring a settlement, so as to preserve their inchoate rights, & it did not have the retrospective effect of creating or conferring a settlement where none existed at the commencement of the order.—*GLOUCESTER UNION v. WOORWICH UNION*, [1917] 2 K. B. 374; 86 L. J. K. B. 1187; 117 L. T. 250; 81 J. P. 281; 15 L. G. R. 561, D. C.

**Test of Irremovability.**—*See* Part VI., Sect. 2, *post*.

### *B. Continuity of Residence.*

*See, generally*, Poor Law Act, 1927 (c. 14), ss. 108, 111, 121 (b).

**482. What amounts to break—Infirmity nurse—Sent on duty to branch establishment.**—The pauper was employed from Nov. 1873, to July, 1878, as an indoor resident nurse at an infirmary in M. She was under the authority of the lady superintendent of nurses in the infirmary, & was bound by the terms of her agreement to undertake any duties that might be assigned to her either as a hospital or a private nurse. For five months in 1876, & for three months in 1877, she acted, under the orders of the lady superintendent, as a nurse at a branch establishment out of M., returning to the infirmary as soon as her duties ceased at the branch establishment. During this absence her wages were paid from the head institution at M., & the greater part of her effects during the first period of absence was left behind her in her box in the dormitory at the infirmary, to which place she went from time to time for change of clothing as required:—*Held*: the absence of the pauper for the two periods did not amount to a break of residence, & she had gained a settlement in M. by three years' residence within Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34.—*MANCHESTER OVERSEERS v. ORMSKIRK UNION* (1886), 16 Q. B. D. 723; 54 L. T. 573; 50 J. P. 518; 34 W. R. 533; 2 T. L. R. 475, D. C.

**483. — Absence abroad — Of parent.**—*TOTNES UNION v. CARDIFF UNION*, No. 1111, *post*.

**484. — Of husband — Not amounting to desertion.**—*TEWKESBURY UNION v. BIRMINGHAM UNION*, No. 1161, *post*.

**485. — Of seamen—Change of lodgings by wife unknown to husband.**—A seaman left his wife for the purpose of sailing on a voyage, & with the intention of returning to her on the completion of the voyage. During his absence she removed from the parish in which they were residing at the time of his going to sea to lodgings in another parish, where he joined her on his return:—*Held*: in the absence of evidence that the lodgings were taken by the husband's directions, the husband could not be treated as constructively resident there while he was at sea, & the period that elapsed between his wife's removal there & his return could not be computed as part of a three years' residence by him in the parish so as to confer upon him a settlement in the parish under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34.—*WEST HAM UNION v. CARDIFF UNION*, [1895] 1 Q. B. 766; 64 L. J. M. C. 167; 72 L. T. 497; 59 J. P. 343; 43 W. R. 424; 39 Sol. Jo. 384; 15 R. 378, D. C.

*Annotation*:—*Apld.* *PLYMOUTH UNION v. POPLAR UNION* (1908), 72 J. P. 72.

**486. — Absence on military service — Continued residence of family—Intention to return.**—The absence of a person on military service from the parish where he has been residing constitutes a break in the residence necessary for the purpose of acquiring a settlement in the parish under Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), s. 34, notwithstanding that his absence is compulsory & that during such absence his wife & children continue to live in the parish, & that he had the intention of returning & does return to the parish. In such case the two separate periods of residence before his departure & after his return cannot be added together for the purpose of making up the three years' residence necessary to confer a settlement under that section, although the time during which a person is serving as a soldier is by Poor Removal Act, 1846 (c. 66), s. 1, to be excluded from the computation of the time for the purposes of that sect.—*NEWARK UNION v. MAIDSTONE UNION* (1905), 93 L. T. 602; 3 L. G. R. 1005; *sub nom.* *MAIDSTONE UNION v. NEWARK UNION*, 69 J. P. 413, D. C.

**487. — Period spent in hospital.**—The residence for a term of three years which confers a settlement under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), is residence for three consecutive years, under the conditions provided by the Act.

The period during which a person is a patient in a hospital must be excluded in computing the time necessary for his acquisition of a settlement under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61).—*ST. OLAVE'S UNION v. CANTERBURY UNION*, [1897] 1 Q. B. 682; 66 L. J. Q. B. 471; 76 L. T. 517; 61 J. P. 371; 45 W. R. 529; 41 Sol. Jo. 423, C. A.

*Annotations*:—*Apld.* *ORMSKIRK UNION v. CHORLTON UNION*, [1903] 2 K. B. 498; *Newark Union v. Maidstone Union* (1905), 93 L. T. 602.

**488. — — — — —**—A child under the age of sixteen resided with his father in a parish from Dec. 2, 1901, to Apr. 24, 1905, except that during the week of Oct. 21 to Oct. 28, 1902, the father was confined as a patient in a hospital in another parish in the same union as that in which the parish was situated:—*Held*: the father, & therefore the child also, became irremovable from the parish on Dec. 9, 1902; that the three consecutive years' residence required by Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, in the case of the child, included the year ending Dec. 9, 1902; & the child had therefore acquired a settlement in the parish, notwithstanding that the father by reason of the continuity of his residence having been broken by his confinement in hospital had not done so.—*DAVENTRY UNION v. COVENTRY UNION*, [1917] 1 K. B. 289; 86 L. J. K. B. 276; 116 L. T. 286; 81 J. P. 62; 15 L. G. R. 52, D. C.

### *C. Receipt of Relief.*

*See* Poor Law Act, 1927 (c. 14), s. 108 (f).

**489. General rule — Relief prevents acquisition of settlement.**—A pauper resided in resps.' union for six years, but during that period received parish relief on five different occasions:—*Held*: he had not acquired a settlement in resps.' union within Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, for, by receiving relief at intervals during his residence, he had failed to reside for "a term of three years in such manner & under such circumstances as would render him

PART V. SECT. 5, SUB-SECT. 2.—B.  
s. What amounts to break—Whether  
service in militia.—*AYR PARISH COUN-*

*CIL v. WIGTOWN PARISH COUNCIL*,  
[1913] 8 C. 13.—*SCOT.*  
h. — Absence through work.] —

*MAYBOLE PARISH COUNCIL v. KIRKOS-*  
*WALD PARISH COUNCIL*, [1917] 8 C.  
436.—*SCOT.*

**Sect. 5.—Settlement by residence: Sub-sect. 2, C.; sub-sect. 3, A. & B.]**

irremovable." In order to acquire such a settlement a person must reside for three whole consecutive years without receiving relief.—**DORCHESTER UNION v. WEYMOUTH UNION** (1885), 16 Q. B. D. 31; 55 L. J. M. C. 44; 54 L. T. 52; 50 J. P. 310; 2 T. L. R. 56, D. C.

**Annotations:—***Apprvd.* St. Olaves Union v. Canterbury Union, [1897] 1 Q. B. 682. *Apld.* Newark Union v. Maidstone Union (1905), 93 L. T. 602; Daventry Union v. Coventry Union, [1917] 1 K. B. 289.

**490. Relief received after settlement acquired.]**—L., a pauper, was born in 1810, in applt. union, & in 1865, went to reside in the G. union, where he continued to live till 1877. In 1869, after the pauper had acquired a *status* of irremovability in G. for upwards of three years, he met with an accident, & from that time till 1877 received relief from the G. union. In 1877 the pauper went to reside in the resp. union, & shortly afterwards became chargeable there. On Oct. 6, an order for his removal to applt. union was made by justices, & was confirmed on appeal by the sessions, subject to a special case:—**Held:** the order of removal was wrongly made to applt. union, inasmuch as the pauper had acquired a settlement in G. union, under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, by virtue of his residence there.—**R. v. BRAMPTON UNION** (1878), 3 Q. B. D. 479; 26 W. R. 776; *sub nom.* **BRAMPTON UNION v. CARLISLE UNION**, 47 L. J. M. C. 114; 38 L. T. 714; 43 J. P. 156, D. C.

**Annotations:—***Apld.* R. v. Abergavenny Union (1880), 6 Q. B. D. 31. *Refd.* Sunderland Union v. Sussex Clerk of the Peace (1882), 46 L. T. 98.

**491. —**—A pauper had lived from 1871 to 1876 in M. union so as to be irremovable. In Jan. 1876, the pauper received relief from the M. union while residing there, & so continued until 1879, when the pauper went to the A. union, & was removed to the M. union. The removing justices had no corroboration of pauper's residence, but quarter sessions received such corroborative evidence:—**Held:** the quarter sessions rightly received the corroborative evidence, but were wrong in holding that pauper had not acquired a settlement by residence in M. union, though residence without relief ceased before Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34.—**R. v. ABERGAVENNY UNION** (1880), 6 Q. B. D. 31; 50 L. J. M. C. 1; 45 L. T. 602; 29 W. R. 803; *sub nom.* **MONMOUTH UNION v. ABERGAVENNY UNION**, 45 J. P. 205, D. C.

**492. What amounts to relief—Residence in charitable home.]**—A pauper had resided for upwards of three years in a building in the parish of F., occupied as a home or reformatory for women. This home was supported by money collected at church offertories without the parish, & by annual subscriptions & donations from persons resident in all parts of the kingdom, the money being applied in providing for the supervision, instruction, maintenance, & clothing of the inmates. The pauper during the whole term paid no money for her maintenance & clothing:—**Held:** the money collected for her maintenance in the home was a "*bona fide* charitable gift," & she had not been maintained by a rate or subscription raised in a parish in which she did not reside, within the meaning of the proviso to Poor Removal Act, 1846 (c. 66), s. 1, & she was irremovable from & settled within the parish of F., under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34.—**FULHAM UNION v. ISLE OF THANET UNION** (1881), 7 Q. B. D. 539; 50 L. J.

M. C. 101; 44 L. T. 678; 45 J. P. 552; 29 W. R. 723, C. A.

**Annotation:—***Apld.* Ormskirk Union v. Lancaster Union (1912), 10 L. G. R. 1041.

**Period spent in hospital.]—***See* Nos. 487, 488, *ante*.

**SUB-SECT. 3.—ACQUISITION BY CHILDREN.**

**A. Legitimate Children.**

*See, now,* Poor Law Act, 1927 (c. 14), s. 110.

**493. Capacity of child under sixteen to acquire independent settlement.]**—Children may gain a settlement by living with the mother, after the father's death, as they may by living with the father, before his death.—**R. v. OULTON (INHABITANTS)** (1735), *Lee temp.* Hard. 169; *Burr.* S. C. 64; 95 E. R. 108.

**Annotations:—***Refd.* R. v. Holbeck (1742), *Burr.* S. C. 198; *Ex p.* Tollerton Overseers (1842), 3 Q. B. 792. *Mentd.* Walsall Overseers v. L. & N. W. Ry. (1878), 4 App. Cas. 30.

**494. — Upon satisfying statutory conditions—Residence before attaining sixteen years—With deserted mother.]**—A legitimate child can, under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, before the age of sixteen, acquire a settlement by residence under the requisite conditions in a parish with its deserted mother who has become irremovable therefrom.—**HACKNEY UNION v. KINGSTON-UPON-HULL INCORPORATION FOR THE POOR**, [1912] A. C. 475; 81 L. J. K. B. 739; 106 L. T. 909; 76 J. P. 361; 28 T. L. R. 418; 50 Sol. Jo. 535; 10 L. G. R. 409, H. L.; *affg.* S. C. *sub nom.* **KINGSTON-UPON-HULL INCORPORATION FOR THE POOR v. HACKNEY UNION**, [1911] 1 K. B. 748, C. A.

**Annotations:—***Apld.* Tewkesbury Union v. Upton-on-Severn Union, [1913] 3 K. B. 475. *Consd.* Paddington Union v. Westminster Union, [1915] 2 K. B. 644. *Apld.* Daventry Union v. Coventry Union, [1917] 1 K. B. 289. *Consd.* Loxden & Winstree Union v. Windsor Union, [1921] 2 K. B. 143. *Refd.* Paddington Union v. St. Matthew, Bethnal Green Union, [1913] 1 K. B. 508.

**495. — With father though father disqualified.]**—A child under the age of sixteen years living for three years with its father in a parish from which the father is irremovable may acquire a settlement in that parish under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, notwithstanding that the father through having received poor law relief may be disqualified from acquiring a settlement in the same parish.—**TEWKESBURY UNION v. UPTON-ON-SEVERN UNION**, [1912] 3 K. B. 475; 83 L. J. K. B. 37; 109 L. T. 557; 77 J. P. 9; 10 L. G. R. 1019, D. C.

**496. — — — Partly before attaining sixteen & partly after.]**—**REIGATE UNION v. CROYDON UNION, HIGHWORTH & SWINDON UNION v. WESTBURY-ON-SEVERN UNION, MEDWAY UNION v. BEDMINSTER UNION**, No. 317, *ante*.

**497. — — — Residence apart from parent.]**—A pauper, whose settlement both by birth & parentage was in applt.' union, had, before he was sixteen years old, resided in another union for the term, in the manner, & under the circumstances required by Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, to acquire a settlement by residence. Upon an appeal from an order of removal to applt.' union:—**Held:** Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, para. 1, refers only to derived settlements; there was nothing in Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, to prevent the pauper from acquiring a settlement under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34; & therefore

the order of removal was bad.—**WOLSTANTON & BURSLEM UNION v. NORTHWICH UNION** (1882), 46 L. T. 528; 46 J. P. 377.

*Annotation*.—**Apld.** **Holborn Union v. Chertsey Union** (1884), 14 Q. B. D. 289.

**498.** ——— **Proof of intention that children should return.**—Upon appeal to quarter sessions from an order of the justices adjudging that two pauper children under sixteen years of age were settled in a parish within the Holborn Union, in which their father had a settlement at the time of his death, it appeared that seven years before the order the children, then under seven years old, were on the death of their mother placed by their father in the care of K. & his wife, who resided at Chertsey within the Chertsey Union, & lived with them from that time continuously until they became chargeable. After they went to Chertsey the children were visited by their father on three occasions only, & then only for a few hours at a time, but he made a weekly payment for their maintenance which was continued to his death:—**Held**: there was evidence on which the justices might find, as they must be taken to have done, that the father had never given up the intention that his children should return to him when he was in a position to receive them.—**HOLBORN UNION v. CHERTSEY UNION** (1885), 15 Q. B. D. 76; 54 L. J. M. C. 137; 53 L. T. 656; 33 W. R. 698; 1 T. L. R. 479; *sub nom.* **CHERTSEY UNION v. HOLBORN UNION**, 50 J. P. 36, C. A.

*Annotations*.—**Refd.** **Highworth & Swindon Union v. Westbury-on-Severn Union** (1888), 20 Q. B. D. 597; **Tendring Union v. Woolwich Union**, [1923] 1 K. B. 121. **Mentd.** **Dewsbury & Heckmondwike Waterworks Board v. Penkstone Union Assmt. Com.** (1886), 2 T. L. R. 375; **Lodge v. Huddersfield Corpn.**, [1898] 1 Q. B. 859.

**499.** ——— **A pauper, nearly fourteen years old, went into domestic service in the parish of L. in the West Ham Union, remained there nearly four years, left before she became eighteen & resided outside that union with her mother. The pauper's father died when she was two years old. The widowed mother never resided in or acquired a status of irremovability from or a settlement in that union:—Held**: upon the true construction of Poor Removal Act, 1846 (c. 66), s. 1, & Poor Removal Act, 1848 (c. 111), s. 1, & Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, the pauper had not resided for the term of three years in the parish of L. in such manner & under such circumstances in each of such years as would in accordance with the statutes in that behalf render her irremovable, & she had not therefore acquired a settlement in the West Ham Union.—**WEST HAM UNION v. ST. MATTHEW, BETHNAL GREEN (CHURCHWARDENS)**, [1894] A. C. 230; 63 L. J. M. C. 97; 70 L. T. 818; 58 J. P. 493; 42 W. R. 573; 10 T. L. R. 375; 6 R. 111, H. L.

*Annotations*.—**Consd.** **St. Olave's Union v. Canterbury Union**, [1897] 1 Q. B. 438; **Fulham Union v. Woolwich Union**, [1907] A. C. 255. **Apld.** **Brantree Union v. Rochford Union** (1911), 81 L. J. K. B. 251. **Consd.** **Paddington Union v. Westminster Union**, [1915] 2 K. B. 644. **Apld.** **Wycombe Union v. Barton-upon-Irwell Union**, [1927] A. C. 217. **Refd.** **West Ham Union v. Bethnal Green Union** (1896), 75 L. T. 286.

**500.** ——— **Residence in convalescent home.**—In Sept. 1896, E., being then about five years of age, was sent to a convalescent home for children situate in the parish of P., which parish was subsequently amalgamated with others to form the parish of B., in the C. union. E. remained at the home till Jan. 1901.

The children received in the home were of delicate health & came for fresh air treatment. There were about fourteen in the home at any one time, & they remained for periods varying from one

month to five years. Two nurses were attached to the home, & a doctor called once a week to see if any children required attention. The children were sent to the home by various charitable institutions, who made payments to the proprietor for their maintenance.

Inquiries had been made with respect to the parents of E., but the parents could not be traced:—**Held**: (1) E. had not acquired a settlement in the parish of B. in the C. union; (2) the convalescent home was a "hospital" within Poor Removal Act, 1846 (c. 66), s. 1.—**CHRISTCHURCH UNION v. ST. MARY, ISLINGTON UNION** (1906), 70 J. P. 247, D. C.

**Test of removability.**—See Part VI., Sect. 1, *post*.

### B. Illegitimate Children.

See, *now*, Poor Law Act, 1927 (c. 14), s. 110.

**501. Capacity of child under sixteen to acquire independent settlement.**—Upon satisfying statutory conditions—**Residence apart from mother—Abandoned by mother.**—The pauper was the illegitimate child of W., a single woman, & was born in the parish of R. When the child was about a fortnight old it was placed by its mother in the care of O. & his wife, who resided with it for the term of six years in the parish of S.:—**Held**: under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, which enacts that "where any person shall have resided for the term of three years in any parish in such manner & under such circumstances as would, in accordance with the statutes in that behalf, render him irremovable, he shall be deemed to be settled therein," etc., the sessions were justified in finding that the pauper was settled in S.—**R. v. LEEDS UNION** (1879), 4 Q. B. D. 323; 48 L. J. M. C. 129; 27 W. R. 708; *sub nom.* **LEEDS UNION v. TADCASTER UNION**, 40 L. T. 521; 43 J. P. 639.

*Annotations*.—**Refd.** **Salford Union v. Manchester Overseers** (1882), 10 Q. B. D. 172. **Consd.** **Holborn Union v. Chertsey Union** (1884), 14 Q. B. D. 289. **Distd.** **Manchester Overseers v. Ormskirk Union** (1890), 59 L. J. M. C. 103. **Distd.** **West Ham Union v. St. Matthew, Bethnal Green**, [1894] A. C. 230. **Consd.** **Fulham Union v. Woolwich Union**, [1907] A. C. 255. **Distd.** **Brantree Union v. Rochford Union** (1911), 81 L. J. K. B. 251.

**502.** ——— **Residence with mother.**—**WEST HAM UNION v. HOLBEACH UNION**, No. 436, *ante*.

**503.** ——— **Or reputed father.**—An illegitimate child can, under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, before the age of sixteen, acquire a settlement by residence under the requisite conditions in a parish with its reputed father who is irremovable therefrom.

The proviso to sect. 1 of Poor Removal Act, 1846 (c. 66), that a wife or children having no other settlement than that of the husband or parent are removable or irremovable, according as the husband or parent is removable or irremovable, applies to the case of illegitimate as well as that of legitimate children (LORD MACNAGHTEN).—**FULHAM PARISH v. WOOLWICH UNION**, [1907] A. C. 255; 70 L. J. K. B. 739; 97 L. T. 117; 71 J. P. 361; 23 T. L. R. 583; 51 Sol. Jo. 529; *sub nom.* **WOOLWICH UNION v. FULHAM UNION**, 5 L. G. R. 801, H. L.

*Annotations*.—**Consd.** **Brantree Union v. Rochford Union** (1911), 81 L. J. K. B. 251; **Hackney Union v. Kingston-upon-Hull Incorporation for the Poor**, [1912] A. C. 475; **Lexden & Winstree Union v. Windsor Union**, [1921] 2 K. B. 143; **Barton-upon-Irwell Union v. Wycombe Union**, [1926] 2 K. B. 3. **Refd.** **Paddington Union v. St. Matthew Bethnal Green Union**, [1913] 1 K. B. 568; **Tevkeshury Union v. Upton-on-Severn Union**, [1913] 3 K. B. 476; **Paddington Union v. Westminster Union**, [1915] 2 K. B. 644; **Daventry Union v.**

**Sect. 5.—Settlement by residence: Sub-sect. 3, B.; sub-sect. 4. Sect. 6: Sub-sect. 1, A.]**

Coventry Union, [1917] 1 K. B. 289; Tendring Union v. Braintree Union, [1920] 2 K. B. 647; Wycombe Union v. Barton-upon-Irwell Union, [1927] A. C. 217. *Mentd.* L. O. C. v. St. Botolph, Bishopsgate, [1914] 2 K. B. 660.

**504. — Mother not irremovable from parish of residence—Child still under sixteen at date of adjudication.]—**(1) M. was the illegitimate child of J. & was born in the parish of B. on or about July 23, 1902. In or about Aug. 1902, M. was placed by her mother under the care & control of Sergeant & Mrs. P., of the parish of S., in the R. union, by whom M. was received & adopted as their own child. Except for short immaterial periods in 1908 & 1909 during which she was in receipt of relief from the guardians of resp. union M. had ever since Aug. 1902, resided with Sergeant & Mrs. P. in the parish of S. At no time since Aug. 1902, had M. resided with or been maintained by J. At no time so far as was known had J. acquired a settlement in any parish in the R. union & at no time had she been irremovable from the union. On Jan. 18, 1911, the order of justices was obtained on behalf of the guardians of resp. union adjudging the pauper M. to be settled in the parish of B., in the B. union, that being the parish in which J. was last legally settled & in which the pauper M. was born:—*Held*: the pauper was settled in the parish of B. in the B. union, & the case was covered by the decision in *West Ham Union v. St. Matthew, Bethnal Green (Churchwardens)*, No. 499, *ante*.

(2) The word "children" in Poor Removal Act, 1848 (c. 111), s. 1, includes illegitimate as well as legitimate children.—*BRAINTREE UNION v. ROCHFORD UNION* (1911), 81 L. J. K. B. 251; 106 L. T. 509; 70 J. P. 41; 28 T. L. R. 60; 10 L. G. R. 40, D. C.

*Annotation:—As to (2) Consd. Barton-upon-Irwell Union v. Wycombe Union*, [1926] 2 K. B. 3.

**Lunatic child.]—See LUNATICS, Vol. XXXIII., p. 262, No. 1817.**

**Test of removability.]—See Part VI., Sect. 1, post.**

**SUB-SECT. 4.—TWO PLACES OF RESIDENCE.**

**505. Rendered necessary by occupation—Surgeon resident in asylum—Regular visits to wife in another parish.]—**A surgeon in a private lunatic asylum in the parish of N. married, & being required to board, & lodge in the asylum, he took lodgings for his wife in the parish of P., about eight miles distant, & he was in the habit of visiting her nearly weekly, & staying with her from the Saturday evening to the Monday morning; the wife had thus lived in P. for six years, when, the husband having been convicted & sentenced to imprisonment, she became chargeable to P.:—*Held*: the husband had been resident in N., & not in P., & the wife & her children were therefore removable from P.—*R. v. NORWOOD* (1867), L. R. 2 Q. B. 457; 16 L. T. 484; 31 J. P. 518; 15 W. R. 788; *sub nom.* *NORWOOD (CHURCHWARDENS & OVERSEERS) v. ST. PANCRAS (CHURCHWARDENS & OVERSEERS)*, 36 L. J. M. C. 91.

*Annotations:—Reid, Great Yarmouth Union v. St. Matthews, Bethnal Green Union* (1907), 51 Sol. Jo. 607. *Mentd.* Oldham Borough Case (1889), 1 O'M. & H. 161.

**506. — Railway guard—Residence with wife in one union—Regularly lodging in another.]—**J. who was a night goods guard on the G. E. Ry. co. from 1871 to 1897, rented & occupied with his first wife a house in the B. union, & had a lodging in the Y. union. In Oct. 1897, J. married again, & became the tenant of a house in the Y. union,

where he resided with his wife, & had a lodging in the B. union. He slept in the B. union & the Y. union on alternate days. In Mar. 1906, he became chargeable to the B. union:—*Held*: he had acquired a settlement in the Y. union, & was removable thereto.—*GREAT YARMOUTH UNION v. BETHNAL GREEN UNION* (1907), 97 L. T. 440; 71 J. P. 422; 51 Sol. Jo. 607; 5 L. G. R. 1105.

**SECT. 6.—SETTLEMENT BY APPRENTICESHIP.**

**SUB-SECT. 1.—CONTRACT OF APPRENTICESHIP.**

**A. Necessity for Valid Contract.**

*See Poor Law Act, 1927 (c. 14), s. 112.*

**507. General rule—Valid apprenticeship necessary to confer settlements.]—***R. v. HORNBEY (INHABITANTS)* (1731), 2 Barn. K. B. 115; 94 E. R. 391.

**508. — — —.]—**Where the master & father of a boy agreed, under seal, that the master should teach the son the art & mystery of weaving for five years, & find utensils, & the son should receive half his earning, & the master the other half; under which the boy served out the time as an apprentice:—*Held*: this agreement between the father & master, to which the son was no party, not binding the son, or the father for him, to any service to the master; but the son's service in fact being merely voluntary; was no apprenticeship in point of law; & consequently no settlement could be gained by the son serving his master under such a contract.—*R. v. CROMFORD (INHABITANTS)* (1806), 8 East, 25; 2 Bott, 407; 103 E. R. 253.

*Annotation:—Reid. R. v. Arnesby* (1820), 3 B. & Ald. 584.

**509. — — —.]—**An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law & the master, though with her consent, does not constitute her an apprentice; & consequently no settlement can be gained by her under such indenture.—*R. v. RIPON (INHABITANTS)* (1808), 9 East, 295; 103 E. R. 586.

*Annotation:—Reid. R. v. Arnesby* (1820), 3 B. & Ald. 584.

**510. — — —.]—**Poor Relief Act, 1601 (c. 2), s. 1, enacting that the churchwardens of every parish & four, three or two substantial householders there, to be nominated by the magistrates, shall be overseers of the poor, requires an appointment to be made of two such overseers at the least, exclusive of the existing churchwardens; which body so constituted, or the greater part of them, are empowered to execute certain duties relating to the poor; & therefore Poor Relief Act, 1601 (c. 2), s. 5, which authorises "the churchwardens & overseers, or the greater part of them," by the assent of two justices, to bind out poor children apprentices, is not satisfied by a compulsory binding by two persons styling themselves churchwardens & overseers, who had been appointed the overseers of the parish at a time when one of them was churchwarden; which latter continued the sole churchwarden for about two months afterwards, when the other overseer was appointed sole churchwarden in his place. For at all events this power is given to a body constituted of more than two persons; though it may be executed by the major part of the body when well constituted. Therefore a poor child, assumed to be bound apprentice by such an indenture, could not gain a settlement by service under it.—*R. v. ALL SAINTS, DERBY (INHABITANTS)* (1810), 13 East, 143; 104 E. R. 323.

*Annotation:—Reid. R. v. St. Margaret's, Leicester* (1818), 2 B. & Ald. 200.



511. — — —.]—A parish apprentice was, before the passing of 18 Geo. 3. c. 47, bound till twenty-four, & served till nearly attaining twenty-one, when his master, being about to leave the parish, & no longer wanting his service, told him that he might leave him & go where he liked, & shift for himself, but if he could not provide for himself he might return to him, upon which he quitted, & when he was about four months past twenty-one bound himself by indenture as apprentice to another master for three years, & served with him the three years:—*Held*: he did not acquire a settlement by service under the second indenture.—*R. v. Bow* (INHABITANTS) (1815), 4 M. & S. 383; 105 E. R. 875.  
*Annotation*:—*Reid. R. v. Skeffington* (1820), 3 B. & Ald. 382.

512. — — —.]—A father has at the common law, no authority to bind his infant son apprentice without his assent; & consequently, where an indenture of apprenticeship was executed by the master & the father of the apprentice, but not also by the apprentice himself:—*Held*: it was invalid, & no settlement could be gained under it.—*R. v. ARNESBY* (INHABITANTS) (1820), 3 B. & Ald. 584; 106 E. R. 775.

*Annotation*:—*Reid. St. Nicholas, Rochester v. St. Botolph without Bishopsgate* (1802), 12 C. B. N. S. 645.

513. — — —.]—An infant bound himself apprentice for seven years, & served three of them; having then quarrelled with his master, the latter offered to sell him the remainder of his time for 6*d*. The infant paid the money, & went away & bound himself to another master in another parish:—*Held*: the infant had no power to dissolve the first apprenticeship; the second binding was therefore invalid, & no settlement could be gained by service under it.—*R. v. GREAT WIGSTON, LEICESTER* (INHABITANTS) (1824), 3 B. & C. 484; 5 Dow. & Ry. K. B. 339; 2 Dow. & Ry. M. C. 445; 3 L. J. O. S. K. B. 85; 107 E. R. 813.

*Annotations*:—*Mentd. Ellen v. Topp* (1851), 6 Exch. 424; *Waterman v. Fryer*, [1922] 1 K. B. 499.

514. — — —.]—A master shoemaker made a proposal to a poor woman to take her son to learn his business; the son was to serve him for four years, to board & lodge with his mother, & to have half what he earned. No indentures were executed on account of the poverty of the mother:—*Held*: this was a defective contract of apprenticeship, & not a contract of hiring, & consequently the pauper did not gain any settlement by serving under it.—*R. v. ST. MARGARET'S, KING'S LYNN* (INHABITANTS) (1826), 6 B. & C. 97; 9 Dow. & Ry. K. B. 160; 4 Dow. & Ry. M. C. 260; 5 L. J. O. S. M. C. 18; 108 E. R. 388.

*Annotations*:—*Apld. R. v. Combe* (1828), 8 B. & C. 82; *R. v. Edingale* (1830), 10 B. & C. 730. *Consd. R. v. Great Wishford* (1835), 4 Ad. & El. 216. *Reid. R. v. Newtown* (1834), 1 Ad. & El. 238; *R. v. Ightham* (1836), 5 L. J. M. C. 105.

515. — — —.]—Parish Apprentices Act, 1810 (c. 139), s. 11, recited, that the salutary provisions enacted by Poor Relief Act, 1801 (c. 2), were frequently evaded in the binding out of poor children, & that the premium of apprenticeship was clandestinely provided by parish officers who were thus enabled to bind out poor children without the sanction of justices of the peace; & then enacted, "That no indenture of apprenticeship, by reason of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid & effectual, unless approved by two justices of the peace under their hands & seals, according to the provisions of the Act & of this Act":—*Held*: in order to make an indenture by reason of which any expense had

been incurred by the public parochial funds valid & effectual, the approval of two justices should be under their hands & seals, & such an indenture, approved of by two justices under their hands only, was void & not voidable, & no settlement was gained by serving under it.—*R. v. STOKES DAMEREL* (INHABITANTS) (1828), 7 B. & C. 503; 1 Man. & Ry. K. B. 458; 1 Man. & Ry. M. C. 155; 6 L. J. O. S. M. C. 28; 108 E. R. 833.

*Annotations*:—*Distd. R. v. Ickham* (1843), 7 J. P. 599. *Apld. R. v. St. George, Bloomsbury* (1855), 24 L. T. O. S. 213. *Reid. R. v. St. Mary Magdalen, Bermondsey* (1853), 2 E. & B. 809. *Mentd. R. v. St. Paul, Exeter* (1820), 10 B. & C. 12.

516. — — —.]—28 Geo. 3, c. 48, s. 4, makes void all indentures whereby children under eight years of age are bound apprentices to chimney sweepers, & no settlement can be gained by serving under them.—*R. v. HIPSWELL* (INHABITANTS) (1828), 8 B. & C. 466; 2 Man. & Ry. K. B. 474; 7 L. J. O. S. M. C. 4; 108 E. R. 1116.

*Annotations*:—*Apld. R. v. Gravesend* (1832), 3 B. & Ad. 240. *Reid. R. v. St. Gregory* (1834), 2 Ad. & El. 99; *R. v. Epsom* (1855), 4 E. & B. 1003. *Mentd. Pearse v. Morrice* (1834), 2 Ad. & El. 84.

517. — — —.]—10 Geo. 2, c. 31, s. 5, after reciting the inconvenience which happens by watermen, etc., taking apprentices before they are housekeepers or have any settled habitation for themselves or their apprentices, enacts, that it shall not be lawful for any waterman, though a freeman of the waterman's co., or his widow, to take to keep any person as his or her apprentice, unless he or she shall be the occupier of some house or tenement wherein to lodge him or herself & such apprentice: & that he or she shall keep such apprentice in the same house or tenement, wherein he or she shall lodge or lie, on pain of forfeiting £10 for every offence. By 10 Geo. 2, c. 31, s. 4, it is provided, that no such freeman or freeman's widow shall take or retain more than two apprentices at the same time, under a penalty:—*Held*: by 10 Geo. 2, c. 31, s. 5, any contract to take an apprentice, entered into by such freeman or widow, not being an occupier of some house, etc., or having already two apprentices, was prohibited; & therefore, where a pauper bound himself by indenture of apprenticeship to serve the widow of a waterman, she not having such house, etc., but it being understood that he was to live at the house of a freeman of the co., which he did, & to serve him conformably to the indenture, he having two other apprentices at the time, such indenture was absolutely void, & no settlement was gained by serving under it.—*R. v. GRAVESEND* (INHABITANTS) (1832), 3 B. & Ad. 240; 1 L. J. M. C. 20; 110 E. R. 90.

*Annotations*:—*Reid. R. v. St. Gregory* (1834), 2 Ad. & El. 99; *R. v. Barmston* (1838), 7 Ad. & El. 858. *Mentd. Pearse v. Morrice* (1834), 2 Ad. & El. 84; *Cundell v. Dawson* (1847), 4 C. B. 376.

518. — — —.]—On special case, the sessions found that J. by indenture in 1774, was put apprentice to P. for & in respect of W.'s estate; & there was a covenant by P. to teach J. the business of husbandry. The indenture was executed by the parish officers & W. P. was a farmer & tenant to W., who was a stocking weaver. J. never served P., but lived with W. long enough to gain a settlement by apprenticeship, if he could acquire one by such service. The sessions not having found that P. ever executed the indenture, or assigned the apprentice to, or assented to his service with W.:—*Held*: a settlement by apprenticeship was not proved.—*R. v. ST. CUTHBERT, WELLS* (INHABITANTS) (1834), 5 B. & Ad. 939; 3 Nev. & M. K. B. 100; 2 Nev. & M. M. C. 93; 3 L. J. M. C. 35; 110 E. R. 1038.

**Sect. 6.—Settlement by apprenticeship: Sub-sect. 1 A. & B. (a), (b) & (c).]**

**519.** ———.]—By a local Act (1 Geo. 2. c. xx), certain revenues were vested in the guardians of the poor of Canterbury, in trust for the maintenance & employment of the poor of that city; & the guardians were required to give bond under their common seal, for themselves & their successors, for ever thereafter to provide for, clothe, & maintain sixteen poor boys of the city, to be called Bluecoat Boys, & cause the sixteen boys to be instructed, etc., & put them & every of them respectively out apprentices after they & every of them respectively should have attained their respective ages of thirteen years, & before their ages of fifteen years, etc. :—*Held*: the indenture was invalid, & a service by the apprentice under it conferred on him no settlement.—*ST. NICHOLAS, ROCHESTER (CHURCHWARDENS & OVERSEERS) v. ST. BOTOLPH WITHOUT BISHOPSGATE (CHURCHWARDENS & OVERSEERS)* (1862), 12 C. B. N. S. 645; 31 L. J. M. C. 258; 6 L. T. 495; 9 Jur. N. S. 101; 142 E. R. 1296.

**520. Voidable contract—May confer settlement.]**—A service of four years under indentures of apprenticeship for that period, is sufficient to gain a settlement. Although 5 Eliz. c. 4, makes all apprenticeship in corporate towns for less than seven years void, yet indentures for a less time are voidable only as between the parties.—*ST. NICHOLAS, IPSWICH (INHABITANTS) v. ST. PETER'S, IPSWICH* (1736), *Lee temp. Hard.* 333; 2 Stra. 1066; 95 B. R. 210; *sub nom.* *R. v. ST. NICHOLAS, IPSWICH (INHABITANTS)*, *Burr.* S. C. 91; 2 Sess. Cas. K. B. 231.

*Annotations.*—*Appl.* *Petroch Parish v. Stoke Fleming Parish* (1745), 1 Wils. 96. *Reid.* *R. v. Gravesend* (1832), 3 B. & Ad. 240; 11 v. St. Gregory (1834), 2 Ad. & El. 99; *R. v. Clossworth* (1837), 6 Ad. & El. 286; *R. v. Barmston* (1838), 7 Ad. & El. 858. *Mentl.* *Gray v. Cookson & Clayton* (1812), 16 East. 13; *R. v. Hipswoil* (1828), 7 L. J. O. S. M. C. 4; *Pearse v. Morrice* (1834), 2 Ad. & El. 84.

**521.** ———.]—A local Act gave power to a corporation to bind out apprentices, "provided the child be not bound for a longer time than until he or she shall have attained a certain age":—*Held*: a deed of apprenticeship by which a boy was bound out for a longer time than that mentioned in the proviso was voidable only, & not void, & he gained a settlement by residence under it.—*R. v. ST. GREGORY (INHABITANTS)* (1834), 2 Ad. & El. 99; 2 Nev. & M. M. C. 440; 4 Nev. & M. K. B. 137; 4 L. J. M. C. 9; 111 E. R. 38.

**522. Defective contract of apprenticeship—Not convertible into contract of hiring.]**—A defective contract of apprenticeship cannot be converted into a contract of hiring & service, so as to give the apprentice a settlement as a yearly servant, by serving under it.—*R. v. LAINDON (INHABITANTS)* (1709), 8 Term Rep. 379; 2 Bott. 402; 101 E. R. 1444.

*Annotations.*—*Consd.* *R. v. Eccleston* (1802), 2 East. 298. *Reid.* *R. v. Shinsfield* (1811), 14 East. 541. *Mentl.* *R. v. Llanrunnor* (1831), 2 B. & Ad. 616; *Re Bush*, *Ex p. Fussell* (1837), 2 Deac. 158; *R. v. Stoke-upon-Trent* (1843), 5 Q. B. 303.

**523. Fraudulent contract of apprenticeship—Parish apprentice.]**—The parish officers of A. bound a pauper apprentice to his grandfather, who was described as a butcher. Indentures were executed with the sanction of two justices. The grandfather in fact did not carry on the trade of a butcher, but he & the mother colluded together, & fraudulently imposed him on the justices & the parish officers as a proper master for the pauper :—*Held*: there having been no fraud in the parish officers the pauper gained a settlement by

serving under this indenture.—*R. v. GREAT SHEEPY, LEICESTER (INHABITANTS)* (1828), 8 B. & C. 74; 2 Man. & Ry. K. B. 286; 1 Man. & Ry. M. C. 252; 6 L. J. O. S. M. C. 75; 108 E. R. 970.

**524.** ———.]—Father & son executed an indenture by which the son was bound apprentice to the father, as a tailor, for seven years, antedating the instrument by two years. The sessions found that this was fraudulently done, to evade the provisions of 5 Eliz. c. 4, & obtain the benefit of a seven years' service by serving five :—*Held*: the sessions were warranted in this conclusion, & no settlement was gained by residence under such apprenticeship, although the parish insisting on the settlement was not party to the fraud.—*R. v. BARMSTON (INHABITANTS)* (1838), 7 Ad. & El. 858; 3 Nev. & P. K. B. 167; 1 Will. Woll. & H. 242; 7 L. J. M. C. 31; 2 Jur. 537; 112 E. R. 693.

**B. What constitutes Valid Contract.**

**(a) In General.**

*See, generally, MASTER & SERVANT, Vol. XXXIV., pp. 502 et seq.*

**525. Capacity of parties—Who may be apprentice—Articled clerk.]**—An attorney's clerk, articulated by indenture, is an apprentice within the Poor Relief Act, 1691 (c. 11), s. 8; & as such, gains a settlement under that statute in the parish in which he inhabits while serving under his articles.—*ST. PANCRAZ v. CLAPHAM* (1800), 2 E. & El. 742; 24 J. P. 613; 6 Jur. N. S. 700; 8 W. R. 493; 121 E. R. 278; *sub nom.* *CLAPHAM PARISH v. ST. PANCRAZ PARISH*, 29 L. J. M. C. 141; 2 L. T. 210.

—.]—*See MASTER & SERVANT, Vol. XXXIV., p. 505, Nos. 4176–4191.*

**526. Who must execute contract—Trustees parties to indenture.]**—An indenture binding out an apprentice with the consent of the trustees of certain funds bequeathed for the binding out poor apprentices, which was executed by the apprentice & the master, & recited the trustees to be parties, & in which the consideration paid by the trustees to the master was stated to be £20, was held to confer a settlement, though it was not executed by the trustees, & though the master actually received only £16 15s. 6d., the residue being retained by the agent of the trustees for costs & expenses of the binding.—*R. v. QUANTON (INHABITANTS)* (1814), 2 M. & S. 338; 105 E. R. 407.

—.]—*See MASTER & SERVANT, Vol. XXXIV., p. 508, Nos. 4214–4223.*

**527. Contract executed abroad—When apprentice of full age.]**—An indenture was made in Newfoundland between pauper, being an Englishman & of age, & C., a merchant of Newfoundland, having also an establishment in England, witnessing that the pauper bound himself apprentice as a sailor to C., with covenants that pauper would serve C. as an apprentice, & that C. would take pauper as an apprentice, & maintain him during the term :—*Held*: pauper gained a settlement in an English parish by residence & service there under this indenture, & no evidence of the law of Newfoundland was necessary.—*R. v. CLOSSWORTH (INHABITANTS)* (1837), 6 Ad. & El. 286; 1 Nev. & P. K. B. 437; Nev. & P. M. C. 151; 6 L. J. M. C. 71; 1 Jur. 52; 112 E. R. 109; *sub nom.* *R. v. CLOSSWORTH (INHABITANTS)*, Will. Woll. & Dav. 28; 1 J. P. 20.

**528. Form of contract—Necessity for deed.]**—In order to acquire a settlement by apprenticeship in the place where the pauper was bound apprentice, it is not necessary for such apprentice to have



been bound under a deed of indenture, since under the provisions of 31 Geo. 2, c. 11, s. 1, amending Poor Relief Act, 1691 (c. 11), s. 8, a settlement by apprenticeship can be acquired under any deed, writing, or contract not indented, provided such has been first duly stamped, & the apprentice has resided forty days in the place where he was so bound.—*WOODSTOCK UNION v. SHIPTON-ON-STOUR UNION* (1892), 62 L. J. M. C. 43; 68 L. T. 449; 57 J. P. 167; 9 T. L. R. 28; 5 R. 67, D. C.

—*J.*—See MASTER & SERVANT, Vol. XXXIV., pp. 507, 508, Nos. 4209–4213.

**Necessity for express contract to teach.**—See MASTER & SERVANT, Vol. XXXIV., pp. 503, 504, Nos. 4156–4164, 4167, 4168.

**Necessity for use of technical words.**—See MASTER & SERVANT, Vol. XXXIV., pp. 504, 505, Nos. 4169–4172.

**Necessity for payment of premium.**—See MASTER & SERVANT, Vol. XXXIV., p. 505, Nos. 4173, 4174.

#### (b) Parish Apprentices.

See Poor Law Act, 1927 (c. 14), ss. 93–101; MASTER & SERVANT, Vol. XXXIV., pp. 522, 523, Nos. 4412–4423.

**529. Necessity for notice to parish to which bound.**—A pauper, settled in the parish of N. C., in the county of Nottingham, was, pursuant to an order of two justices of the county, bound apprentice by the churchwardens & overseers of that parish to A. B. of another parish, in a borough situate in the same county, but having justices who had exclusive jurisdiction therein. The indenture was allowed by the two county justices, but no notice was given to the overseers of the poor of the parish in the borough of the intention to bind such apprentice, nor did they or any of them attend before the county justices who allowed the indenture, & admit such notice:—*Held*: by Parish Apprentices Act, 1816 (c. 139), the indenture was void for want of such notice, & the pauper did not gain any settlement by serving under it.—*R. v. NEWARK-UPON-TRENT (INHABITANTS)* (1824), 3 B. & C. 59; 4 Dow. & Ry. K. B. 745; 2 Dow. & Ry. M. C. 306; 107 E. R. 656.

*Annotation* :—*Follid. R. v. Threlkeld* (1832), 4 B. & Ad. 229.

**530.** —*J.*—Under Parish Apprentices Act, 1816 (c. 139), s. 2, when an apprentice is bound from one parish into another, notice must be given to the overseers of the latter, though both be in the same county & jurisdiction of the peace.—*R. v. THRELKELD (INHABITANTS)* (1832), 4 B. & Ad. 229; 1 Nev. & M. K. B. 14; 1 Nev. & M. M. C. 3; 2 L. J. M. C. 20; 110 E. R. 441.

**531.** —*J.*—(1) Under Parish Apprentices Act, 1816 (c. 139), ss. 1, 2, when an apprentice is bound from one parish into another, the indenture is not valid for the purpose of settlement, unless notice has been given to the overseers of the latter parish, pursuant to sect. 2, before the indenture was allowed.

(2) But, on appeal against an order of removal grounded on such indenture, resps. are not bound in the first instance to prove such notice: if there be no evidence to the contrary, the notice will be presumed.—*R. v. WHISTON (INHABITANTS)* (1836), 4 Ad. & El. 607; 1 Har. & W. 696; 6 Nev. & M. K. B. 65; 3 Nev. & M. M. C. 514; 5 L. J. M. C. 67; 111 E. R. 915.

*Annotation* :—*As to* (2) *Follid. R. v. Witney* (1836), 5 Ad. & El. 191.

#### (c) Stamps.

See, generally, Stamp Act, 1891 (c. 39), ss. 1, 25, sched. I.; EVIDENCE, Vol. XXII., pp. 262, 263, No. 2465.

**532. General rule—Contract must be stamped.**

—Where the duty on apprentices is not paid the apprentice gains no settlement.—*CURDEN PARISH v. LALAND, LANCASHIRE, PARISH* (1731), 2 Stra. 903; 93 E. R. 929; *sub nom. COURLAND (INHABITANTS) v. LEELEAD (INHABITANTS)*, 1 Barn. K. B. 406; *sub nom. CUREDEN PARISH v. LALAND*, 2 Sess. Cas. K. B. 167; 1 Bott, 517.

*Annotations* :—*Distd. Ovingdon Parish v. Northorham Parish* (1740), 2 Stra. 1132. *Reid. St. Nicholas v. St. Peter's, Ipswich* (1736), Lee temp. Hard. 323. *Mentd. Boyer v. Bampton* (1740), 7 Mod. Rep. 334; *Robinson v. Bland* (1760), 1 Wm. Bl. 256.

**533.** —*J.*—A son sixteen years old was bound apprentice in A. for four years, which he served, & never afterwards returned to his father's family; the indenture was void for want of a stamp, & the father in the meantime gained a settlement at B.:—*Held*: the son was not settled in A. by service of the apprenticeship, & he was not emancipated, but followed his father's settlement at B.—*R. v. EDGEWORTH (INHABITANTS)* (1789), 3 Term Rep. 353; 100 E. R. 616.

*Annotations* :—*Apld. R. v. Amersham* (1836), 4 Ad. & El. 508. *Reid. R. v. Yeoveley* (1838), 8 Ad. & El. 806.

**534.** —*J.*—No settlement is gained by serving under an agreement of apprenticeship not stamped.—*R. v. DITCHINGHAM (INHABITANTS)* (1792), 4 Term Rep. 769; Nolan, 109; 2 Bott, 401; 100 E. R. 1292.

*Annotation* :—*Expld. Woodstock Union v. Shipton-on-Stour Union* (1892), 62 L. J. M. C. 43.

**535.** —*J.*—An indenture of apprenticeship, executed before the passing of Stamp Act, 1804 (c. 98), must be stamped with the premium stamp within the time prescribed by the statute 8 Ann. c. 9, & where such an indenture was stamped at the time of its being produced in evidence, with the stamp required by the Stamp Act, 1815 (c. 184), but not within the time prescribed by 8 Ann. c. 9:—*Held*: the indenture was wholly void, & the pauper, by serving under it, gained no settlement.—*R. v. CHIPPING-NORTON (INHABITANTS)* (1822), 5 B. & Ald. 412; 100 E. R. 1242.

*Annotation* :—*Follid. R. v. Church Hulme* (1831), 5 B. & Ad. 1029, n.

**536.** —*J.*—*WOODSTOCK UNION v. SHIPTON-ON-STOUR UNION*, No. 528, *ante*.

—*J.*—See MASTER & SERVANT, Vol. XXXIV., p. 509, No. 4229.

**537. Presumption of stamping—Copy of apprenticeship deed—Proceedings in respect of removal.**—Resps. in an appeal against an order of removal sent to appls., with the copy of their order & notice of chargeability, a copy of an indenture of apprenticeship, under which the alleged settlement was gained, together with the examination of a witness who stated: "I produce a covenant indenture of apprenticeship," etc. (describing it). "The indenture is duly stamped":—*Held*: the stamp being no part of the indenture, it was not necessary to send any "copy" of it; & the statement & indenture taken together conveyed sufficient information to appls., & showed that the removing justices had evidence of a settlement. *Semble*: it was not necessary to send any statement respecting the stamp at all.—*R. v. KEIGHLEY (INHABITANTS)* (1846), 8 Q. B. 877; 2 New Sess. Cas. 321; 15 L. J. M. C. 102; 10 J. P. 440; 10 Jur. 492; 115 E. R. 1104; *sub nom. R. v. KIGHLEY*, 7 L. T. O. S. 158.

—*J.*—See MASTER & SERVANT, Vol. XXXIV., p. 509, Nos. 4227, 4228.

**One stamp sufficient.**—See MASTER & SERVANT, Vol. XXXIV., p. 509, No. 4230.

**Exemptions in case of parish apprentices.**—See MASTER & SERVANT, Vol. XXXIV., p. 524, Nos. 4428–4430.

**Sect. 6.—Settlement by apprenticeship: Sub-sect. 1, C. & D.; sub-sect. 2, A. & B.]**

**C. Proof of Contract.**

See, generally, EVIDENCE, Vol. XXII., pp. 191 *et seq.*

**538. General rule—Indenture must be produced.]—***R. v. St. HELEN'S, ABINGDON (INHABITANTS)* (1749), Burr. S. C. 292.

**Annotation:—***Reid. R. v. Heyop* (1846), 2 New Sess. Cas. 270.

**539. Sufficiency of evidence—Indenture lost.]—**Where, in the absence of the usual proof in support of a settlement by apprenticeship, it appeared that the pauper, when a boy, had lived for three years with his master, & then ran away; that twenty years since a fire had happened in the apartment in which the pauper's father lived, & destroyed every thing he had; that the father & mother of the pauper were both dead; that the pauper's master, & the wife of the latter, were also dead; that the master had left no property at his decease, & that no relatives of his were to be found; that a fellow apprentice of the pauper had seen in his master's hand an indenture, which he understood to be the indenture of apprenticeship of the pauper; & that after the pauper had left his master's service he married, & the parish in which he was supposed to have served as an apprentice relieved his wife by receiving her into the workhouse:—**Held:** this was sufficient evidence to warrant the sessions in presuming a legal binding & service as an apprentice, so as to confer a settlement.—*R. v. St. MARY-LE-BONE INHABITANTS* (1824), 4 Dow. & Ry. K. B. 475; 2 Dow. & Ry. M. C. 325.

**Annotation:—***Fold. R. v. Fordingbridge* (1858), E. B. & E. 678.

**540. ———.]—**On objection, stated in grounds of appeal, that "no copy of an order of removal has been sent," applts. cannot allege that the copy sent is defective & inaccurate in not setting out the name of one of the paupers. In an examination, after loss of an indenture of apprenticeship & sufficient search had been shown, the following evidence was given: "In or about May, 1831, the pauper was, by his own consent, his father & mother being dead, bound by indenture of apprenticeship, bearing date," etc., "which was duly stamped & executed," to serve, etc. "as an apprentice, for the term of six years then next following. I saw the indenture executed":—**Held:** sufficient to prove a binding as apprentice.—*R. v. St. ANNE'S, WESTMINSTER (INHABITANTS)* (1847), 8 Q. B. 561; 2 New Mag. Cas. 75; 2 New Sess. Cas. 517; 16 L. J. M. C. 33; 8 L. T. O. S. 338; 11 J. P. 167; 11 Jur. 124; 115 E. R. 986.

**Admissibility of secondary evidence.]—**See EVIDENCE, Vol. XXII., pp. 213, 214, 225, 229, 230, 231, 240, Nos. 1865, 1871, 1990, 1997, 2038, 2039, 2041, 2044, 2049, 2161.

**541. Admissibility of extrinsic evidence—Inaccurate description in indenture.]—**To prove the settlement by apprenticeship of Joseph Beaumont, an indenture was put in, dated, & purporting to be between Joseph Roberds, of one part, & John Beaumont of the other. It was very inaccurately worded, & spelt. It witnessed "that the said John Beaumont hath, of his own free will, & with the consent of & by his father's John Beaumont, has put & bound himself apprentice to & with the said Joseph Roberds, & with him after the manner of an apprentice to dwell, remain & serve, from the date hereof, for, during & until the term of his attain ages twenty-one thence next following be fully completed & ended";

during which term "the said apprentice his said master shall serve," etc. "The said Joseph Roberds" doth covenant with "the said Joseph Beaumont, apprentice," to teach him, etc., to pay him 3s. "yearly & every year during his apprenticeship," & to allow him two weeks to go to school, "yearly & every year during his apprenticeship." "In witness whereof, the parties above named to these present indentures have set their hands & seals." At the bottom, followed "Joseph (L.S.) Roberts. Joseph (L.S.) Beaumont." Joseph Beaumont gave evidence that he was bound by the above indenture, & served under it:—**Held:** (1) it appeared from the deed that the John Beaumont, party thereto, was the Joseph Beaumont therein named apprentice. (2) Extrinsic evidence might be given that the person so meant was the pauper, & he had executed the indenture. (3) The meaning of the parties sufficiently appeared to be that the apprentice should be bound until he attained the age of twenty-one. (4) This, combined with the date of the indenture, might by extrinsic evidence of the pauper's age be made sufficiently certain as to the term for which he became bound. (5) The sessions, upon the above evidence, were justified in finding a settlement by apprenticeship.—*R. v. WOOLDALE (INHABITANTS)* (1844), 6 Q. B. 549; 1 New Sess. Cas. 377; 14 L. J. M. C. 13; 4 L. T. O. S. 132 A; 9 J. P. 85; 9 Jur. 83; 115 E. R. 206.

**Proof of execution.]—**See MASTER & SERVANT, Vol. XXXIV., p. 508, Nos. 4224-4226.

**D. Termination of Contract.**

See MASTER & SERVANT, Vol. XXXIV., pp. 515-518, 524, Nos. 4304-4355, 4431-4436.

**SUB-SECT. 2.—RESIDENCE UNDER CONTRACT OF APPRENTICESHIP.**

**A. Necessity for.**

See Poor Law Act, 1927 (c. 14), s. 112.

**542. General rule—Residence a necessary qualification.]—**Inhabitaney is a qualification requisite for an apprentice to gain a settlement (PARKER, C.J.).—*ST. OLIVES, OLD JURY, LONDON, PARISH V. MILE-END, MIDDLESEX* (1717), 1 Sess. Cas. K. B. 115; 93 E. R. 34.

**543. ———.]—***R. v. CHARLES (INHABITANTS)* (1772), Burr. S. C. 706; 2 Bott, 448.

**Annotations:—***Apld. R. v. Linkinhorne* (1832), 3 B. & Ad. 413. *Reid. R. v. Stratford-upon-Avon* (1809), 11 East, 176; *R. v. Banbury* (1832), 3 B. & Ad. 706.

**544. ———.]—**The examination of a pauper which alleges a settlement by apprenticeship, is not sufficient unless it state a residence of the pauper with his master in the place in which the settlement is claimed, for a length of time that would confer a settlement.—*R. v. WEST RIDING OF YORK JJ.* (1843), 2 Dowl. N. S. 707; 12 L. J. M. C. 37; 6 J. P. 718; 6 Jur. 1063.

**Annotation:—***Consd. R. v. Flockton* (1843), 2 Q. B. 535.

**B. What constitutes Residence.**

**545. Must be for purpose of sleeping.]—***R. v. CASTLETON (INHABITANTS)* (1766), Burr. S. C. 569; 2 Bott, 418.

**Annotation:—***Distd. R. v. Ilkeston* (1825), 4 B. & C. 64.

**546. Must be in pursuance of service.]—***R. v. CASTLETON (INHABITANTS)* (1766), Burr. S. C. 569; 2 Bott, 418.

**Annotation:—***Reid. R. v. Ilkeston* (1825), 4 B. & C. 64.

**547. ———.]—**The residence of an apprentice with his grandmother in a different parish from

his master on account of illness, though with the consent of the master, is not referable to the apprenticeship, so as to gain him a settlement in such parish.—*R. v. BARMBY-IN-THE-MARSH (INHABITANTS)* (1806), 7 East, 381; 2 Bott, 422; 3 Smith, K. B. 375; 103 E. R. 148.

*Annotations*:—*Distd. R. v. Stratford-upon-Avon* (1809), 11 East, 176; *R. v. Foulness* (1817), 6 M. & S. 351. *Refd. R. v. Banbury* (1832), 1 L. J. M. C. 64.

548. —[Apprentice, who lived & worked with his master in the parish of I., went home to his father's in the parish of R., every Saturday, & slept there on Saturday & Sunday nights, with his master's leave, & returned to work on Monday morning. Apprentice having returned, & worked as usual on a Monday, left his master in the evening, & never returned:—*Held*: the sleeping in R. being merely by way of indulgence, & not for the purposes of the apprenticeship, was not sufficient to confer a settlement.—*R. v. ILKESTON* (1825), 4 B. & C. 64; 6 Dow. & Ry. K. B. 64; 3 Dow. & Ry. M. C. 45; 2 Bott, 431; 107 E. R. 983.

*Annotations*:—*Distd. R. v. Warden* (1828), 2 Man. & Ry. K. B. 24; *R. v. Linkinhorne* (1832), 3 B. & Ad. 413; *Il. v. St. George's, Bloomsbury* (1845), 1 New Mag. Cas. 438; *R. v. Barton-upon-Irwell* (1863), 3 B. & S. 604. *Refd. R. v. Banbury* (1832), 3 B. & Ad. 706; *R. v. Banbury* (1833), 5 B. & Ad. 176.

549. *Residence in extra-parochial place.*—The justices of peace have no authority to settle any person in an extra-parochial place: for the statute which gives them authority extends only to the poor within parishes (HOLT, C.J.).—*CLERKENWELL PARISH (INHABITANTS) v. BRIDEWELL* (1099), 1 Ld. Raym. 549; 91 E. R. 1206; *sub nom. BRIDEWELL PRECINCT v. CLERKENWELL PARISH*, Holt, K. B. 509; 2 Salk. 486; *sub nom. BRIDEWELL PRECINCT'S CASE*, Holt, K. B. 574; Carth. 515.

*Annotation*:—*Refd. R. v. Belvoir* (1727), 2 Sess. Cas. K. B. 111.

550. *Residence elsewhere on account of illness.*—*R. v. BARMBY-IN-THE-MARSH (INHABITANTS)*, No. 547, *ante*.

551. —[Apprentice maintained by master.]—An apprentice to a barge master, who had slept thirty-five nights in the master's parish during his service, went with his master on a voyage to London, where the master absconded, & never returned during the period of the indentures; but the apprentice returned in the barge to the master's parish, & remained on board two days, when, in consequence of illness, he was, by direction of his master's wife, conveyed to the poor-house, she being unable to accommodate him in her own house, but was maintained entirely at her expense, in expectation of her husband's return, during three weeks, while he continued there:—*Held*: the apprentice acquired a settlement by such residence in the master's parish.—*R. v. FOULNESS (INHABITANTS)* (1816), 6 M. & S. 351; Pratt, 248; 105 E. R. 1274.

*Annotation*:—*Mentd. Ellen v. Topp* (1851), 20 L. J. Ex. 241.

552. —[G. was bound apprentice to a cork cutter in parish B., to serve him for seven years. After serving for seven weeks in that parish, the apprentice having a weakness in his eyes, his master told him to go back to his father, & it was afterwards agreed that the master should give the pauper two gross of corks per week, of the value of 2s., to maintain him; he went & lived with his father in parish K. for two years, during which time he received the corks from his master & sold them, & slept more than forty nights at his father's house in K., but did no work for his master. At the expiration of two

years, in consequence of the master giving him bad corks, he was taken back to the master in B., with whom he lived ten days, & during that time he went out hawking corks for sale for his master. He then went home again, his master agreeing to let him have a gross of the best corks per week, which he did, & the apprentice disposed of them as before, doing no work for the master, & residing in K. with his father till his indentures were discharged by an order of two justices:—*Held*: the apprentice being maintained by his master in K. in pursuance of the indenture, resided there as apprentice, & gained a settlement.—*R. v. BANBURY (INHABITANTS)* (1832), 3 B. & Ad. 706; 1 L. J. M. C. 64; Pratt, 249; 110 E. R. 258.

*Annotations*:—*Apld. R. v. Somerby* (1839), 1 Per. & Dav. 180. *Refd. R. v. Barton-upon-Irwell* (1863), 7 L. T. 853.

553. —[Apprentice assigned to another.—Return to first master's parish.]—A pauper was duly apprenticed to a farmer residing in parish A., & served him there, but before the expiration of the apprenticeship, the farmer, having failed in business, placed the pauper with another farmer in parish B., & the pauper served the latter in B. for nine months, when becoming ill & disabled from service, he returned to his first master in parish A. The latter, having no accommodation for him, told him to go to his mother, who lived in that parish. The pauper did so, & his first master, a few days after, promised his mother to remunerate her for taking care of the pauper. The pauper continued to reside with his mother in A. for about eight weeks, his first master also being resident there, but did not perform any actual service for him:—*Held*: the pauper resided in A. in the character of apprentice, & thereby gained a settlement in that parish.—*R. v. LINKINHORNE (INHABITANTS)* (1832), 3 B. & Ad. 413; 1 L. J. M. C. 42; Pratt, 256; 110 E. R. 148.

*Annotations*:—*Consd. R. v. Banbury* (1832), 3 B. & Ad. 706. *Follid. R. v. Burslem* (1839), 11 Ad. & El. 52. *Refd. R. v. Banbury* (1833), 5 B. & Ad. 176; *Il. v. Sandhurst* (1837), 6 Ad. & El. 130.

554. —[Apprentice performing same service.—Though work illegal.]—A pauper, apprenticed to a carpenter in parish S., being disabled by an accident from working in his business, was taken by his master to his, the apprentice's, father's house in parish M. for the benefit of surgical attendance. He resided there forty days, & during such residence was employed by his master to sell tickets in a lottery in which the prizes were articles manufactured by the master, & was allowed by him 1s. on each ticket sold, in aid of his maintenance:—*Held*: he gained a settlement in M., although the sale of such tickets was illegal.—*R. v. SOMERBY (INHABITANTS)* (1838), 9 Ad. & El. 310; 1 Per. & Dav. 180; 1 Will. Woll. & H. 697; 2 Jur. 1064; 112 E. R. 1230.

555. *Residence at school*—[With approval of master.]—Where a master mariner, having no immediate occasion for his apprentice's service, the vessel being then in dock, offered either to turn him over to another master for a time, or to let him go back to school, & the apprentice said he would go back to school & learn navigation; & accordingly did so, & resided above forty days there:—*Held*: such residence was not a residence under the indentures, & he did not thereby gain a settlement.—*R. v. ST. MARY BREDIN, CANTERBURY (INHABITANTS)* (1819), 2 B. & Ald. 382; 106 E. R. 406.

*Annotations*:—*Apld. R. v. Brotton* (1820), 4 B. & Ald. 81; *R. v. Ilkeston* (1825), 4 B. & C. 64.

556. *Residence with master under control of*

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**third persons—Permanent staff of militia.]**—A parish apprentice & his master being both on the permanent staff of the local militia, in consequence of that circumstance resided together with his master, & continued to serve him in the parish of B. for forty days:—*Held*: this residence was sufficient, & he thereby acquired a settlement in B., notwithstanding they were both under the control of their superior officers during the whole time.—*R. v. CHELMSFORD (INHABITANTS)* (1820), 3 B. & Ald. 411; 106 E. R. 713.

**557. Residence at home during part of year—Under terms of apprenticeship deed—Sea apprentice.]**—By an indenture of apprenticeship it was stipulated, that the master should provide meat, etc. during the term, except in the winter seasons, when the ship to which the apprentice belonged should be laid by unrigged; during which time the apprentice was to be maintained by himself or friends, the master paying a compensation. Under this stipulation, the apprentice, during the winter, resided with his parents in the township of B. for more than forty days, not doing any work for his master during such residence:—*Held*: this was not a residence under the indenture, & conferred no settlement.—*R. v. BROTON (INHABITANTS)* (1820), 4 B. & Ald. 84; 106 E. R. 869.

*Annotations*:—*Apld. R. v. Ilkeston* (1825), 4 B. & C. 64. *Distd. R. v. Banbury* (1832), 3 B. & Ad. 706.

**558. Residence elsewhere by indulgence of master.]**—An apprentice bound for seven years to A., served him in his house between five & six years, & afterwards, for the remainder of the term, resided in his mother's house, having agreed with his master that he should be at liberty to work for whom he pleased, he paying 2s. per week to his master. The master also, during this time, occasionally gave him work, for which he was not paid:—*Held*: this was not a continuance of the service to A. for seven years under the indenture.—*R. v. INMAN* (1820), 4 B. & Ald. 55; 106 E. R. 858.

**559. —.]**—*R. v. ILKESTON*, No. 548, *ante*.

**560. Residence after agreement to dissolve apprenticeship—Before payment of money.]**—A boy bound out by a parish as an apprentice in husbandry, till he should be twenty-one years of age, served the master, first in husbandry & afterwards as a miner. He then left his master, & went to live with his own father, who was a miner, & worked with his father at the same mine at which he had worked with his master. The master afterwards agreed with the father that the apprentice should remain with the father, & the indenture be given up on a subsequent day, upon the payment of a sum of money. On the day appointed, which was before the passing of Parish Apprentices Act, 1816 (c. 139), the money was paid, & the indenture given up to the father. The son was then under age. He worked with the father as a miner till his majority, when the indenture was given up to him by his father. From his first coming to his father, the father had received his wages, & maintained him:—*Held*: even supposing the parties to have had power to dissolve the apprenticeship, & to have intended to do so, it was not dissolved till the money was paid; & a residence of forty days between the making of the agreement & the payment of the money, was a residence under the apprenticeship, & conferred a settlement.—*R. v. GWINNEAR (INHABITANTS)* (1834), 1 Ad. & El. 152; 8 Nev. & M. K. B. 297; 2 Nev. & M. M. C. 216;

110 E. R. 1165; *sub nom. R. v. GUINEAR (INHABITANTS)*, 3 L. J. M. C. 81.

**561. Residence elsewhere as matter of business.]**—*R. v. BARTON UPON IRWELL (INHABITANTS)*, No. 623, *post*.

### C. Length of Residence.

*See Poor Law Act, 1927 (c. 14), s. 112.*

**562. General rule—Forty days.]**—*ST. BRIDE'S PARISH v. ST. SAVIOUR'S PARISH*, No. 611, *post*.

**563. —.]**—Forty days is a good settlement to an apprentice in respect of his skill & art, by which he is supposed unlikely to become chargeable (*PARKER, C.J.*).—*R. v. BRIGHTWELL (INHABITANTS)* (1715), 1 Sess. Cas. K. B. 92; 93 E. R. 27.

*Annotation*:—*Reid. Hamner Parish, Flint v. Ellosmere Parish, Salop* (1730), 2 Stra. 878.

**564. —.]**—Apprentice living forty days in a parish after his master, who was certificated, purchased an estate, gains a settlement.—*IVINGHOE PARISH v. STONEBRIDGE PARISH* (1720), 1 Stra. 265; 93 E. R. 513.

*Annotations*:—*Consd. R. v. Great Driffield* (1828), 8 B. & C. 684; *R. v. Leeds* (1832), 4 B. & Ad. 248.

**565. —.]**—*R. v. WHITCHURCH (INHABITANTS)* (1726), 3 Vin. Abr. 31.

*Annotation*:—*Reid. St. Pancras Parish v. Clapham Parish* (1860), 6 Jur. N. S. 700.

**566. Days of residence need not be successive.]**—The forty days inhabitation of an apprentice need not be all together.—*R. v. CIRENCESTER (INHABITANTS)* (1724), 1 Stra. 579; 93 E. R. 711.

**567. —.]**—*R. v. GAINSBOROUGH (INHABITANTS)* (1768), Burr. S. C. 586.

*Annotations*:—*Apld. R. v. Aldstone* (1831), 2 B. & Ad. 207. *Reid. R. v. Closworth* (1837), 6 Ad. & El. 286.

**568. —.]**—(1) When indentures of apprenticeship still subsist in point of law, & the pauper has served another master under the idea that they were relinquished, no settlement is gained thereby, either as an apprentice, or as an hired servant. (2) In order to give the apprentice a settlement in a different parish, by serving another master, there must be an express consent of the original master to the particular service; & a mere recommendation is not sufficient.

(3) In the case of an apprentice, the latter part of the service may be joined to the former, notwithstanding any intervening settlement.—*R. v. SANDFORD (INHABITANTS)* (1786), 1 Term Rep. 281; 2 Bott. 453; 99 E. R. 1095.

*Annotations*:—*As to (1) Reid. R. v. Brightelmston* (1793), 5 Term Rep. 188. *As to (2) Distd. R. v. Holy Trinity* (1790), 3 Term Rep. 605; *R. v. Chipping Warden* (1799), 8 Term Rep. 108.

**569. —.]**—*R. v. ALDSTONE (INHABITANTS)*, No. 570, *post*.

**570. Days of residence need not be in same year.]**—An apprentice may gain a settlement by residing in a parish during his apprenticeship forty days, though not within the compass of any one year.—*R. v. ALDSTONE (INHABITANTS)* (1831), 2 B. & Ad. 207; Pratt, 249; 109 E. R. 1121.

### SUB-SECT. 3.—SERVICE UNDER CONTRACT OF APPRENTICESHIP.

#### A. Necessity for.

**571. Actual service not necessary.]**—*R. v. LINKINHORNE (INHABITANTS)*, No. 553, *ante*.

**572. —.]**—Where an apprentice lived & slept in a parish, & in his master's house there, during the whole term of the apprenticeship, but was never employed by his master in the business

under the indenture, but allowed by him to hire himself out to others in a different business, the master receiving part of his earnings:—*Held*: such residence was sufficient, & a settlement was thereby gained.—*R. v. BURSLEM (INHABITANTS) (1839)*, 11 Ad. & El. 52; 3 Per. & Dav. 38; 9 L. J. M. C. 1; 4 J. P. 57; 4 Jur. 169; 113 E. R. 332.

#### *B. Transfer of Service.*

##### *(a) In General.*

See Poor Law Act, 1927 (c. 14), ss. 95, 112; MASTER & SERVANT, Vol. XXXIV., p. 513, Nos. 4283–4285.

**573. General rule—Service under new master confers settlement—When transfer with consent of first master.]—***R. v. FREMINGTON (INHABITANTS) (1757)*, Burr. S. C. 416; 2 Bott, 445.

*Annotations:—Fidd. R. v. Holy Trinity (1790)*, 3 Term Rep. 605; *Reld. R. v. Sandford (1786)*, 1 Term Rep. 281; *R. v. Brighthelmston (1793)*, 5 Term Rep. 188.

**574. ———.]—**Where a parish apprentice was assigned by his original master to S. by an instrument in writing, but there was no consent of two magistrates:—*Held*: this was not a lawful assignment under 32 Geo. 3, c. 57, s. 7, but it was sufficient to show the consent of the first master, to the service to S., & consequently, such service was good as a service under the original indenture & conferred a settlement.—*R. v. BARLESTON (INHABITANTS) (1822)*, 5 B. & Ald. 780; 1 Dow. & Ry. M. C. 103; 1 Dow. & Ry. K. B. 421; 100 E. R. 1376.

*Annotation:—Reld. R. v. Shipton (1828)*, 6 L. J. O. S. M. C. 92.

**575. ———.]—**Pauper was bound apprentice for seven years to a breeches maker, & served his master half a year; the latter then failed in business, & told the pauper he might go & work for one B., who lived in another parish, & if pauper did not become troublesome to him, the first master, or to his parish, till the end of his time, he would give pauper his watch. The pauper agreed with B., & worked for him at breeches making, by the piece, at the usual rate. B. frequently carried messages between the first master & the pauper. The latter having worked for B. a year, in B.'s parish, agreed, with the consent of his first master, to work by the piece for C., another breeches maker, living in a third parish, who gave better terms. While he so worked with C. his first master came to see him, & again promised him his watch at the end of his time. The pauper worked two years for C., living in C.'s parish; he afterwards left, & his first master then sent him his watch. The pauper kept his earnings & maintained himself:—*Held*: the inhabitation of the pauper in the parishes of the second & third master was connected with the apprenticeship, & he thereby gained settlements in those parishes.—*R. v. BANBURY (INHABITANTS) (1833)*, 5 B. & Ad. 176; 2 Nev. & M. K. B. 105; 1 Nev. & M. M. C. 148; 2 L. J. M. C. 66; 110 E. R. 757.

*Annotations:—Expld. R. v. Maldstone (1836)*, 5 Ad. & El. 326; *Consd. R. v. Sandhurst (1837)*, 6 Ad. & El. 130.

**576. ———.]—**Though apprenticeship not known to second master.]—An apprentice may gain a settlement by serving a second master with the assent of the first, although the second master never knew of the apprenticeship, if the service be in other respects a good service under the indentures.—*R. v. SANDHURST (INHABITANTS) (1837)*, 6 Ad. & El. 130; 1 Nev. & P. K. B. 296; Nev. & P. M. C. 92; Will. Woll. & Dav. 34; 6 L. J. M. C. 57; 1 J. P. 23; 112 E. R. 50.

**577. ———.]—**Parish apprentice.]—*PETROCH PARISH v. STOKE FLEMING PARISH (1745)*,

1 Wils. 96; 95 E. R. 512; *sub nom. R. v. St. PETROX (INHABITANTS)*, Burr. S. C. 248.

*Annotations:—Consd. R. v. Barleston (1822)*, 5 B. & Ald. 780; *Reld. R. v. Barnsley (1813)*, 1 M. & S. 377; *St. Pancras v. Clapham (1860)*, 2 E. & E. 742.

**578. ———.]—**When transfer with consent of first master's assignee.]—*R. v. TAVISTOCK (1767)*, Burr. S. C. 578; 1 Wm. Bl. 635; 2 Bott, 447; 96 E. R. 368.

##### *(b) Consent of Master.*

##### *i. Necessity for.*

**579. General rule—Consent necessary.]—**To enable an apprentice to gain a settlement by serving a second master, the service must be performed with the consent of the first master.—*R. v. St. PAUL'S, BEDFORD (INHABITANTS) (1795)*, 6 Term Rep. 452; 101 E. R. 644.

*Annotation:—Reld. R. v. Enderby (1831)*, 2 B. & Ad. 205.

**580. ———.]—**An examination stated an apprenticeship, & a service in applt. parish with a party other than the master; but did not state the master's consent:—*Held*: (1) the examination was bad on the face of it, so far as regarded a settlement by apprenticeship; although the examinant, the apprentice, stated that it was agreed, in the indenture, that he should serve the last forty days of his apprenticeship in L., applt. parish, " & I served the last forty days " in L., " with H. my master's father." (2) The objection was sufficiently taken by objecting that it did not appear that the examinant served H. with the consent of the master, or in any other manner, under any indenture of apprenticeship, alleging some additional defects, & then proceeding thus, " & the said examinations are too general, & are wanting in sufficient particularity, in each of these last-mentioned respects."—*R. v. LYDEARD ST. LAWRENCE (INHABITANTS) (1841)*, 11 Ad. & El. 616; 1 Gal. & Dav. 191; 10 L. J. M. C. 147; 6 Jur. 32; 113 E. R. 547.

*Annotations:—Generally, Reld. R. v. Rishworth (1842)*, 2 Q. B. 476; *R. v. West Riding JJ. (1842)*, 2 Q. B. 705.

**581. ———.]—***R. v. St. LUKE'S, MIDDLESEX (INHABITANTS) (1765)*, 1 Wm. Bl. 553; Burr. S. C. 542; 96 E. R. 319.

*Annotation:—Consd. R. v. Holy Trinity Minorities (1790)*, 3 Term Rep. 606.

**582. Necessity for express consent to particular service.]—***R. v. AUSTKEY (INHABITANTS) (1758)*, Burr. S. C. 441; 2 Bott, 446.

*Annotations:—Appld. R. v. Langham (1781)*, Cald. Mag. Cas. 126; *R. v. Crediton (1800)*, 1 East, 59.

**583. ———.]—***R. v. OFFERTON (1775)*, Burr. S. C. 802; 2 Bott, 448.

**584. ———.]—***R. v. SANDFORD (INHABITANTS)*, No. 568, *ante*.

**585. ———.]—**If an apprentice serve a third person by an express licence from his master, it is a service of the original master under the indentures, & confers a settlement (BULLER, J.).—*R. v. St. JOHN THE EVANGELIST (INHABITANTS) (1792)*, Nolan, 165.

**586. ———.]—**Before the expiration of the term of an apprenticeship, the apprentice asked his mistress leave to go into another service, without mentioning where he was going. The mistress said that she was not against it, if he could better himself. The apprentice then went & hired himself to B. in another parish for a year, at certain wages. He then returned to his mistress, & told her what he had done, & she said that she was not against it. The apprentice then went to his new place, & lived with B. for three months:—*Held*: the service with B. was not a service under the indenture; because there was not a particular assent of the mistress to that

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B. (b) i. & ii., (c) & (d).]**

service; & because the service with B. was not as an apprentice, but as a servant under a contract of hiring.—*R. v. WHITCHURCH (INHABITANTS)* (1823), 1 B. & C. 574; 2 Dow. & Ry. K. B. 845; 1 Dow. & Ry. M. C. 452; 107 E. R. 211.

*Annotations*.—*Apld. R. v. Shipton* (1828), 8 B. & C. 88. *Distd. R. v. Banbury* (1833), 5 B. & Ad. 178. *Apld. R. v. Maidstone* (1836), 5 Ad. & El. 328. *Refd. R. v. Sandhurst* (1837), 6 Ad. & El. 130.

**587. —.**—[Settlement by apprenticeship cannot be gained by services under a second master, with the assent of the first, unless such assent be given to the particular service.—*R. v. MAIDSTONE (INHABITANTS)* (1836), 5 Ad. & El. 328; 2 Har. & W. 198; 6 Nev. & M. K. B. 545; 3 Nev. & M. M. C. 658; 5 L. J. M. C. 119; 111 E. R. 1188.

**ii. What amounts to.**

**588. May be by parol.]**—The express consent by parol of a first master to a service with a second is for the purpose of a settlement a legal assignment of the apprentice.—*R. v. LANGHAM (INHABITANTS)* (1781), *Cald. Mag. Cas.* 126.

**589. Subsequent approbation.]**—Upon a general leave given by his original master to an apprentice to go & work, wherever he pleases, the knowledge & approbation of any particular services, though such knowledge does not reach the master till after the contract for such service is made, makes such service a service under the indentures.—*R. v. BRADNINCH* (1784), *Cald. Mag. Cas.* 461; 2 Bott, 452.

*Annotation*.—*Refd. R. v. Maidstone* (1836), 5 Ad. & El. 328.

**590. —.**—[The pauper, an apprentice, being about to marry, told his master that he wished to provide & work for himself, to which the master consented, & said he might do the best he could for himself; but nothing was said about the indentures, & they were not in fact delivered up or cancelled; the pauper afterwards engaged to work with another master, who told the original master that he had got the pauper at work, to which the original master answered, "I am glad of it, he was a bad lad, & I could make nothing of him":—*Held*: this was not such a consent to the particular service as would confer a settlement in the parish where the pauper then lived with the second master.—*R. v. ST. HELEN, STONEGATE (INHABITANTS)* (1801), 1 East, 285; 102 E. R. 110.

*Annotation*.—*Consd. R. v. Whitchurch* (1823), 1 B. & C. 574.

**591. —.**—[*R. v. WHITCHURCH (INHABITANTS)* No. 586, *ante*.

**592. —.**—[The master of several apprentices, upon his quitting business, proposed to assign all his apprentices, without mentioning either their names or number, to S., but no assignment was ever made; the pauper, one of the apprentices, was afterwards hired by S. as a servant for fifty-one weeks; & her former master, on meeting her, expressed his approbation of her having gone into the service of S.; the sessions having found that there was not a particular assent of the original master to the second service, & therefore the relation of master & apprentice never subsisted between S. & the pauper, this ct. thought the sessions well warranted in that conclusion.—*R. v. ASHBY-DE-LA-ZOUCH (INHABITANTS)* (1817), 1 B. & Ald. 116; 106 E. R. 43.

*Annotations*.—*Apld. R. v. Whitchurch* (1823), 1 B. & C. 574. *Consd. R. v. Banbury* (1833), 5 B. & Ad. 176; *R. v. Sandhurst* (1837), 6 Ad. & El. 130.

**593. Giving character.]**—Giving a character to an apprentice is a constructive assent to his service with the party applying for it.—*R. v. ST. MARY, LAMBETH (INHABITANTS)* (1785), *Cald. Mag. Cas.* 533; 4 Doug. K. B. 329; 99 E. R. 906.

**594. Giving recommendation.]**—*R. v. SANDFORD (INHABITANTS)*, No. 568, *ante*.

**595. —.**—[An apprentice agreed with his master to purchase the rest of his time, & that the indentures should remain with the master till payment of the sum stipulated, part of which only was paid: before the expiration of the time, he served another man, at the recommendation of his original master, above forty days; this was held to enure as a service under the indentures.—*R. v. CHIPPING WARDEN (INHABITANTS)* (1799), 8 Term Rep. 108; 101 E. R. 1293.

*Annotations*.—*Apld. R. v. Gwinear* (1834), 1 Ad. & El. 152. *Mentd. Ellen v. Topp* (1851), 6 Exch. 424.

**596. Knowledge.]**—Consent of the first master may be given after the service with the second master has commenced.—*R. v. BRADSTONE* (1787), 2 Bott, 454.

*Annotation*.—*Refd. R. v. Maidstone* (1836), 5 Ad. & El. 328.

**597. Subsequent general assent.]**—Where the master of an apprentice told him "that he had no further employment for him & he might go where he pleased," & the apprentice hearing of another master was going to him, & being met by his original master, & asked where he was going, answered that he was going to U., to which the master replied "he might go there or where he pleased":—*Held*: this was not such a particular assent of the original master to the service with U. as would enable the apprentice thereby to gain a settlement, though the indentures were not delivered up or cancelled.—*R. v. CREDITON (INHABITANTS)* (1800), 1 East, 59; 2 Bott, 457; 102 E. R. 23.

*Annotations*.—*Distd. R. v. Shobbear* (1800), 1 East, 73. *Apld. R. v. St. Helen, Stonegate* (1801), 1 East, 285. *Consd. R. v. Maidstone* (1836), 5 Ad. & El. 328.

**598. Permission to go & learn trade.]**—An apprentice offered his master a guinea "to let him off," to which the master agreed, & was also to give him a suit of clothes when the guinea was paid; but the indentures were not delivered up or cancelled. The guinea not being paid, the indentures still subsisted in law, & a settlement may be gained by serving another master with the consent of the first. The sessions ought properly to find the fact of such consent, & not merely evidence of it; but having found that on application by the apprentice to his original master for leave to serve B., who would not take him without, the master said "he might go with all his heart, & that it would be a good thing for him to learn the trade": this was holden sufficient evidence to warrant the conclusion of the sessions that the original master had consented to the particular service.—*R. v. SHEBBEAR (INHABITANTS)* (1800), 1 East, 73; 102 E. R. 29.

*Annotation*.—*Refd. R. v. Sandhurst* (1837), 6 Ad. & El. 130.

**(c) On Death of Master.**

**599. Whether settlement gained under new master.—Transfer by widow.—With apprentice's consent.]**—Upon a special order it was stated that an apprentice, upon the death of his master, was with his own consent turned over by the widow, who had taken no administration, to another master, whom he served. The ct. held it a good settlement in the last parish.—*R. v. EAST BRIDG-*



FORD (INHABITANTS) (1739), 2 Stra. 1115; Burr. S. C. 133; 2 Bott, 443; 93 E. R. 1068.

*Annotations* :—*Apld.* R. v. Stockland (1779), 1 Doug. K. B. 70; R. v. Barnsley (1813), 1 M. & S. 377; R. v. Barlestone (1822), 5 B. & Ald. 780. *Refd.* R. v. Tavistock (1767), Burr. S. C. 578.

600. — [Where F. was bound apprentice by indenture in 1764, in the township of C. & upon the death of his master in 1769 was assigned by the widow by indorsement on the indenture, whereby she acquitted & assigned over her apprentice F. for all the remainder of his apprenticeship, & F. served under such assignment in the township of K., which township for the last seven years had regularly relieved the family of F. whilst residing in another parish :—*Held* : this was evidence from which the sessions ought to have presumed, after such a distance of time, that the widow was extrix. & capable of assigning the apprentice, & that F. had acquired a settlement in K., & consequently his son who had gained no settlement for himself was there settled; & the sessions having drawn a contrary conclusion, this ct. quashed the order of sessions.—R. v. BARNSELY (INHABITANTS) (1813), 1 M. & S. 377; 105 E. R. 142.

*Annotation* :—*Refd.* R. v. Holme St. Cuthbert (1847), 2 New Mag. Cas. 92.

601. — Service with executor.] — Serving out the year with an exor. in another parish is a settlement there.—LADOCK PARISH v. ST. ENNIDORE PARISH (1742), 2 Stra. 1164; 19 Vin. Abr. 398; 93 E. R. 1102; *sub nom.* R. v. LADOCK (INHABITANTS), Burr. S. C. 179.

*Annotations* :—*Refd.* Crosscombe Parish v. St. Cuthbert in Wells Parish (1745), 2 Stra. 1240. *Mentd.* Farrow v. Wilson (1869), 38 L. J. C. P. 326.

602. — Transfer with consent of executor.] — If the master of an apprentice die, & exor., at the pauper's request, agree that he shall go to live with another person, a service of forty days with such person, before the term of the apprenticeship expires, gains a settlement under the apprenticeship.—R. v. STOCKLAND (INHABITANTS) (1779), 1 Doug. K. B. 70; 2 Bott, 450; Cald. Mag. Cas. 61; 99 E. R. 49.

603. — Transfer with consent of son & assignee—Parish apprentice—Apprenticeship dissolved by statute.] — Since 32 Geo. 3, c. 57, for the regulation of parish apprentices, which recites "that on the death of the master during the term of such apprenticeship, the agreement for service on the part of the apprentice is at an end, but the covenant for maintenance on the part of the master still continues as far as his assets extend, or doubts have arisen with respect thereto," etc.; & then enacts that such covenants for maintenance of parish apprentices, with whom no more than £5 shall be given, shall not continue in force longer than for three calendar months after the death of the master, etc., during which three months the apprentice shall continue to serve exors., etc., or their appointee; & that within the three months two justices of the peace, on application of the widow or certain relatives of the master, may, by indorsement on the indenture, etc., direct such apprentice to serve out his time with the appct., such appct. having lived with & been part of the family of master, etc., at his death; but otherwise, that such apprenticeship shall be determined; & then it provides that nothing thereinbefore contained shall extend to any parish apprentice but to such only as shall be living with & make part of the family, or be in the actual employment of the original master, etc., or if any subsequent master, etc., appointed under the provisions of the Act at the time of the death of such master,

etc.:—*Held* : a parish apprentice who was not living at the time of his mistress's death with her appointee under 32 Geo. 3, c. 57, though living with her son by her individual consent, could not gain a settlement in another parish by serving another mistress with the consent of the son & assignee of the original mistress; given after the death of the original mistress; the contract of service being declared by the recital of the Act to be at an end upon the death of the original mistress, unless continued in the manner described in 32 Geo. 3, c. 57, ss. 2, 3, 4, to which sections the proviso in 32 Geo. 3, c. 57, s. 5, seems properly to apply.—R. v. SHEEPSHEAD (INHABITANTS) (1812), 15 East, 59; 104 E. R. 766.

604. — Service with partner.] — A. is apprenticed to B. & C. partners. The partnership being dissolved B. removes & A. serves C. & C.'s new partner D. After the death of C., A. continues to serve D. It not being found by the sessions that the service under D. was with the consent of B., this ct. will not refer the service to the apprenticeship. No settlement is therefore gained by A., in the parish in which he served & resided with D.—R. v. ST. MARTIN'S, EXETER (INHABITANTS) (1835), 2 Ad. & El. 655; 1 Har. & W. 69; 4 Nev. & M. K. B. 388; 2 Nev. & M. M. C. 555; 4 L. J. M. C. 54; 111 E. R. 252.

#### (d) Parish Apprentices.

See Poor Law Act, 1927 (c. 14), s. 95; MASTER & SERVANT, Vol. XXXIV., pp. 523, 524, Nos.

605. Necessity for consent of justices.] — R. v. BARLESTON (INHABITANTS), No. 574, *ante*.

606. — [The master of a parish apprentice not having work sufficient for him, proposed to him to go to a farm in a different parish, occupied by the master's sister. The pauper assented to the proposal, & agreed with her to work there for a twelve month for his meat & drink. He worked for her for four years & four months. During the first two years he received from her meat & drink. During the third & fourth he received wages :—*Held* : (1) no settlement was gained by the service with the sister, the service not being under the indentures; (2) there had been a putting away of the apprentice without the consent of the justices, within Parish Apprentices Act, 1816 (c. 139), s. 9, & the pauper did not by his service with the sister gain any settlement by hiring & service.—R. v. SHIPTON (INHABITANTS) (1828), 8 B. & C. 88; 1 Man. & Ry. M. C. 394; 6 L. J. O. S. M. C. 92; 108 E. R. 975.

*Annotations* :—As to (1) *Consd.* R. v. Banbury (1833), 5 B. & Ad. 176. *Refd.* R. v. Sandhurst (1837), 1 Nev. & P. K. B. 296. As to (2) *Refd.* R. v. Wainfleet, All Saints (1840), 11 Ad. & El. 656.

607. — [A parish apprentice, bound for seven years to A., served him for four years, when A. agreed with B., who carried on the same business in another parish, that the pauper should work for B., B. paying 5s. a week to A. out of the pauper's earnings; the pauper accordingly went & continued to work for B. till the end of his apprenticeship, with the exception of ten days when he was sent for by A. to assist him during illness. B. paid A. at the rate agreed upon, deducting for the ten days' absence during A.'s illness :—*Held* : there being no consent of justices, that this was a "placing out" or "putting away" of the apprentice, within Parish Apprentices Act, 1816 (c. 139), s. 9, and that no settlement was gained by the service under B.—R. v. WAINFLEET, ALL SAINTS (INHABITANTS) (1840), 11 Ad. & El. 656; 3 Per. & Dav. 72; 9 L. J. M. C. 31;

*Sect. 6.—Settlement by apprenticeship: Sub-sect. 3, B. (d); sub-sect. 4, A. & B.]*

113 E. R. 563; *sub nom.* R. v. WAKEFIELD ALL SAINTS (INHABITANTS), 4 J. P. 74.

**608. New contract made—Necessity for reference to original contract.]—**A parish apprentice, who was bound by her original master to another master by a new indenture of apprenticeship, without reference to or recognition of the original indenture, which still subsisted in law, does not gain a settlement by serving her new master, as upon a constructive service of the original master under the first indenture; this being only evidence of the first master's consent to the service with the second under a new & distinct contract of apprenticeship.—R. v. CHRISTOWE (INHABITANTS) (1809), 11 East, 95; 103 E. R. 940.

*Annotations:—*Apld. R. v. Ecclesfield (1817), 6 M. & S. 173. *Consd. R. v. Barlston* (1822), 5 B. & Ald. 780.

**609. ———.]—**Where pauper, a parish apprentice, bound till twenty-one, served about eight years, when it was agreed that he should go to C., who was of the same trade with his master, to serve him the remainder of his term, & O. agreed to pay his master 1s. 6d. per week during that period, & pauper accordingly went to C., at first for a few days on trial, & continued serving him with his master's express consent, & after he had been there three weeks, the original indenture was given up by his master to C., & a new indenture of apprenticeship made between the pauper, his father-in-law, his master, & C., without reference to the original indenture, & for a longer period than the remainder of the original term, & containing some provisions differing from those in the original indenture:—*Held*: pauper did not gain a settlement by serving C. as upon a constructive service under the first indenture with his master's consent, although C. continued to pay his master the 1s. 6d. per week under the agreement.—R. v. ECCLESFIELD (INHABITANTS) (1817), 6 M. & S. 173; Pratt, 252; 105 E. R. 1208.

**610. ———.]—**R. v. SHIPTON (INHABITANTS), No. 606, *ante*.

#### SUB-SECT. 4.—PLACE OF SETTLEMENT.

##### A. In General.

*See* Poor Law Act, 1927 (c. 14), s. 112.

**611. General rule—Place of residence—Though matter settled elsewhere.]—**(1) Apprentice may gain a settlement, though the master has none.

(2) Nor does his settlement depend on his master, as that of a wife on her husband for a settlement; but he gains a settlement for himself . . . by forty days' inhabitation (*per cur.*).—ST. BRIDE'S PARISH v. ST. SAVIOUR'S PARISH (1706), 2 Salk. 533; Sett. & Rem. 89; 91 E. R. 453.

*Annotation:—Generally, Refd. R. v. St. Nicholas, Ipswich* (1736), 2 Sess. Cas. K. B. 231.

**612. ———.]—**Though binding elsewhere.]—An apprentice gains a settlement in the parish where he serves, though bound in another.—R. v. BURY-POMROI (INHABITANTS) (1715), 10 Mod. Rep. 279; Sett. & Rem. 296; 88 E. R. 727.

**613. ———.]—**If a poor boy be bound apprentice by the parish officers, with the consent of justices of the county, to a master residing in a different parish & county, & all the parties, except the apprentice, sign the indenture, the apprentice will gain a settlement in the parish of the master by residing there forty days under the indenture.—R. v. ST. NICHOLAS, NOTTINGHAM (INHABITANTS) (1788), 2 Term Rep. 726; 2 Bott, 398; 100 E. R. 391.

*Annotation:—*Apld. R. v. St. George, Exeter (1835), 3 Ad. & El. 373.

**614. ———.]—**Though service elsewhere.]—ST. MARY, COLECHURCH v. RADCLIFF (1717), 1 Stra. 60; Sett. & Rem. 81; 1 Sess. Cas. K. B. 123; 2 Bott, 415; 93 E. R. 385; *sub nom.* R. v. ST. MARY, COLECHURCH & RATCLIFFE (INHABITANTS), Fortes. Rep. 306.

*Annotation:—*Foll. St. John the Baptist, Devises v. St. James, Bishops Kenny (1724), 1 Stra. 594.

**615. ———.]—**If an apprentice serve his master by day in one parish, & lodge on nights with his father in another parish, he does not gain a settlement in the master's parish, although his lodging with his father is paid for by the master, in pursuance of a covenant in the indentures, but he gains a settlement under the indenture in the father's parish.—R. v. ST. JOHN THE BAPTIST PARISH (1724), 8 Mod. Rep. 285; Fortes. Rep. 321; 88 E. R. 203; *sub nom.* ST. JOHN BAPTIST DEVICES (INHABITANTS) v. ST. JAMES, BISHOPS KENNY (INHABITANTS), 1 Stra. 594; 2 Ld. Raym. 1371; 2 Bott, 416; Foley's Poor Laws, 3rd ed. 170; *sub nom.* ST. JAMES PARISH, BISHOPS CANNINGS (CHAPELEY) v. ST. JOHN'S DEVICES, WILTS (INHABITANTS), Sett. & Rem. 120.

**616. ———.]—**If an apprentice serve in one place & reside at another, he gains a settlement at the place where he resides.—R. v. ST. PETER'S-ON-THE-HILL (1741), 2 Bott, 417.

**617. ———.]—**An apprentice who went to lodge at his mother's in an adjoining parish to that of his master, for the purpose of getting cured of a disorder, but who continued to serve his master all the time, by going errands for him, & attending when wanted, gains a settlement by such service in the parish where he lodged.—R. v. STRATFORD-UPON-AVON (INHABITANTS) (1809), 11 East, 176; 2 Bott, 424; 103 E. R. 971.

*Annotations:—*Distd. R. v. Hitchester (1813), 2 M. & S. 135. *Apld. R. v. Chelmsford* (1820), 3 B. & Ald. 411.

*Distd. R. v. Ilkeston* (1825), 4 B. & C. 64. *Consd. R. v. Somerby* (1838), 9 Ad. & El. 310.

**618. ———.]—**A parish apprentice having left his master's service for a certain period, & gone into the service of another person, returns to his master & is employed by him as an errand boy, the indenture of apprenticeship still being in force, & no assignment or transfer of it executed. During this latter employment he slept for more than forty days at his father's house:—*Held*: he gained a settlement in the parish in which that house was situate.—R. v. ST. GEORGE'S, BLOOMSBURY (1845), 1 New Mag. Cas. 438; 6 L. T. O. S. 147; 9 J. P. Jo. 772.

**619. Where change of residence—Settlement in last place of residence.]—**ANON. (1724), 1 Sess. Cas. K. B. 279; 93 E. R. 82.

**620. ———.]—**A poor child may be bound apprentice to the inhabitant of another parish & shall be settled where she serves the last forty days under the indenture.—R. v. ST. MARGARET'S, LINCOLN (INHABITANTS) (1773), Burr. S. C. 728.

*Annotations:—*Apld. R. v. St. Nicholas, Nottingham (1788), 2 Term Rep. 726. *Refd. St. Pancras v. Clapham* (1860), 2 E. & E. 742.

**621. ———.]—**If an apprentice live with his master forty days in A. then forty days in B. & then one day in A. he is settled in A.—R. v. BRIGHTHELMSTON (INHABITANTS) (1793), 5 Term Rep. 188; 2 Bott, 420; Nolan, 207; 101 E. R. 106.

*Annotations:—*Distd. R. v. Topsham (1806), 7 East, 466. *Apld. R. v. Knaresborough* (1851), 20 L. J. M. C. 147.

**622. Apprentice sleeping away at week ends—Dissolution of apprenticeship—Settlement in last place of residence as apprentice.]—**Where an apprentice who worked & slept at his masters' works in C. at weekly wages, went with their knowledge on Saturdays & Sundays to R., & slept



there, & returned to his work on Mondays, & was received by them, & on the Saturday afternoon before Shrove Tuesday, having the night before slept at C., received his pay & never returned again to the service, & slept that & the following night at R., but on quitting the works on Saturday had not formed any intention not to return, nor had he on the Sunday, nor could he fix the time when he determined not to return:—*Held*: his settlement was at C., his service having ended on his quitting on Saturday.—*R. v. RIBCHESTER (INHABITANTS)* (1813), 2 M. & S. 155; 105 E. R. 333.

*Annotations*:—*Apld.* *R. v. Ilkestone* (1825), 6 Dow. & Ry. K. B. 64. *Distd.* *Barton v. Hulme* (1863), 27 J. P. 405; *lt. v. Barton upon Irwell* (1863), 3 B. & S. 604.

623. ————*]*—By indenture of Sept. 29, 1845, K. was apprenticed to N. in the township of B. for five years; there were covenants by the master to pay weekly wages, & by the father to provide board & lodging during the apprenticeship. On each Saturday during the term N.'s works closed at two o'clock in the afternoon: throughout the term the pauper resided & slept every night except Saturday, & occasionally Sunday, at lodgings in B.; on each Saturday after leaving work he went, until shortly after his marriage, to the house of his father, who lived in M.: he slept there on Saturday night, & occasionally on Sunday night, & returned to his work on Monday morning. Shortly after his marriage, which took place about a year before the expiration of the term, he slept at his father-in-law's house, which was also in M., on Saturday nights, & occasionally on Sunday nights. For the last eighteen months or two years of the term he lodged at the house of C. in B., except on Saturday nights, when C. required the room which he occupied for members of her own family who came to see her on that day. He slept at his lodgings on the night of Friday, Sept. 27, 1850, & about two in the afternoon of the next day left off work & went to M. & slept there that night & also on the Sunday night. On the Monday morning he returned to N., & worked one week at the same rate of wages, & then left:—*Held*: he slept in M. as an apprentice on the last night of his apprenticeship, & therefore gained a settlement there.—*R. v. BARTON UPON IRWELL (INHABITANTS)* (1863), 3 B. & S. 604; 32 L. J. M. C. 102; 7 L. T. 853; 9 Jur. N. S. 795; 122 L. R. 227; *sub nom.* *BARTON (INHABITANTS) v. HULME (INHABITANTS)*, 27 J. P. 405.

624. ————*]*—At master's house—May gain settlement in parish of residence at week ends.]—An apprentice, working with his master during the week in one parish, & sleeping on Saturday & Sunday nights at his master's house in another, may gain a settlement in the latter parish by inhabitation under his indenture. A verbal agreement by a master, "upon being paid £3 to set his apprentice at liberty, & to give him up his indenture," does not discharge the indenture, so as to fix the settlement of the apprentice in the parish where he slept last before the making of such agreement.—*R. v. WARDEN (INHABITANTS)* (1828), 2 Man. & Ry. K. B. 24; 1 Man. & Ry. M. C. 277; 6 L. J. O. S. M. C. 72.

#### B. On Transfer of Service.

625. General rule—Settlement in parish of new master.]—An apprentice who is assigned may as such gain a settlement in the parish in which he serves the master to whom he is assigned.—*CAISTER PARISH v. ECCLES PARISH* (1701), 1 Ld. Raym. 683; 1 Const. 580; 91 E. R. 1355; *sub nom.* *CASTOR (INHABITANTS) v. AICLES (INHABITANTS)*, 1 Salk. 68; *sub nom.* *R. v. AICLES (INHABITANTS)*, 12 Mod. Rep. 553.

*Annotations*:—*Refd.* *Silvester v. Ashton* (1700), Fortes. Rep. 308; *Buckington v. St. Michael Sebbington* (1724), 2 Ld. Raym. 1352; *R. v. St. George's, Hanover Square* (1734), 2 Sess. Cas. K. B. 176. *Mentd.* *Mouldadale v. Birchall* (1771), 2 Wm. Bl. 820; *Master v. Miller* (1791), 4 Term Rep. 320.

626. ————*]*—A. is bound to B. but serves C. his settlement is in C.'s parish.—*HOLY TRINITY PARISH v. SHOREDITCH PARISH* (1716), 1 Stra. 10; 1 Bott. 541; 93 E. R. 352.

*Annotations*:—*Fold.* *Allhallows on the Wall Parish v. St. Olave, Surrey Parish* (1723), 1 Stra. 554; *R. v. East-Bridgford* (1739), 2 Stra. 1115.

627. ————*]*—If an apprentice serve two years in one parish, & is turned over by verbal agreement to a master in another parish, & there serve out his time, he is settled under the indentures, in the last parish.—*ST. OLAVE PARISH v. ALL HALLOWS ON THE WALL PARISH* (1723), 8 Mod. Rep. 168; *Sett. & Rem.* 116; 1 Sess. Cas. K. B. 275; 88 E. R. 124; *sub nom.* *ALLHALLOWS ON THE WALL PARISH v. ST. OLAVE, SURREY PARISH*, 1 Stra. 554; 2 Bott. 443.

628. ————*]*—*ST. GEORGE HANOVER SQUARE PARISH v. ST. JAMES, WESTMINSTER PARISH*, No. 632, *post*.

629. ————*]*—A parish apprentice may be turned over from A. to B. & from B. to C. & shall gain a settlement where he served the last forty days.—*AUSTWICK PARISH v. CLAPHAM PARISH* (1747), 1 Wils. 158; 95 E. R. 548.

630. ————*]*—Where a master after giving his apprentice leave to get another master, recommended him to go to a particular person in the same business, & make an agreement with him for his own good, which he accordingly did, & served his second master two months before the indentures were given up to him by his first master, such service with the second master gained a settlement in his parish.—*R. v. HOLY TRINITY, MINORIES (INHABITANTS)* (1790), 3 Term Rep. 605; 2 Bott. 455; 100 E. R. 758.

*Annotations*:—*Refd.* *R. v. Crediton* (1800), 1 East, 59; *R. v. Banbury* (1833), 5 B. & Ad. 176. *Mentd.* *Ellen v. Topp* (1851), 20 L. J. Ex. 241.

631. Hiring out by master.]—If a son be bound apprentice to his father, & the father give up his indenture to the son, & hires him out in another parish, where he serves a year, he is settled in the father's parish; for the indentures not being cancelled the apprenticeship continues.—*R. v. THURSLEY PARISH* (1704), 6 Mod. Rep. 190; 87 E. R. 945.

632. ————*]*—Upon an order of sessions the case was stated specially, that W., a parish girl, was bound by indenture an apprentice to G. in St. George's parish, where she served forty days; & her master afterwards let her out for hire to a person in Marybone, where she resided above forty days, but the master received her wages & found her clothes. The sessions held, that the last service gained her no settlement, & consequently she was settled at St. George's. But the ct. quashed the order, being of opinion, that there was no difference between the master's hiring her out, & her own act; & that it was like the case of a binding to A. & serving B. where it has been always held to be a settlement in B.'s parish.—*ST. GEORGE HANOVER SQUARE PARISH v. ST. JAMES, WESTMINSTER PARISH* (1734), 2 Stra. 1001; 93 E. R. 995; *sub nom.* *R. v. ST. GEORGE'S HANOVER SQUARE, BURT. S. C.* 12; 2 Sess. Cas. K. B. 176.

*Annotations*:—*Refd.* *R. v. Holy Trinity* (1790), 3 Term Rep. 758; *R. v. Brighthelmston* (1793), 5 Term Rep. 138; *R. v. St. Paul's, Bedford* (1795), 6 Term Rep. 452; *R. v. Crediton* (1800), 1 East, 59.

*Sect. 6.—Settlement by apprenticeship: Sub-sect. 4, B. Sect. 7: Sub-sect. 1, A., B., C. & D.]*

**633. Subsequent return to parish of first master—Service not resumed.]**—An apprentice, after serving out most of his time with his master in S., obtained a subsequent settlement in H., by serving another master there for forty days by the direction of his first master, who was to receive 3s. a week from the second master for such service: & being then dismissed by the second master, the apprentice unknown to the first master, & without any intention of returning into his service again, lodged for one night in the same parish of S., & then went into a third parish, & worked for himself for a month, when his term being expired, he returned to S., & went with his original master to a common friend, with whom the indenture had been deposited, to take it up; which he did, & carried it away:—*Held*: the settlement was not brought back to S. by such casual lodging of the apprentice one night in the same parish of his master, without any resumption of, or even intention to resume, the service with the first master under the indenture.—*R. v. SMARDEN (INHABITANTS)* (1811), 13 East, 452; 104 E. R. 446.

*Annotation:—Distd. R. v. Iddesleigh* (1824), 4 Dow. & Ry. K. B. 332.

**634. — Service with second master continued.]**—Where an apprentice served his master for six years & nine months in the parish of I. under indentures which expired at Midsummer day, & then went into the parish of D. & hired himself for a month to another master at weekly wages, to which service the first master gave his consent; & at the end of that month, the pauper entered into a fresh agreement with the second master at the like wages, & continued to serve under that agreement until June 7, when he was called out to serve in the local militia, which he did for a fortnight & returned to his second master on June 21 & made a new agreement to serve him as before at sixpence a day, & while in that service he slept from June 21 to 24 inclusive in the parish of I.:—*Held*: whether the service with the second master during the remainder of the term was with the consent of the first or not, still the pauper's sleeping for the last three nights in I. settled him in that parish, though the first master did not know of his sleeping there.—*R. v. IDDESLEIGH (INHABITANTS)* (1824), 4 Dow. & Ry. K. B. 332; 2 Dow. & Ry. M. C. 245.

## SECT. 7.—SETTLEMENT BY ESTATE.

### SUB-SECT. 1.—OWNERSHIP.

#### A. In General.

*See Poor Law Act, 1927 (c. 14), s. 113.*

**635. Equitable estate sufficient to give settlement.]**—*R. v. NATLAND (INHABITANTS)* (1774), *Burr. S. C.* 793.

*Annotations:—Apld. R. v. Wivelingham* (1781), *Cald. Mag. Cas.* 121. *Distd. R. v. St. Margaret, Leicester* (1842), 2 Q. B. 559. *Reid. R. v. Aslackby* (1836), 5 Ad. & El. 200; *R. v. Burgate* (1854), 2 C. L. R. 1484. *Mentd. Thorpe v. Cole* (1835), 2 Cr. M. & R. 367; *L. & N. E. Ry. v. Easington Union Assmt. Com. & Easington-with-Thorpe Parish Council* (1925), 95 L. J. K. B. 255.

**636. — Must be actually vested.]**—*R. v. CARLTON (INHABITANTS)*, No. 734, *post*.

**637. — Permission to occupy room in charitable institution insufficient.]**—A poor widow, occupying a room in a charitable institution as an object of the charity, & receiving £8 a year as such object does not by such occupation either gain a settlement or become irremovable, though,

by the rules of the charity, she is only liable to lose the benefits of it, by absence or misconduct.

A settlement by estate is founded upon the principle that a man is not to be removed from his own property, but he must have some estate, legal or equitable, in what he claims. Here the pauper had merely a permission to occupy under certain conditions. There is no authority to show that the inmate of a hospital of charity has any right such as to exempt her from removability if she become chargeable (*LORD CAMPBELL, C.J.*).—*R. v. ST. MARY CASTLEGATE (CHURCHWARDENS)* (1852), 21 L. J. M. C. 106; 18 L. T. O. S. 224; 18 Jur. 363; *sub nom. ST. MARY CASTLEGATE (CHURCHWARDENS) v. ST. MARY BISHOPHILL THE ELDER (CHURCHWARDENS)*, 16 J. P. 87.

**638. Strict proof of title not required—Instrument not under seal admissible in evidence.]**—The question of strict legal title ought not to be entertained in cases of settlement. Therefore, an instrument not under seal, which professed to convey the fee, was held to be admissible evidence, with reference to the question of equitable estate; though the instrument could convey no legal interest.—*R. v. RIDGWELL (INHABITANTS)* (1827), 6 B. & C. 665; 9 Dow. & Ry. K. B. 678; 4 Dow. & Ry. M. C. 459; 5 L. J. O. S. M. C. 67; 108 E. R. 596.

*Annotations:—Mentd. Freeman v. I. R. Comrs.* (1871), L. R. 6 Exch. 101; *Limmer Asphalt Paving Co. v. I. R. Comrs.* (1872), L. R. 7 Exch. 211.

#### B. Estate of Devisee.

**639. Whether settlement gained.]**—*R. v. SANDWICH PARISH (INHABITANTS)*, No. 720, *post*.

**640. —**—A devisee of a copyhold was admitted after he had resided more than forty days on the copyhold. His son became emancipated after the expiration of the forty days, & before the admittance:—*Held*: the father by such residence gained a settlement which was communicated to the son.—*R. v. THRUSCROSS (INHABITANTS)* (1834), 1 Ad. & El. 120; 3 Nev. & M. K. B. 284; 2 Nev. & M. M. C. 201; 3 L. J. M. C. 83; 110 E. R. 1156.

*Annotations:—Reid. R. v. Axbridge* (1835), 1 Har. & W. 74; *R. v. St. Mary, Castlegate* (1852), 21 L. J. M. C. 106.

**641. — Estate directed to be sold—For payment of debts & surplus divided.]**—An estate being devised to trustees to be sold to pay debts, & to divide the surplus, if any, between A. B. & C., A. has an equitable interest in the estate, & by residing upon it forty days, gains a settlement.—*R. v. WIVELINGHAM (INHABITANTS)* (1781), 2 Doug. K. B. 767; *Cald. Mag. Cas.* 121; 99 E. R. 490.

*Annotations:—Reid. R. v. Aslackby* (1836), 5 Ad. & El. 200; *R. v. St. Margaret, Leicester* (1842), 11 L. J. M. C. 48; *R. v. Burgate* (1854), 3 E. & B. 823.

**642. — Proceeds divided among children.]**—Testator, by his will, directed that a freehold estate should be sold within six months after his wife's death & equally divided between his children. He appointed exors., & directed that their reasonable expenses should be paid. The pauper, who was one of the co-heiresses of testator, resided on the devised property for more than forty days after the death of the wife, & until it was sold under the provisions of the will, when she received her share of the purchase-money:—*Held*: she had such a legal title coupled with an equitable interest as conferred a settlement by estate.—*R. v. BURGATE (INHABITANTS)* (1854), 3 E. & B. 823; 2 C. L. R. 1484; 23 L. J. M. C. 143; 23 L. T. O. S. 155; 18 J. P. 631; 18 Jur. 875; 2 W. R. 517; 118 E. R. 1350.

**643. — Estate purchased for less than £30.]**—A father having purchased a tenement for less than

£30, devised it in trust to be let to farm during his daughter's life, & to pay her the rents after deducting the expenses:—*Held*: by forty days' residence thereon by permission of the trustee, after the father's death, she gained a settlement.—*R. v. HOLM EAST WAVER QUARTER (INHABITANTS)* (1812), 16 East, 127; 104 E. R. 1037.

*Annotation*:—*Apld. R. v. Thruscross* (1834), 1 Ad. & El. 126.

644. ————*]*—(1) The interest of a tenant from year to year, or of the extrix. of such tenant, of an estate under £10 a year, passes to her husband on their marriage by operation of law, & he acquires a settlement by forty days' residence upon the estate.

(2) Though a person cannot acquire a settlement by a purchase for less than £30 paid, yet if he take such estate by devise, he may. So, though he cannot gain a settlement, by renting a tenement of less value than £10 a year, yet, if such estate devolve upon him by operation of law, he may acquire a settlement by forty days' residence upon it; & it signified not, whether he be a tenant from year to year, or a tenant for a term of years, the distinction being one of words rather than of substance (*BAYLEY, J.*).—*R. v. YNYSYNHANARN, CARNARVON (INHABITANTS)* (1827), 7 B. & C. 233; 1 Man. & Ry. K. B. 16; 1 Man. & Ry. M. C. 77; 6 L. J. O. S. M. C. 9; 108 E. R. 710.

*Annotation*:—*As to* (1) *Apld. R. v. North Cerney* (1832), 3 B. & Ad. 463.

645. ———— *Devise in trust to pay rents—Residence by permission of trustees.*—*R. v. HOLM EAST WAVER QUARTER (INHABITANTS)*, No. 613, *ante*.

646. ———— *Rents insufficient for debts & devisee undischarged bankrupt.*—*Devise to the use of trustees in fee, in trust, after payment of debts to receive the rents for the benefit of her brother, M., his wife & children, all or any of them, during his life, as they should think proper, & after his decease, in trust for her nephew, etc.*:—*Held*: M. who, after the death of testatrix, by permission of the trustees, occupied until his death, a cottage in the township where the lands devised were situate, did not acquire a settlement thereby, the rents & profits of the lands having been insufficient to pay testatrix's debts; & M., at testatrix's decease, & from that time until his own decease, being an uncertified bkpt.—*R. v. DARLINGTON (INHABITANTS)* (1816), 5 M. & S. 493; 105 E. R. 1132.

*Annotation*:—*Expld. R. v. Aslackby* (1836), 5 Ad. & El. 200.

647. ———— *Estate pur autre vie.*—*A. devised to his son, who had come into a parish with a certificate, an estate in these words. "My desire is, that my son Robert shall live in that part of my house as he now does, & at the same yearly rent which he now gives, as long as my son John," to whom testator devised the house in fee, "shall enjoy & own the same":—Held*: this was a devise of an estate *pur autre vie*, which discharged the certificate.—*R. v. CASSINGTON (INHABITANTS)* (1831), 2 B. & Ad. 874; 1 L. J. M. C. 8; 109 E. R. 1367.

#### C. Estate of Heir-At-Law.

648. *Settlement gained.*—*Descent of a copyhold to a certificate man gives him a settlement.*—*R. v. BURCLEER PARISH* (1719), 11 Mod. Rep. 292; 10 Mod. Rep. 430; 88 E. R. 1047; *sub nom. BURCLEER PARISH v. EASTWOODHAY PARISH*, 1 Stra. 163; Sett. & Rem. 90.

*Annotations*:—*Apld. R. v. Stanfield* (1743), Burr. S. C. 205. *Expld. R. v. Great Driffield* (1828), 8 B. & C. 684.

649. ————*]*—Where a person settled in A. has an estate descended to him in B. he cannot be

sent thither, though if he was there he would be irremovable.—*WOOKEY PARISH v. HINTON-BLEWET PARISH* (1721), 1 Stra. 476; 93 E. R. 644.

*Annotation*:—*Reid. Over-Norton v. Salford* (1764), 1 Wm. Bl. 45.

650. ————*]*—A child cannot be with the grandmother for nurture, & a boy with her cannot be removed if he has an estate in the parish.—*HASFIELD PARISH v. FURLEY, GLOUCESTERSHIRE PARISH* (1740), 2 Stra. 1131; 93 E. R. 1082; *sub nom. R. v. HASFIELD*, Burr. S. C. 147.

*Annotation*:—*Apld. R. v. Houghton le Spring* (1801), 1 East, 247.

651. ———— *Necessity for forty days' residence.*—*R. v. WYLEY, WILTS (INHABITANTS)*, No. 675, *post*.

652. ————*]*—A. agreed to give a cottage to his grandson on his marriage, but there was no conveyance; the grandson entered, fitted it up at his own expense, & lived in it several years; then the grandfather died intestate, leaving an only child the mother of the grandson who never entered on the cottage or received or demanded any rent for it; then the mother died, leaving a husband & an only son:—*Held*: the husband was not tenant by the curtesy; the son, the above grandson, was seised in fee; & consequently he gained a settlement by residing on it forty days.—*R. v. GREAT FARINGDON (INHABITANTS)* (1790), 6 Term Rep. 679; 101 E. R. 768.

#### D. Estate of Next of Kin.

653. *Whether settlement gained—Administration not taken out—Person taking possession not solely entitled.*—*Leasehold cottage gives no settlement by living in it, unless the person by taking out administration becomes legally entitled to it.*—*WODWORTHY v. FARRINGTON* (1737), 1 Sess. Cas. K. B. 401; 93 E. R. 117; *sub nom. R. v. WIDWORTHY (INHABITANTS)*, Andr. 4; Burr. S. C. 109; *sub nom. WIDWELLY PARISH v. FARRINGTON PARISH*, Lee temp. Hard. 392.

*Annotations*:—*Follid. R. v. North Curry* (1781), Cald. Mag. Cas. 137. *Reid. R. v. Horsley* (1807), 8 East, 405.

654. ————*]*—*R. v. NORTH CURRY (INHABITANTS)* (1781), Cald. Mag. Cas. 137.

*Annotation*:—*Reid. R. v. Horsley* (1807), 8 East, 405.

655. ————*]*—*R. v. CHEW MAGNA (INHABITANTS)* (1783), Cald. Mag. Cas. 365.

656. ————*]*—*Husband gains no settlement.*—*P. went about thirty-seven years ago to live in the house of T. in the parish of C. M., & in the course of a year married T.'s daughter, who was living with her father. The house was held by the father under a lease for years, determinable on three lives. T. died about thirty-six years ago intestate, leaving a widow, a son, & his daughter. The widow & daughter, with P., her husband, were living in the house at T.'s death, & the widow continued there till her death, about six years ago, & the daughter & P. to the present time; but it did not appear that letters of administration were taken out:—Held*: P. did not by such residence, acquire a settlement in C. M.—*R. v. CANFORD MAGNA (INHABITANTS)* (1817), 6 M. & S. 355; 105 E. R. 1275.

*Annotation*:—*Follid. R. v. Okoford Fitzpaine* (1830), 1 B. & Ad. 254.

657. ————*]*—*P. being lessee of a tenement for ninety-nine years, determinable upon three lives invited B., who had married his daughter, to reside upon part of the premises. The latter did reside there until the death of P. in 1791. P. left a widow, three sons & a daughter, the wife of B.; & B. & his wife continued after the death of her father to reside on the same part of the premises occupied by them before; two of the*

**Sect. 7.—Settlement by estate: Sub-sect. 1, D., E., F., G. & H.]**

sons of P. occupying other parts, & each of them paying one-third of the rent. B. paying the other third. A part of the premises having fallen into decay, one of the sons of P. gave it up, & B. had possession of that part, & afterwards paid two-thirds of the rent, & he continued to occupy until 1823, when the last of the lives dropped, & since that time he continued in possession by permission of the landlord. It did not appear that letters of administration had been taken out after the death of P.:—*Held*: B. did not by such residence gain a settlement.—*R. v. OKEFORD FITZPAINE* (INHABITANTS) (1830), 1 B. & Ad. 254; 9 L. J. O. S. M. C. 2; 109 E. R. 781.

**658. — Person taking possession solely entitled.]**—A sole next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing forty days in the same parish after intestate's death, before administration granted to her. It matters not that the widow of intestate survived him, if she died afterwards without having taken out administration, leaving the other sole next of kin to intestate. But no settlement is gained by the mere relation back to the death of intestate of the letters of administration when granted, taken out only eighteen days before the next of kin parted with her interest in the leasehold; so as to connect the residence for those eighteen days with a residence by such next of kin in same parish for more than forty days, after the deaths of intestate & his widow, before such administration granted.—*R. v. HORSLEY* (INHABITANTS) (1807), East, 405; 103 E. R. 398.

*Annotations*:—*Mentd. Barnett v. Gulliford* (1855), 11 Exch. 19; *Turner v. Barnes* (1862), 2 B. & S. 435; *In the Goods of Pryse*, [1904] P. 301.

**659. — Estate not distributed.—Husband gains no settlement.]**—The lord of a manor granted a lease of a cottage for thirty-one years to A., who resided in it above a year, & died, leaving a widow & three daughters. Administration was granted to the widow, but no distribution of the estate was made. After his death, the widow, & by her permission, one of the daughters & her husband resided in it some years:—*Held*: the daughter, or her husband in her right, had not any equitable estate in the cottage, & no settlement was gained by their residence in it.—*R. v. BERKSWELL* (INHABITANTS) (1823), 1 B. & C. 542; 3 Dow. & Ry. K. B. 9; 1 Dow. & Ry. M. C. 467; 107 E. R. 200.

*Annotations*:—*Apld. R. v. Northwold Bassett* (1824), 2 B. & C. 724. *Distd. R. v. Aslockby* (1836), 5 Ad. & El. 200. *Refd. R. v. St. Margaret, Leicester* (1842), 2 Q. B. 559.

**E. Estate of Personal Representative.**

**660. Settlement gained—By executor—Estate under ten pounds a year.]**—It is very true, that a share not amounting to £10 a year, of a tenement of above £10 a year in value, will not do. But here he has a right as exor. The value therefore is totally immaterial; because, by common law, no person can be removed from his own: & one who has a right to reside, irremovably, does thereby gain a settlement, if he resides forty days (WILMOT, J.).—*R. v. UTTOXETER* (INHABITANTS) (1765), Burr. S. C. 538; 2 Bott, 499.

*Annotation*:—*Refd. R. v. Stone* (1795), 6 Term Rep. 295.

**661. — Will not proved.]**—The exor. of a tenant from year to year of an estate under £10 a year may gain a settlement by residing on it forty days; & though he do not prove the will, still the term is in him.—*R. v. STONE*

(INHABITANTS) (1795), 6 Term Rep. 295; 2 Bott, 517; 101 E. R. 561.

*Annotations*:—*Apld. R. v. Burgate* (1854), 23 L. T. O. S. 155. *Refd. R. v. Ynyscynhanarn* (1827), 7 B. & C. 233.

**662. — By administrator.]**—A. rented a house in applt. parish of L. as tenant from year to year, & died. His widow, a fortnight after his death, told the landlord that she wished to pay the rent weekly; he assented, & she paid it weekly for the following nine months, when she quitted on a week's notice. Two months after her husband's death, the attorney for resp. parish, which had relieved the widow, told her she had a right to take out administration if she chose, & if she would leave it to him, he would do whatever was necessary; she assented. The letters of administration were obtained, & the pauper resided forty days afterwards in applt. parish. The sessions found that the administration was fraudulently taken out by the direction & at the expense of resp. parish, for the purpose of settling the pauper in applt. parish:—*Held*: as the widow was not only entitled, but bound by law, to take out administration, there was no fraud in the transaction which could prevent her from taking, as administratrix, her husband's interest as yearly tenant, & thereby acquiring a settlement.—*R. v. GREAT GLENN* (INHABITANTS) (1833), 5 B. & Ad. 188; 2 Nev. & M. K. B. 91; 1 Nev. & M. M. C. 158; 2 L. J. M. C. 69; 110 E. R. 762.

*Annotation*:—*Refd. R. v. Halifax* (1855), 4 E. & B. 647.

**663. — ]**—On application to justices for an order of removal, the settlement alleged was an interest in land acquired by the pauper as administrator. The examination stated this interest, & the grant of the letters of administration, with names & dates; & together with the examination, there were sent to applt. parish copies of letters of administration corresponding in names & dates with the letters described in the examination: but the examination did not expressly show that any letters of administration were produced before the justices, nor was any notice given to applt. of their having been produced:—*Held*: the examinations were not, on that ground, insufficient; for it must be assumed that the letters sent to applt. parish were before the justices.—*R. v. ST. ANNE, WESTMINSTER* (INHABITANTS) (1845), 7 Q. B. 245; 1 New Sess. Cas. 608; 14 L. J. M. C. 113; 5 L. T. O. S. 71; 9 J. P. 521; 9 Jur. 468; 115 E. R. 481.

*Annotation*:—*Refd. R. v. High Bickington* (1846), 2 New Sess. Cas. 326.

**F. Estate in Remainder or Reversion.**

**664. Whether settlement gained—Necessity for estate to be in possession.]**—F., being seised in fee of a cottage, demised the same to the overseers of the poor for one thousand years, reserving a peppercorn rent, & continued to reside there. Being sick, his daughter & her husband came, by permission of the parish officers, to reside with & take care of him: after his death, the daughter being his heir, they continued to reside there above forty days, claiming a right to the possession:—*Held*: they thereby gained a settlement, being entitled to the reversion, & the residence not being fraudulent.—*R. v. STAPLEGROVE* (INHABITANTS) (1819), 2 B. & Ald. 527; 106 E. R. 458.

*Annotations*:—*Distd. R. v. Willoughby-with-Sloothby* (1829), 10 B. & C. 62. *Refd. R. v. Belford* (1829), 10 B. & C. 54; *R. v. Ringstead* (1829), 7 L. J. O. S. M. C. 103.

**665. — ]**—An estate in remainder will not confer a settlement. It must be vested in possession.—*R. v. WILLOUGHBY-WITH-SLOOTHBY*

(INHABITANTS) (1829), 10 B. & C. 62; 5 Man. & Ry. K. B. 32; 2 Man. & Ry. M. C. 545; 8 L. J. O. S. M. C. 32; 109 E. R. 374.

666. ———.]—Testator, by his will, devised to his daughter E., the widow of his late son M., part of a messuage or tenement therein described, to hold to her & her assigns for & during the term of her natural life, if she should so long continue a widow & unmarried, & from & after her decease, or day of marriage, which should first happen, he gave & devised the premises, before given to his wife, & also other real property therein mentioned, unto the four children of his late son, M., deceased, in fee:—*Held*: by this devise, the children of M. took no estate in any part of the property devised till after the death of E., & consequently, one of them, a pauper, who came, during the lifetime of his mother, to reside in the parish where the lands not given to E. for life were situate, gained no settlement by estate.—*R. v. RINGSTEAD (INHABITANTS)* (1829), 9 B. & C. 218; 4 Man. & Ry. K. B. 67; 2 Man. & Ry. M. C. 71; 7 L. J. O. S. M. C. 103; 109 E. R. 82.

*Annotations*:—*Reid*, *R. v. Willoughby-with-Sloothby* (1829), 10 B. & C. 62. *Mentd.* *Attwater* (1853), 18 Beav. 330; *Barnet v. Barnet* (1861), 29 Beav. 239; *Ralph v. Carrick* (1879), 11 Ch. D. 873; *Ithodes v. Rhodes* (1882), 7 App. Cas. 192; *Re Willatts, Willatts v. Arley*, [1905] 1 Ch. 378.

667. ———.]—If A. residing on a cottage of his own, grant it by lease & release to B. in fee, in consideration of £36 with a proviso "that A. shall live in & occupy the cottage with the appurtenances as he theretofore had done & then did for life"; B. has not such an interest during A.'s life as will enable him to gain a settlement by a residence on the estate.—*R. v. FLATINGTON (INHABITANTS)* (1791), 4 Term Rep. 177; 2 Bott, 515; 100 E. R. 959.

*Annotations*:—*Apld.* *R. v. Ringstead* (1829), 4 Man. & Ry. K. B. 67. *Fold*, *R. v. Willoughby-with-Sloothby* (1829), 10 B. & C. 62. *Mentd.* *Rabbeeth v. Squire* (1859), 4 De G. & J. 406.

668. ———. *Doubtful & contingent interest.*]—Where a pauper purchased a leasehold tenement for less than £30, & afterwards conveyed the whole term to one, in trust to let the premises, & out of the rents and profits to repay himself £10 advanced thereon, & then to apply the rents & profits to the separate use of the pauper's wife during her life, & afterwards to the pauper's own use for life if he survived her, & afterwards amongst their children: & the trustee suffered the pauper to continue to reside in the house for above forty days, till becoming chargeable to the parish he was removed:—*Held*: he gained no settlement by such residence: for he had no immediate interest remaining in him at the time, but at most a doubtful & contingent future interest; it being uncertain whether the £10 would ever be paid off, & even if it were, not giving him any right to reside upon the premises.—*R. v. TARRANT LAUNCESTON (INHABITANTS)* (1803), 3 East, 226; 102 E. R. 584.

*Annotation*:—*Distd.* *R. v. Ardeleigh* (1837), 1 Jur. 403.

#### G. Estate at Will.

669. *Whether settlement gained.*]—A lease at will gains a settlement.—*CRANLY PARISH v. ST. MARY GUILFORD PARISH* (1722), 1 Stra. 502; 93 E. R. 661.

*Annotations*:—*Apld.* *R. v. Butley in Suffolk* (1737), 2 Stra. 1077; *R. v. Duns Tew* (1756), Burr. S. C. 398. *Expld.* *R. v. Chew Magna* (1830), 8 L. J. O. S. M. C. 80.

670. ———.]—*R. v. DUNS TEW (INHABITANTS)* (1756), Burr. S. C. 398; Say. 311; 96 E. R. 891.

*Annotations*:—*Apld.* *R. v. Seamer* (1796), 6 Term Rep. 554. *Reid*, *Rogers v. Harvey* (1858), 5 C. B. N. S. 3.

671. ———.]—Where a son having agreed to purchase a piece of land for £65 applied to his father who consented to advance £20 left to his wife on condition, that a house should be built by the son on the land, which the father & mother were to have for their lives & the life of the survivor, & afterwards, the same to go to the son, but the father & mother were not to sell or dispose of it, nor to take any other family into the house; but this agreement was only by parol; & afterwards the father advanced the £20 & the son completed the purchase & the land was conveyed to him in fee, & he built a house, of which the father & mother took possession with his consent & lived in it for three years, without paying any rent, when the father died & the mother continued in possession:—*Held*: the father did not gain a settlement by the residence on the land nor was the mother entitled to reside on it irremovably.—*R. v. STANDON (INHABITANTS)* (1814), 2 M. & S. 461; 105 E. R. 452.

672. ———.]—The taking a grant of a licence from the lord of a manor to erect a cottage on a piece of land, rendering an annual rent of 10s. 6d. as a quit rent, & also a grant of a license to inclose a piece of ground for a garden to the cottage, both being parts of the waste, & building a cottage thereon & residing in it a year & a half, were held not to confer a settlement; this being a license only, & not a grant of any interest in land.—*R. v. HORNDON-ON-THE-HILL (INHABITANTS)* (1816), 4 M. & S. 502; 105 E. R. 942.

*Annotations*:—*Apld.* *It. v. Geddington* (1823), 2 B. & C. 129; *It. v. Hagworthingham* (1823), 1 B. & C. 634. *Reid*, *R. v. Cuddington* (1845), 14 L. J. M. C. 182. *Mentd.* *Wood v. Leadbitter* (1845), 13 M. & W. 838.

673. ———.]—*R. v. CHEDISTON (INHABITANTS)*, No. 830, *post*.

674. ———.]—A. being seised in fee of a close of land, gave a small piece by parol to B., who built a cottage on it, & resided in it fifteen years, when A. told him he had sold the land to C., & asked B. to give him possession & to sell him his right; A. agreed to give B. £3 for giving possession, & that B. should take the materials; B. pulled down the cottage & carried away the materials, & delivered possession to C.:—*Held*: B. did not gain any settlement by residing in the house.—*R. v. CHEW MAGNA (INHABITANTS)* (1830), 10 B. & C. 747; 5 Man. & Ry. K. B. 635; 3 Man. & Ry. M. C. 53; 8 L. J. O. S. M. C. 80; 109 E. R. 627.

#### H. Estate Acquired by Adverse Possession.

675. *Period of possession necessary to gain settlement.*]—(1) A cottager having been thirty years in possession:—*Held*: a good settlement.

(2) His heir-at-law gains a settlement by residing forty days in such cottage after his death.—*R. v. WYLEY, WILTS (INHABITANTS)* (1724), 2 Sess. Cas. K. B. 121; 93 E. R. 162; *sub nom.* *R. v. WILBY PARISHIONERS*, 8 Mod. Rep. 287; *sub nom.* *ASHBRITTLE PARISH v. WYLEY PARISH*, 1 Stra. 608; 2 Bott, 492.

*Annotations*:—*As to* (1) *Reid*, *R. v. Cold Ashton* (1758), Burr. S. C. 444. *Generally*, *Reid*, *R. v. Butterton* (1796), 6 Term Rep. 554.

676. ———.]—Adverse possession of a cottage for more than twenty years will gain a settlement.—*R. v. BITTON (INHABITANTS)* (1768), Burr. S. C. 631; 2 Bott, 501.

677. ———.]—Possession of a cottage for more than twenty years, though not altogether adverse, will gain a settlement.—*R. v. GARWAY (INHABITANTS)* (1768), Burr. S. C. 632; 2 Bott, 500.

*Annotation*:—*Distd.* *R. v. Cuddington* (1845), 1 New Mag. Cas. 369.

*Sect. 7.—Settlement by estate: Sub-sect. 1, H. & I.]*

**678.** —.]—Where the pauper's father upon his marriage obtained from his father-in-law a spot of ground, though without any conveyance, upon which he built a house & enjoyed it during his life, & it afterwards descended to his eldest son, who enjoyed it also on the whole near twenty years & never received any interruption from the donor or his heirs or any claim of ownership from them:—*Held*: the younger children of the person who built the house could not be removed from that parish.—*R. v. BUTTERTON (INHABITANTS)* (1796), 6 Term Rep. 554; 2 Bott, 518; 101 E. R. 690.

*Annotation*:—*Mentd.* *Brydges v. Kilburne* (1792), cited in 5 Ves. p. 689.

**679.** —.]—A settlement by estate was claimed for H. under the following circumstances:—Premises were demised for three lives, which expired in 1784, & a lease for other lives was then granted to a new tenant, who paid rent under it during all the time after mentioned. At the time of the execution of the lease, W. was in possession, & claimed to hold, on the ground that one of the lives in the first lease was still in existence. He continued to hold for twenty-six years, & then died, more than twenty years before the settlement came in question. His widow retained possession for sixteen years, in the last of which she devised the premises to her daughter, the wife of H. in fee, & appointed her extrix. & residuary legatee; at the same time expressing a doubt whether the premises did not belong to the party who became lessee in 1784. She left other sons & daughters. On her death, H. & his wife, who had been living with the mother on the premises, retained possession for three years, at the end of which H. conveyed them to a purchaser by feoffment & livery of seisin. No probate of the mother's will was obtained. Neither W. nor the parties holding after him ever paid any rent. The lives in the second lease had not expired when the settlement came into dispute:—*Held*: H. did not acquire a settlement by residence on the premises after the death of his wife's mother, there having been no adverse possession for twenty years by W. or those who succeeded him, & H.'s wife not having taken any interest which could give a settlement, as extrix. of her mother.—*R. v. AXBRIDGE (INHABITANTS)* (1835), 2 Ad. & El. 520; 1 Har. & W. 74; 4 Nev. & M. K. B. 477; 3 Nev. & M. M. C. 44; 4 L. J. M. C. 81; 111 E. R. 201.

**680.** —.]—Grandfather gave the father a piece of land, on which he immediately built a house, & continued in possession for thirty years, without paying any rent or acknowledgment, sometimes residing in the house with his family, & at other times letting it, & receiving the rent:—*Held*: the son, who ceased to be a part of his father's family fifteen years after the building of the house, was entitled to the settlement which the father gained by residing in the house.—*R. v. CALOW (INHABITANTS)* (1814), 3 M. & S. 22; 2 Bott, 533; 105 E. R. 520.

**681.** —.]—The husband of a pauper being settled in parish A., in 1800 enclosed a small piece of waste land in parish B. from a common, & held & cultivated it until Christmas, 1827, when he sold it & conveyed it to a purchaser. From the year 1800 to 1825 he resided out of parish B.; but in the year 1825 he removed to that parish, & in 1826 built a hut on the land, & lived in it a year & a half. In the years 1806, 1811, & 1817, the parish officers & freeholders perambulated the

parish for the purpose of marking their boundaries, & asserting their rights of common. On those occasions they pulled up a portion of the fence to the land so enclosed, & dug up part of the bank, & rode through the enclosure. In 1820 or 1822 a like perambulation was made by the direction of the lord of the manor, when similar acts were done. No acknowledgment was paid to the lord of the manor for the land:—*Held*: (1) there was an adverse possession, & the husband of the pauper gained a settlement by estate in B.

(2) I doubt very much whether the lord of the manor could take advantage of the entries made by the parishioners in 1806, 1811 & 1817; for they were not made for his benefit, but for that of the parish (*PARKE, J.*).—*R. v. WOOBURN (INHABITANTS)* (1830), 10 B. & C. 846; Pratt, 275; 5 Man. & Ry. K. B. 723; 3 Man. & Ry. M. C. 125; 8 L. J. O. S. M. C. 93; 109 E. R. 663.

*Annotations*:—*As to* (1) *Fold.* *R. v. Pensax* (1832), 3 B. & Ad. 815. *Generally, Mentd.* *Worsam v. Vandenbrande* (1868), 17 W. R. 53.

**682.** —.]—A. enclosed an acre of land from a common, & built a house upon it, for which the parish gave him materials. Fourteen years after he gave, by parol, part of the land so enclosed to B., who built a cottage on it, & afterwards enclosed a further portion of the common; & B. occupied the whole premises for about sixteen years. The copyholders, who were accustomed every seven years to break down the fences of encroachments on the common, twice broke down the fences between the common & the new land thus enclosed by B., the fence between the new & the old enclosure having been previously removed, & passed over that part of the land which had been newly enclosed by B.:—*Held*: B. gained a settlement by estate.—*R. v. PENSAX (INHABITANTS)* (1832), 3 B. & Ad. 815; 1 L. J. M. C. 82; 110 E. R. 299.

**683.** —.]—In 1769, A. enclosed a piece of land from the waste, & built a cottage on it, paying the yearly sum of 2s. 6d. to the lord of the manor, & upon a further inclosure of land for a garden that payment was increased to 3s. A. continued in possession of the cottage & garden until his death in 1829, & was succeeded by his son, who continued to occupy the same premises:—*Held*: this payment could not be considered in the nature of a chief or quit rent, but as an acknowledgment of the lord's title, & therefore, no settlement was acquired by estate.—*R. v. CUDDINGTON* (1845), 1 New Mag. Cas. 369; 2 New Sess. Cas. 10; 14 L. J. M. C. 182; 5 L. T. O. S. 172; 9 J. P. 713; 9 Jur. 938.

**684.** How settlement by adverse possession defeated—Not by entry to assert right.]—*R. v. WOOBURN (INHABITANTS)*, No. 681, *ante*.

**685.** —.]—*R. v. PENSAX (INHABITANTS)*, No. 682, *ante*.

**686.** —] Payment of small rent as acknowledgment of title.]—*R. v. CUDDINGTON*, No. 683, *ante*.

*I. Husband Acquiring Estate by Marriage.*

**687.** Whether husband gains settlement—Estate vested in trustees.]—*MEESLY v. GRANBOROUGH (INHABITANTS)* (1718), Fortes. Rep. 302; 92 E. R. 862; *sub nom.* *MURSLEY PARISH v. GRANBOROUGH PARISH*, 1 Stra. 97; 1 Sess. Cas. K. B. 133; 2 Bott, 491; *sub nom.* *GRAMBOROUGH PARISH v. MURSLEY, BUCKS PARISH, Sett. & Rem.* 87.

*Annotations*:—*Consd.* *R. & Heaver Parish Overseers v. Sandwich Parish* (1733), Cun. 76; *R. v. Stone* (1785), 6 Term Rep. 295. *Held.* *R. v. West Shefford* (1751), Burr. S. C. 307.



**688. — Wife retaining possession—Estate subject to mortgage.]**—A cottage leased for ninety-nine years determinable on lives, purchased by the pauper's wife before marriage, was in the lifetime of her first husband conveyed by them to a trustee in trust that he should by sale or mtge. raise £10, for the benefit of the parish by whom the family had been before relieved to that amount, interest & charges, & after payment of the same, in trust to reassign the premises. The parties always continued in possession; & it did not appear whether the money were ever paid; or what was the value of the cottage:—*Held*: on the death of the first husband, the pauper who married the widow gained a settlement by residing forty days in the cottage of which she had retained the possession.—*R. v. EDINGTON PARISH* (1801), 1 East, 288; 102 E. R. 112.

**689. — For separate use of wife.]**—*R. v. OFFCHURCH* (INHABITANTS), No. 381, *ante*.

**690. — Residence by husband pending sale directed by testator.]**—N., by his will, after directing payment of debts & legacies, devised lands in trust to sell, the trustee to stand possessed of the moneys arising from such sale upon trust to pay & divide the same equally among the devisor's nine children; & he gave & bequeathed the shares of such daughters as should be married at the time of his decease to & for their own separate & absolute use; their respective receipts alone to be discharges for the same. Pauper, before the death of N., was married to one of the daughters, & lived with her in a house, part of the devised estates, as tenant to N. After the death of N., pauper continued to occupy & reside in the house as tenant to the trustees, paying them rent. They divided the rents monthly among the nine children. Such residence by the pauper, & division of rents by the trustees, continued for two years after N.'s death. The estates were then sold, & the proceeds divided according to the will, pauper receiving his wife's share:—*Held*: the pauper had not, during his residence after the death of N., such an equitable estate or right as conferred a settlement.—*R. v. ST. MARGARET, LEICESTER* (INHABITANTS) (1842), 2 Q. B. 559; 1 Gal. & Dav. 625; 11 L. J. M. C. 48; 6 Jur. 503; 114 E. R. 220.

*Annotation*:—*Reid. R. v. Burgate* (1854), 3 E. & B. 823.

**691. — Estate purchased by wife for less than thirty pounds.]**—Husband of a woman, who when sole, had purchased for less than £30, gains a settlement by marrying her, & then communicates that settlement to his wife.—*ILMINGTON v. MICKLETON* (1766), 1 Wm. Bl. 598; 96 E. R. 346; *sub nom. R. v. ILMINGTON* (INHABITANTS), Burr. S. C. 500.

*Annotations*:—*Consd. R. v. Ynyscynhanarn* (1827), 7 B. & C. 233. *Appl. R. v. North Cerney* (1832), 3 B. & Ad. 403.

**692. — Wife executrix & residuary legatee—Will not proved.]**—A. occupied a tenement of £10 a year & died, leaving three children, two of whom he bequeathed 5s. each, & to the latter, whom he made extrix., the residue of his property. The pauper, who had before married the extrix., resided on the tenement above forty days, & paid rent for it; this was held to gain him a settlement, though the wife never proved the will.—*R. v. NETHERSEAL* (INHABITANTS) (1791), 4 Term Rep. 258; 100 E. R. 1006.

*Annotations*:—*Distd. R. v. South Lynn* (1794), 5 Term Rep. 664. *Consd. R. v. Hellsam* (1831), 2 B. & Ad. 620.

**693. — Wife & sisters coparceners.]**—While the pauper resided in the parish of B. a freehold estate descended to his wife & her sisters as coparceners in the same parish, & in a month

after the pauper & his wife contracted to sell their share, but the conveyance was not actually executed for more than forty days after their title accrued:—*Held*: the pauper was thereby settled in B., although the estate during all the time was in the occupation of another.—*R. v. DORSTONE* (INHABITANTS) (1801), 1 East, 296; 2 Bott, 563; 102 E. R. 115.

*Annotation*:—*Appl. R. v. Ardleigh* (1837), 7 Ad. & El. 70.

**694. — Wife yearly tenant—Rent below £10 a year.]**—*R. v. YNYSCYNHANARN, CARNARVON* (INHABITANTS), No. 644, *ante*.

**695. — — — — —.]**—A man marrying a woman, who, after the passing of 59 Geo. 3. c. 50, has become a yearly tenant of premises at a rent of less than £10 *per annum*, gains a settlement by forty days' residence thereon.—*R. v. NORTH CERNEY* (INHABITANTS) (1832), 3 B. & Ad. 463; 1 L. J. M. C. 39; 110 E. R. 167.

**696. — — — — —.]**—(1) A woman, being yearly tenant at 50s. a year, marries. Her husband, by forty days' residence on the premises, gains a settlement by estate.

(2) But when a man, being yearly tenant, dies, & his wife occupies & pays rent as one of the next of kin, but without taking out letters of administration, the wife, neither gains a settlement herself, nor is a settlement gained by a second husband, by reason of his marriage with her during such occupation & of forty days' residence.—*R. v. BARNARD CASTLE* (INHABITANTS) (1834), 2 Ad. & El. 108; 4 Nev. & M. K. B. 128; 2 Nev. & M. M. C. 430; 111 E. R. 41.

**697. — Or lessee.]**—On appeal against an order of removal of a pauper widow, appts. set up a settlement of the pauper's late husband in the removing parish, by estate, by marriage of the husband with the pauper, she being at the time of the marriage, as stated in the ground of appeal, possessed of a cottage "for a certain term of years then unexpired, or as tenant thereof from year to year, under a yearly or other renting," & residence thereon for forty days. The sessions affirmed the settlement by estate, & discharged the order, subject to a case in which it was stated that, at the time of the marriage, she had been, & was then, "living as a tenant" of the cottage, & that she & her husband lived there, after the marriage, for upwards of a year. That the pauper was called as a witness for resps., but was not asked, by either party, on what terms she held the cottage. The case left to the ct. whether the evidence "was sufficient to establish the settlement by estate":—*Held*: there was evidence from which the sessions might infer that the wife held, before the marriage, for a term of years, or from year to year.

*Semble*: that, if she had held only as tenant at will, the residence of the husband for forty days without a determination of the will would have conferred a settlement by estate upon him.—*R. v. HALIFAX* (INHABITANTS) (1855), 4 E. & B. 647; 3 C. L. R. 843; 24 L. J. M. C. 65; 24 L. T. O. S. 269; 19 J. P. 244; 1 Jur. N. S. 181; 3 W. R. 239; 119 E. R. 238.

*Annotation*:—*Reid. R. v. Thornton* (1860), 2 E. & E. 788.

**698. — Estate not administered—Estate of first husband.]**—*R. v. BARNARD CASTLE* (INHABITANTS), No. 696, *ante*.

**— — — — — Wife one of next of kin.]**—*See Nos.* 655, 657, 659, *ante*.

**699. — Wife tenant at will.]**—*R. v. HALIFAX* (INHABITANTS), No. 697, *ante*.

**700. — Land allotted to wife in pursuance of family agreement.]**—A person seised in fee agreed among his children to divide his land in parcels

*Sect. 7.—Settlement by estate: Sub-sect. 1, I., J., K.*

among his children, for them to build upon. Accordingly, the husband of one of his daughters built upon the portion set out for himself, & resided on it sixteen or seventeen years.—*Held*: he thereby gained a settlement by estate.—*R. v. CHEADLE (INHABITANTS)* (1832), 3 B. & Ad. 833; 1 L. J. M. C. 75; 110 E. R. 306.

*Annotation*:—*Mentd. R. v. Billingham* (1836), 5 Ad. & El. 678.

**701. — Wife weekly tenant—Rent below ten pounds a year.**—On appeal against an order for the removal of the wife of W. to the place of settlement of the husband acquired before marriage, the following facts were stated for the opinion of the ct., under Quarter Sessions Act, 1849 (c. 45), s. 11. The woman being tenant of a cottage in the township of H., at the rent of 1s. per week, & residing in it, married W.; & from & after the marriage the husband resided with his wife, & occupied the tenement for seven years, during which he paid the weekly rent:—*Held*: the husband was shown to have acquired a settlement by estate in H.; for that, the wife's tenancy from week to week having become vested in the husband by the marriage, no determination of that tenancy during the seven years was shown, the payment of the rent by the husband being equally consistent with the continuance of the old tenancy as with the creation of a new one in him; & the residence for forty days during the continuance of the estate acquired by marriage was sufficient, notwithstanding that the tenancy was not for forty days certain.—*R. v. THORNTON (INHABITANTS)* (1860), 2 B. & E. 788; 29 L. J. M. C. 162; 2 L. T. 212; 6 Jur. N. S. 799; 8 W. R. 435; 121 E. R. 295; *sub nom. THORNTON TOWNSHIP v. R.*, 24 J. P. 694.

*Annotation*:—*Reid. R. v. Norwich Corpn.* (1874), 38 J. P. 877.

**702. Wife gaining settlement—By derivation from husband.**—*ILMINGTON v. MICKLETON*, No. 691, *ante*.

*J. Estate of Mortgagor.*

**703. Whether settlement gained—Mortgagor substantially owner of estate.**—*R. v. St. MICHAEL'S, BATH (INHABITANTS)* (1781), 2 Doug. K. B. 630; *Cald. Mag. Cas.* 110; 2 Bott. 119; 99 E. R. 399.

*Annotations*:—*Distd. R. v. Catherington* (1790), 3 Term Rep. 771. *Apld. R. v. Edington, Parish* (1801), 1 East, 288. *Consd. R. v. Tarrant Launceston* (1803), 3 East, 226. *Reid. R. v. Fillongley* (1788), 2 Term Rep. 709; *R. v. Ardleigh* (1837), 7 Ad. & El. 70. *Mentd. R. v. St. Sepulchre* (1785), 4 Doug. K. B. 336; *R. v. Eriswell* (1790), 3 Term Rep. 707; *R. v. Staplegrave* (1819), 2 B. & Ald. 527.

**704. — Mortgagee taking possession—Permitting residence for particular purpose.**—The mtgoe. of several houses, after recovering possession in ejectment, permitted the mtgor. to inhabit one of them for a particular purpose; the latter gained no settlement by such residence; for he was not in possession as mtgor.—*R. v. CATHERINGTON (INHABITANTS)* (1790), 3 Term Rep. 771; 2 Bott. 514; 100 E. R. 850.

*Annotation*:—*Mentd. R. v. Staplegrave* (1819), 2 B. & Ald. 527.

**705. — Co-mortgagor assigning share in equity of redemption—By verbal agreement—Subsequent residence.**—Four parties being next of kin to intestate, who died possessed of a term in C., one of them took out administration: & the four then joined in a mtge. of the term, & raised a sum thereby, which was divided equally among them. Afterwards one of them verbally agreed to sell all his interest to another, neither being

the administrator, for a sum of money, & in consideration that the purchaser would take the seller's share of the mtge. debt on himself, & pay the interest; & he received the money from the purchaser accordingly:—*Held*: the party selling gained no settlement by subsequent residence in C.—*R. v. CREGG (INHABITANTS)* (1835), 2 Ad. & El. 530; 1 Har. & W. 53; 4 Nev. & M. K. B. 455; 3 Nev. & M. M. C. 32; 4 L. J. M. C. 57; 111 E. R. 207.

*Annotation*:—*Reid. R. v. Ardleigh* (1837), 7 Ad. & El. 70.

**706. — Mortgagor devising land to trustees—Widow residuary legatee.**—Testator purchased land in the parish of A., & mortgaged it, & by will devised it to trustees in trust for sale, & to apply the proceeds in payment of his debts, & the residue to his wife for her own use & benefit:—*Held*: under this devise, the wife had an equitable estate in the land itself such as to confer a right to a settlement: actual residence on the land itself was not necessary, residence in the same parish being sufficient; the occupation of the land by the trustees under the will was not an adverse possession by them against her, & evidence as to the value of the land, with the view of proving that there would be no residue after payment of the debts was immaterial, the question being what estate the wife took under the will, & not what was the value of that estate.—*R. v. ASLACKBY (INHABITANTS)* (1836), 5 Ad. & El. 200; 2 Har. & W. 217; 6 Nev. & M. K. B. 582; 3 Nev. & M. M. C. 609; 5 L. J. M. C. 115; 111 E. R. 1141.

*K. Estate by virtue of Office or Employment.*

**707. Whether settlement gained—Warden of borough.**—*St. MARY PARISH, READING v. St. LAWRENCE, READING* (1710), 10 Mod. Rep. 13; 1 Scss. Cas. K. B. 2; 2 Bott. 173; 88 E. R. 603; *sub nom. St. LAWRENCE, READING (INHABITANTS)*, *Fortes. Rep.* 310; *sub nom. St. LAURENCE PARISH v. St. MARY READING, Sett. & Rem.* 3.

*Annotation*:—*Reid. R. v. Amlwch* (1825), 4 B. & C. 757.

**708. — Annuity charged on land—Paid to schoolmaster.**—*R. v. MELBORNE (INHABITANTS)* (1745), *Burr. S. C.* 244; 2 Bott. 177.

**709. — Annuitant residing by permission.**—An annuity issuing out of an estate on which the annuitant resides, will not gain a settlement.—*R. v. STOCKLEY POMROY* (1774), *Burr. S. C.* 762; 2 Bott. 501.

**710. — Pauper freeman of town—Right of common.**—Where a pauper, as freeman of a town, was entitled, during his residence there, together with the other freemen, to a stinted common of pasture on a neighbouring moor for his own cattle, & also to a right to cut peat for his own use, & get limestones, etc., on the moor, & to put his children to the town school free of expense, at which two of his children were placed at the time of his removal; but it did not appear that he had ever exercised the common of pasture, or had any cattle with which to exercise it:—*Held*: these rights did not amount to such an estate as to make him irremovable.—*R. v. WARKWORTH (INHABITANTS)* (1813), 1 M. & S. 473; 2 Bott. 531; 105 E. R. 176.

*Annotation*:—*Consd. R. v. Belford* (1829), 10 B. & C. 54.

**711. — Right to share in rents of estates.**—The burgesses of the borough of B. were entitled to receive such share of the rent of certain estates as the corp. at large should allow to them. The estates were vested in the corp. at large, & demised by lease, whereby the rents were reserved to the corp.:—*Held*: a freeman of B., who resided in the borough, & was in the receipt



of a portion of the rents, which had been assigned to him by the corp., did not thereby gain a settlement by estate.—*R. v. BELFORD (INHABITANTS)* (1829), 10 B. & C. 54; 5 Man. & Ry. K. B. 174; 2 Man. & Ry. M. C. 608; 8 L. J. O. S. M. C. 38; 109 E. R. 371.

**712. — Liberty to take sand & gravel—At annual rent.]**—Where pauper, by order of a corp., made at a common hall, was allowed the liberty to take sand & gravel, from the bed of a river, of which the corp. were entitled to the soil, with a condition that he sold the sand to the inhabitants of the town at a certain rate; for which liberty he paid to the corp. at the rate of £10 *per annum*:—*Held*: he thereby acquired a settlement.—*R. v. ALL SAINTS, DERBY (INHABITANTS)* (1816), 5 M. & S. 90; 105 E. R. 984.

*Annotation*:—*Consd. R. v. Kenardington* (1826), 6 B. & C. 70.

**713. — Schoolmaster appointed by trustees of charity—Residing rent free—Trustees fraudulently withholding part of trust estate.]**—Under a devise by three trustees in fee of a certain farm, upon trust to dispose of the rents, issues, & profits, as to 40s. a year to the poor of the parish, & the residue to be paid to a schoolmaster, to be nominated by them, to teach the poor children to read the Bible; the trustees, by an agreement in writing, reciting that they were possessed of & entitled to a school house, yard, garden, & premises at M., which they had agreed to let to W. for the purposes mentioned, thereby agreed with W. to let him have the possession, use, & occupation of the school house, etc., & premises, for the purpose of teaching the poor children of M. to read in the Bible, pursuant to the will of B.: & in consideration of his agreeing to teach the children, he was to reside on the premises rent free, & to be paid a certain annual sum by the trustees; who reserved to themselves a power, for reasonable cause, to suspend his salary, & that in case of his death they should turn his exors. out of the premises, & appoint another schoolmaster thereto:—*Held*: this was an appointment, though irregular in its form, of W. under the will, as schoolmaster, so as to give him a life interest in the school house, etc., & premises, of which he was put in possession, & to enable him to gain a settlement by forty days' residence thereon; though the trustees fraudulently withheld from him part of the rents, issues, & profits of the trust estate: & the finding of the sessions, "that the appointment was fraudulent & in no respect consistent with the will," was to be understood in that sense only, & not as imputing fraud to the schoolmaster himself, who was thus wronged, & who engaged to execute all the duties of his appointment under the will.—*R. v. OWERSBY-LE-MOOR (INHABITANTS)* (1812), 15 East, 356; 104 E. R. 879.

*Annotation*:—*Refd. R. v. St. Mary Castlegate* (1852), 21 L. J. M. C. 106.

**714. — Occupation of land as servant.]**—A pauper was hired as shepherd, by the tenantry farmers of a manor, for a year, to keep the tenantry flock; he was to receive 14s. per week, & to have a piece of land called the Shepherd's Croft, which was to make up money as good as 16s. a week; & he served a year under his hiring. The tenantry farmers were leaseholders & copyholders of the manor. By agreement made in 1799, between the then lord of the manor & his lessee of the manor, & the leaseholders & copyholders of that manor, arbitrators were appointed for dividing & allotting the open fields within the manor, amongst the lessees for life of the manor,

& the several leaseholders & copyholders in respect of the land which they had in the manor; & the allottees were to be possessed of the lands allotted to them, for the same estate & interest as they had in the lands, in lieu whereof the allotments were made. The arbitrators by their award allotted to W. R., the lord & farmer of the manor, in trust for the shepherd or keeper of the flock, in lieu of lands in the common field, held by custom by the shepherd, the land which the pauper took when he was hired as shepherd, & he let part of this land to a tenant:—*Held*: the pauper took the land in his character of servant in lieu of wages, & not under the award, & consequently that he gained no settlement by estate.—*R. v. SOUTH NEWTON, WILTS (INHABITANTS)* (1830), 10 B. & C. 838; 3 Man. & Ry. M. C. 115; 5 Man. & Ry. K. B. 715; 8 L. J. O. S. M. C. 90; 109 E. R. 660.

#### *L. Estate of Guardian.*

**715. Whether settlement gained—Legal guardian.]**—A guardian in socage, residing on the ward's estate for forty days, gains a settlement in the parish; & cannot be removed from the possession of it at any time.—*R. v. OAKLEY (INHABITANTS)* (1809), 10 East, 491; 2 Bott, 527; 103 E. R. 802.

*Annotations*:—*Distd. R. v. Toddington* (1818), 1 B. & Ald. 560. *Refd. R. v. Burgate* (1854), 23 L. T. O. S. 155. *Mentd. R. v. Sutton* (1835), 3 Ad. & El. 597.

**716. — —.]**—The mother of an infant copyholder under fourteen, was holden to be guardian by law of the copyhold, there being no custom of the manor for appointing a guardian, & therefore entitled to reside irremovably on the estate. A grant of parcel of the waste of the manor to hold to B. & his heirs by way of increase to his copyhold, by such services as the copyhold was subject to, for which B. paid a fine of 10s., was held not to enure as copyhold, there being no custom to warrant such grant nor as an estate in fee simple.

*Qu.*: if separate purchases may be added together, to make one purchase of £30 within Poor Relief Act, 1722 (c. 7), s. 5.—*R. v. WILBY (INHABITANTS)* (1814), 2 M. & S. 504; 105 E. R. 469.

**717. — Natural guardian.]**—There cannot be a guardian in socage of an equitable estate; & therefore, where a pauper married the widow of a man who had paid for & been let into possession of a freehold cottage, & had died leaving a daughter, but without having had any legal conveyance executed to him in his lifetime:—*Held*: the pauper's residence in the cottage for forty days did not confer a settlement on him, the widow not being guardian in socage to the daughter.—*R. v. TODDINGTON (INHABITANTS)* (1818), 1 B. & Ald. 560; 106 E. R. 206.

*Annotations*:—*Refd. R. v. Berkswell* (1823), 1 B. & C. 542; *R. v. Geddington* (1823), 2 B. & C. 129; *R. v. St. Margaret, Leicester* (1842), 2 Q. B. 559. *Mentd. Caunt v. Ward* (1831), 7 Bing. 608.

**718. — —.]**—A real estate was devised to C., who on the death of testator was sixteen years old. Her father, considering himself her guardian, resided with her on the estate:—*Held*: as the estate came to the daughter by devise & not by descent, & she was above fourteen years of age, the father was not a guardian in socage, but natural guardian only, & having as such no interest in the land, he gained no settlement by residing on it.—*R. v. SHERRINGTON (INHABITANTS)* (1832), 3 B. & Ad. 714; 1 L. J. M. C. 71; Pratt, 279; 110 E. R. 261.

**Sect. 7.—Settlement by estate: Sub-sect. 1, M.; sub-sect. 2, A. & B.]**

*M. Other Estates.*

**719. Freehold estate.]**—Freehold or copyhold gains a settlement for a man & his children though born before.—*R. v. HARROW & EDGWARE (INHABITANTS)* (circa 1700), Fortes. Rep. 310; 92 E. R. 865.

**720. —.]**—Lease was granted to A. for ninety-nine years; he devised it to B. his son, who entered & enjoyed it above forty days:—*Held*: B. had thereby gained a settlement; for it comes within the same reason as the cases of freehold & copyhold estates; & B. having a property could not be removed.—*R. v. SANDWICH PARISH (INHABITANTS)* (1733), Cun. 76; 2 Sess. Cas. K. B. 245; 94 E. R. 1072; *sub nom.* *R. v. SUNDRISH*, Burr. S. C. 7; 2 Bott, 492; 2 Stra. 983.

*Annotations*:—*Reid. R. v. Uttoxeter* (1765), Burr. S. C. 535; *R. v. Stone* (1795), 6 Term Rep. 295.

**721. Copyhold estate.]**—*R. v. HARROW & EDGWARE (INHABITANTS)*, No. 719, *ante*.

**722. —.]**—*EDGAR v. HENDEN* (circa 1713), cited in 1 Sess. Cas. K. B. at p. 47; 93 E. R. 13.

**723. —.]**—*R. v. SANDWICH PARISH (INHABITANTS)*, No. 720, *ante*.

**724. Leasehold estate.]**—*R. v. SANDWICH PARISH (INHABITANTS)*, No. 720, *ante*.

**725. —.]**—(1) A settlement may be gained by being possessed of, & residing forty days in a leasehold house.

(2) Under the word purchase, in the large sense of that word, every acquisition of an estate by gift, marriage settlement or devise, or by any other way, except it be by some act of law, is comprehended, but, as the Poor Relief Act, 1722 (c. 7), does say expressly, that a settlement shall not be gained by purchasing an estate unless the consideration money be *bona fide* paid, that statute can only extend to purchases for pecuniary considerations (*RYDER, C.J.*).—*R. v. MARWOOD (INHABITANTS)* (1756), Say. 268; Burr. S. C. 386; 2 Bott, 495; 96 E. R. 876.

*Annotations*:—*As to* (2) *Apd. Ilmington v. Mickleton* (1766), 1 Wm. Bl. 598. *Consd. R. v. Ufton* (1789), 3 Term Rep. 251. *Reid. R. v. Ashton Underhill* (1784), Cald. Mag. Cas. 416; *R. v. Warblington* (1786), 1 Term Rep. 241.

**726. Estate in dower—Without assignment.]**—A mere right of dower without an assignment will gain the widow a settlement. But such settlement will not communicate itself to a second husband.—*R. v. PAINSWICK (INHABITANTS)* (1774), Burr. S. C. 783; 2 Bott, 502.

*Annotation*:—*Apd. R. v. Northwold Bassett* (1824), 2 B. & C. 724.

**727. —.]**—A widow, before assignment of dower, has not such an interest in the land of which she is dowable, as to be irremovable from the parish in which the land lies.—*R. v. NORTHWEALD BASSETT (INHABITANTS)* (1824), 2 B. & C. 724; 4 Dow. & Ry. K. B. 276; 2 Dow. & Ry. M. C. 221; 107 E. R. 552.

**728. Estate conveyed for benefit of creditors—Fraudulent entry before trusts performed—No settlement gained.]**—*R. v. ST. MICHAEL'S, BATH (INHABITANTS)* (1781), 2 Doug. K. B. 630; 2 Bott, 119; Cald. Mag. Cas. 110; 99 E. R. 399.

*Annotations*:—*Consd. R. v. Edington Parish* (1801), 1 East, 288. *Reid. R. v. Millongley* (1788), 2 Term Rep. 709; *R. v. Catherington* (1790), 3 Term Rep. 771; *R. v. Tarrant Launceston* (1803), 3 East, 226; *R. v. Staplegrave* (1819), 2 B. & Ald. 527; *R. v. Ardleigh* (1837), 7 Ad. & El. 70. *Mentd. R. v. Eriswell* (1790), 3 Term Rep. 707.

**729. — Undertaking to surrender copyholds on request—Settlement gained by residence before surrender.]**—Pauper, by deed recited to be made for the purpose of paying his creditors, conveyed

his freehold estates & assigned his personal property to A., B., & C., in trust to sell, & to receive the proceeds & rents, etc. By same deed he covenanted, on request made by the trustees, to surrender his copyhold estates in D. to their use, or as they should appoint, & in the meantime to stand seised of same in trust for them; & A., B., & C. were to stand possessed of & interested in the copyhold on the same trusts as the freehold. It was further declared that A., B., & C. were to be possessed of, & interested in, the moneys to arise or be collected as above mentioned, in trust to pay the pauper's creditors; & if there should be any surplus, to repay it to him, his exors., etc. While the above trusts continued, & before the copyhold was surrendered, pauper resided forty days in the parish in which the copyhold lay, but not on the estate:—*Held*: he gained a settlement by such residence.—*R. v. ARDLEIGH (INHABITANTS)* (1837), 7 Ad. & El. 70; 2 Nev. & P. K. B. 240; 1 Nev. & P. M. C. 319; Will. Woll. & Dav. 398; 6 L. J. M. C. 151; 1 J. P. 185; 1 Jur. 403; 112 E. R. 397.

**730. Estate granted in pursuance of bond—For work done on land.]**—Where a woman on her marriage with a copyholder of a manor, where the widows of husbands dying seised are entitled to their free bench, gave a bond that the son of her intended husband by a former wife should have possession of part of the copyhold estate after the death of her husband, on condition of his repairing the part of the house reserved for her: & after the death of the husband, the widow delivered up the possession to the son, according to the bond; he gained a settlement by residence on it for forty days.—*R. v. LOPEN (INHABITANTS)* (1788), 2 Term Rep. 577; 100 E. R. 310.

**SUB-SECT. 2.—PURCHASE.**

*A. In General.*

*See* Poor Law Act, 1927 (c. 14), s. 113.

**731. Consideration must be not less than thirty pounds.]**—*R. v. STANSFIELD (INHABITANTS)* (1743), Burr. S. C. 205.

*Annotation*:—*Consd. R. v. Great Driffield* (1828), 8 B. & C. 684.

**732. —.]**—The son of a man who purchases under £30 consideration, born during his father's residence on such purchase, is settled at his father's prior settlement, though the father still continues to reside on the purchased estate.—*OVER-NORTON v. SALFORD* (1764), 1 Wm. Bl. 455; 96 E. R. 263; *sub nom.* *R. v. SALFORD (INHABITANTS)*, Burr. S. C. 516.

**733. —.]**—Where a person rented & resided on a tenement of £4 a year, & in the same year bought at a public auction, on Aug. 12, four lots of oats growing in one field, for £12 14s., which oats were of different kinds, that ripened at different periods, & he began to reap them on Sept. 14, & continued reaping them as they ripened, & carted them away at intervals between Sept. 14 & Nov. 3, on which day he carted off the last load:—*Held*: he did not thereby acquire a settlement.

This was a purchase & not a renting, or in any way a holding as tenant, & upon that construction this person did not gain a settlement (*LORD ELLENBOROUGH, C.J.*).—*R. v. BOWNESS (INHABITANTS)* (1815), 4 M. & S. 210; 105 E. R. 812.

*Annotations*:—*Distd. R. v. All Saints, Cambridge* (1822), 2 Dow. & Ry. K. B. 47. *Reid. R. v. St. John, Glastonbury* (1818), 1 B. & Ald. 481; *R. v. Iken* (1834), 2 Ad. & El. 147.

**734. —.]**—A building club was formed by subscribers to an indenture, which recited the

purpose to be raising a capital stock for erecting dwelling houses; & they agreed to articles, which provided: that every subscriber should pay 6s. 8d. monthly: freehold land was to be purchased by the club for erecting houses: each member to take as many houses as he should have shares: the houses to be built according to a plan annexed, & under the inspection of the agents of the society: the order in which the members should take the houses to be determined by lot, till all the shares should be drawn: no member to mortgage his house till the conclusion of the society, but each to pay rent to the officers, which was to be deemed a vesting of property in them: no subscriber to have power to let or sell his house till security should be given to the satisfaction of the president: the monthly payments & rents to be placed to the funds of the society till the whole subscriptions should be completed & all the dwelling houses be allotted, & possession of them given to the respective subscribers; the president meanwhile to have the power of distraining for the rent: if a member, after being put in possession of a house, should lock his door, quit the neighbourhood for six months, & neglect to pay his monthly payments & rents, the president & steward might take possession of the house & let or sell it: at the determination of the society, each member was to be fully entitled to his share, & a conveyance thereof at his own expense; the surplus stock to be divided; & meanwhile each member to pay £1 yearly, & to forfeit his share upon making default of any of the payments provided for: the society not to be broken up while six members existed, or before all the buildings should be completed. The club contracted for the purchase of land, & commenced building without any conveyance being made to them. The land was afterwards, by deed to which the club was party, mortgaged to A. for money advanced to the club. The whole purchase-money paid by the club amounted to more than £30, but not to so much as £30 for each subscriber. In 1824 & 1825, E., a member of the club, drew his share, had a house built for him, & entered into possession; & he paid rent till the mtge. was paid off, when the mtgee. conveyed the house to E. & the other members severally. The club had shortly before ended, the shares having been paid up & the houses built. At the time when the club ended, E.'s monthly & annual payments, exclusive of rent, exceeded £30: but such payments made before he came into possession did not amount to £30. The house was not of the annual value of £10:—*Held*: E. acquired a settlement by residence in the house after the conveyance to him, not having had any legal or equitable estate until the time of such conveyance, & having before that time paid more than £30, so as to satisfy Poor Relief Act, 1722 (c. 7), s. 5.

An equitable right is not sufficient to confer a settlement; it must be an equitable estate actually vested (LORD DENMAN, C.J.).—*R. v. CARLTON* (INHABITANTS) (1849), 14 Q. B. 110; 3 New Mag. Cas. 192; 4 New Sess. Cas. 1; 19 L. J. M. C. 100; 13 L. T. O. S. 505; 13 J. P. 604; 14 Jur. 240; 117 E. R. 44.

735. ———.]—W. took of T. premises at a yearly rent of £1 11s. 6d. entered into occupation of them, & erected buildings on them at an expense of less than £30. Afterwards, T. & W. executed an indenture witnessing that, in consideration of the yearly rent reserved, & of the covenants on the part of W., T. granted & leased the premises to W., in consideration of having erected the buildings

for the joint benefit of W. & the lessee of other premises: *habendum* for successive terms of six years till the expiration of ninety-six years, if three persons named, or either of them, should so long live, & for three years further:—*Held*: W. did not gain a settlement by estate, by occupying under this lease; for that no consideration otherwise than pecuniary was shown by the facts, & therefore, there not having been £30 paid for the purchase, Poor Relief Act, 1722 (c. 7), s. 5, was applicable, & prevented a settlement from being gained.—*WENDRON* (CHURCHWARDENS, ETC.) *v.* *STITHIANS* (CHURCHWARDENS, ETC.) (1854), 4 E. & B. 147; 24 L. J. M. C. 1; 1 Jur. N. S. 207; 119 E. R. 57; *sub nom.* *R. v. WENDRON OVERSEERS*, 3 C. L. R. 12; 24 L. T. O. S. 73; 19 J. P. 30; 3 W. R. 16.

*Annotation*:—*Reid*. *Belford v. Berwick* (1863), 1 New Rep. 476.

736. ———.]—Whether separate purchases may be added together.]—*R. v. WILBY* (INHABITANTS), No. 716, *ante*.

—Admissibility of parcel evidence to prove real consideration.]—*See* *DEEDS*, Vol. XVII., p. 337, No. 1488.

#### *B. What amounts to Payment.*

737. Charges on purchase bringing amount to £30.]—*ST. PAUL'S WALDON v. KEMPTON* (1720), 2 Bott, 546; *Foley Poor Laws*, 3rd ed. 238.

*Annotation*:—*Distd. It. v. Cottingham* (1827), 7 B. & C. 603.

738. ———.]—The expenses of the surrender of a copyhold estate, paid by the purchaser to his attorney, are not part of the consideration, so as to bring the purchase within Poor Relief Act, 1722 (c. 7), s. 5, & entitle the purchaser to a settlement.—*It. v. COTTINGHAM* (INHABITANTS) (1827), 7 B. & C. 603; 1 Man. & Ry. K. B. 469; 1 Man. & Ry. M. C. 137; 6 L. J. O. S. M. C. 31; 108 E. R. 848.

739. Payment of less than £30—Subsequent expenditure on land.]—*R. v. BENJOE* (INHABITANTS) (1728), 1 Barn. K. B. 91, 140; 94 E. R. 63, 97.

740. ———.]—*R. v. DUNCHURCH* (INHABITANTS) (1766), Burr. S. C. 553.

*Annotations*:—*Distd. It. v. Carlton* (1849), 14 Q. B. 110. *Consd. It. v. Belford Overseers* (1863), 3 B. & S. 662.

741. ———.]—Residue remaining on mortgage.]—Where A. contracted for a copyhold estate for £39 mortgaged to another person for £32 & paid £7, & was admitted to the estate subject to the mortgage, he did not gain a settlement by it under Poor Relief Act, 1722 (c. 7).—*R. v. MATTINGLEY* (INHABITANTS) (1787), 2 Term Rep. 12; 2 Bott, 549; 100 E. R. 7.

*Annotation*:—*Apld. It. v. Olney* (1813), 1 M. & S. 387.

742. ———.]—Where the pauper purchased a messuage for £52, under an agreement that the vendor should allow £40 of the purchase-money to remain upon mtge., & such mtge. was accordingly made, & £12 only paid by the pauper to the vendor, who kept the title-deeds in his hands, but the pauper took possession, & resided in it for some years, but was unable to pay the rest of the purchase money, & afterwards agreed to sell it to B. for £60 who thereupon paid the £40 to the original vendor, upon his delivering up to him the title-deeds, & the remaining £20 to the pauper, on the execution of the conveyance to him, at which time the pauper quitted the messuage, not having resided on it forty days after the payment of the £40 to the original vendor:—*Held*: the pauper did not gain a settlement by residence on such estate.—*R. v. OLNEY* (INHABITANTS) (1813), 1 M. & S. 387; 2 Bott, 672; 105 E. R. 145.

**Sect. 7.—Settlement by estate: Sub-sect. 2, B., C. & D.; sub-sect. 3.]**

**743. — Subsequently paid off—Estate mortgaged to another.]—**A. agreed to purchase a copyhold estate of B. for £80, which was then mortgaged to C. for £50, he paid the £10 & was admitted subject to the mtge. interest in C.; afterwards he borrowed £50 of D. to pay off C.'s mtge., & on C.'s mtge. being satisfied he mortgaged the estate to D. for £50:—*Held*: A. gained a settlement by residing forty days on the estate.—*R. v. CHAILEY (INHABITANTS)* (1796), 6 Term Rep. 755; 2 Bott. 552; 101 E. R. 810.  
*Annotation*:—*Consd. R. v. Belford Overseers* (1863), 3 B. & S. 662.

**744. Part of purchase-money borrowed on mortgage—Transaction bona fide.]—**Though part of the purchase money is advanced by another, yet if there is no fraud, a settlement may be gained on Poor Relief Act, 1722 (c. 7).—*WHADDINGTON PARISH v. TEDFORD, LINCOLNSHIRE PARISH* (1735), 2 Stra. 1014; 93 E. R. 1003; *sub nom. TEDFORD v. WADDINGTON, LINCOLNSHIRE*, 2 Sess. Cas. K. B. 237; *sub nom. R. v. TEDFORD (INHABITANTS)*, Burr. S. C. 57; 2 Bott. 547.

*Annotations*:—*Consd. R. v. Dunchurch* (1766), Burr. S. C. 563. *Distd. R. v. Mattingley* (1787), 2 Term Rep. 12. *Ald. R. v. Chailey* (1796), 6 Term Rep. 755. *Distd. R. v. Olney* (1813), 1 M. & S. 387. *Consd. R. v. Belford Overseers* (1863), 3 B. & S. 662. *Reid. R. v. Whittlebury* (1795), 6 Term Rep. 464; *R. v. Woolpit* (1835), 4 Ad. & El. 205; *R. v. Barmston* (1838), 7 Ad. & El. 858. *Mentd. Ex p. Tollerston Overseers* (1842), 3 Q. B. 792; *R. v. Chantrell* (1875), L. R. 10 Q. B. 587; *Walsell Overseers v. L. & N. W. Ry.* (1878), 4 App. Cas. 30.

**745. Debt of £30 or more.]—**COTLEIGH PARISH v. STOCKLAND PARISH (1742), 2 Stra. 1162; 93 E. R. 1101; *sub nom. R. v. STOCKLAND (INHABITANTS)*, Burr. S. C. 169; 2 Bott. 547.

**746. Work done on land of greater value than £30.]—**A. agreed with B. to build a house according to certain specifications on land then belonging to B., in consideration of which undertaking, & of an annual rent charge of 25s., a lease of the land for three lives was to be granted. The house was built by A. according to the specifications, at the cost of £85, whereupon the lease was granted; the grant of the rent charge & the erection of the house on the land conveyed being together of the pecuniary value to the grantor at the time of the conveyance of more than £30:—*Held*: A. hereby acquired a settlement under Poor Relief Act, 1722 (c. 7), s. 5.—*R. v. BELFORD OVERSEERS* (1863), 3 B. & S. 662; 32 L. J. M. C. 156; 7 L. T. 785; 122 E. R. 248; *sub nom. BELFORD (INHABITANTS) v. BERWICK (INHABITANTS)*, 1 New Rep. 476; 27 J. P. 325.

**C. What amounts to Purchase.**

**747. Money consideration—Not devise or gift.]**

—*R. v. MAEWOOD (INHABITANTS)*, No. 725, ante.

**748. Consideration of natural love & affection.]**

—*R. v. INGLETON (INHABITANTS)* (1766), Burr. S. C. 560.

*Annotation*:—*Reid. R. v. Warblington* (1786), 1 Term Rep. 241.

**749. —.]—**A conveyance after marriage by a wife's father to the husband only of an estate under the value of £30, it appearing to be grounded on natural affection, & intended for the use of both husband & wife, is not a purchase within Poor Relief Act, 1722 (c. 7).—*R. v. CHARLTON* (1784), 2 Bott. 507; *sub nom. R. v. ASHTON UNDERHILL (INHABITANTS)*, *R. v. CHARLTON (INHABITANTS)*, Cald. Mag. Cas. 416.

**750. — & pecuniary consideration less than thirty pounds.]—**A conveyance from a father to his son, in consideration of natural love & affection,

& of £10 is not a purchase within Poor Relief Act, 1722 (c. 7).—*R. v. UFTON (INHABITANTS)* (1789), 3 Term Rep. 251; 2 Bott. 513; 100 E. R. 558.

*Annotations*:—*Ald. R. v. Hatfield Broad Oak* (1832), 1 L. J. M. C. 39. *Distd. R. v. Piddlehinton* (1832), 1 L. J. M. C. 43. *Reid. R. v. Great Driffield* (1828), 8 B. & C. 684.

**751. —.]—**A. being in possession of a copyhold estate of inheritance, offered to give it up to his son & heir, if he would pay off £15 which he, A., had borrowed on the estate, & would permit A. & his wife to reside on it rent free during their lives. The son paid off the £15, & was admitted to the copyhold estate upon the surrender of his father. The admittance recited the verbal agreement between A. & his son, & the payment of the £15. A. & his wife continued afterwards to reside on the estate with their son:—*Held*: from the terms of the conveyance, & the state of the family, natural love & affection must be taken to have formed an ingredient in the consideration, & therefore, this was not the purchase of an estate or interest whereof the consideration did not amount to £30 within Poor Relief Act, 1722 (c. 7), s. 5.—*R. v. HATFIELD BROAD OAK (INHABITANTS)* (1832), 3 B. & Ad. 566; 1 L. J. M. C. 39; Pratt, 278; 110 E. R. 205.

**752. — Agreement verbal only.]—**A father, in consideration of natural affection, & of £24 which he owed his son, made over to him premises in the parish of S., by verbal agreement only, & the son received the rents for three years, residing in S.:—*Held*: the son was a purchaser for less than £30 within Poor Relief Act, 1722 (c. 7), s. 5, & gained no settlement.—*R. v. PIDDLHINTON (INHABITANTS)* (1832), 3 B. & Ad. 460; 1 L. J. M. C. 43; Pratt, 261; 110 E. R. 166.

*Annotation*:—*Reid. R. v. Hinckley Overseers* (1863), 3 B. & S. 885.

**753. Surrender of old lease—& taking new one.]—**A surrender of an old lease, which had been for many years in the family & the taking of a new one is not a purchase within Poor Relief Act, 1722 (c. 7), s. 5, & will not prevent a settlement being acquired by residence.—*R. v. TARRANT LAUNCESTON* (1782), 2 Bott. 506; Cald. Mag. Cas. 209.

*Annotation*:—*Folld. R. v. Lydlinch* (1832), 4 B. & Ad. 150.

**754. —.]—**A surrender of an old lease by a grandfather & great uncle, & the taking of a new lease by the grandson & great nephew, at a nominal fine to the lord of a manor, is not a purchase of an estate within Poor Relief Act, 1722 (c. 7), s. 9.—*R. v. LYDLINCH (INHABITANTS)* (1832), 4 B. & Ad. 150; 1 Nev. & M. K. B. 33; 1 New. & M. M. C. 21; 2 L. J. M. C. 5; Pratt, 358; 110 E. R. 412.

**755. Grant of estate—Small pecuniary consideration.]—**A grant of a copyhold with 1s. fine, 1s. heriot, & 1s. rent, is a purchase within Poor Relief Act, 1722 (c. 7), s. 5.—*R. v. WARBLINGTON* (1786), 1 Term Rep. 241; 99 E. R. 1073.

*Annotations*:—*Distd. R. v. Hornon-on-the-Hill* (1816), 4 M. & S. 662. *Folld. R. v. Hornchurch* (1818), 2 B. & Ald. 189. *Consd. R. v. Great Driffield* (1828), 8 B. & C. 684.

**756. —.]—**(1) Where there is no custom for that purpose, the lord of a manor cannot make a new grant of copyhold; & if he does, the grantee acquires thereby no settlement by estate.

(2) A grant by the lord of copyhold land, paying a yearly rent of 2s. 6d., which rent in a subsequent part was called a quitrent, is a purchase within Poor Relief Act, 1722 (c. 7), & being under £30, confers no settlement.—*R. v. HORNCHURCH (INHABITANTS)* (1818), 2 B. & Ald. 189; 106 E. R. 336.

*Annotation*:—*As to* (2) *Distd. R. v. Cuddington* (1845), 9 Jur. 938.

757. ———.]—R. having long occupied cottages as a squatter, got a lease for nine hundred & ninety-nine years from the lady of the manor, the rent reserved being 25s., & she occupied for twelve months. The value was £130 :—*Held* : R. had acquired a settlement by estate within Poor Relief Act, 1722 (c. 7), s. 5, the ct. being entitled to look beyond the mere consideration expressed in the deed.—*CALVERLEY OVERSEERS v. BRADFORD OVERSEERS* (1865), 12 L. T. 51; 29 J. P. 469.

#### D. What Estate Sufficient.

758. Agreement for purchase—No conveyance executed—Part payment.]—Where J. agreed by parol to purchase a copyhold house & land for £150, & paid £34 on account of the purchase, & entered into possession in part performance of the contract, & continued in possession, as owner under such purchase for nearly six months, but no surrender was made, & a difference arising between him & the vendor as to the loan of part of the unpaid purchase money, the parties agreed to rescind the contract, & that possession should be restored, J. consenting to take back £14 :—*Held* : this was not such a purchase as would confer a settlement on J.—*R. v. LONG BENNINGTON (INHABITANTS)* (1817), 6 M. & S. 403; Pratt, 265; 105 E. R. 1293.

*Annotations*.—*Apld.* *R. v. Geddington* (1823), 2 B. & C. 129; *R. v. Llantillo Grosvenny (INHABITANTS)* (1826), 5 B. & C. 461. *Refd.* *R. v. Woolpit* (1824), 4 Dow. & Ry. K. B. 456; *R. v. Carlton* (1849), 14 Q. B. 110.

759. ———.]—A written agreement was made for the purchase of an estate, to be paid for by two instalments; the first was to be payable within a few days after the signing of the agreement, & the last after the expiration of seven months. The vendor was to make out a good title on the payment of the last instalment, & to convey the premises; but the purchaser was to be let into possession upon the payment of the first instalment. The purchaser paid the first instalment, & was let into possession, & continued in possession for a year & a half, but the last instalment was never paid, nor any conveyance ever executed; & the purchaser afterwards gave up the contract upon receiving back part of the first instalment :—*Held* : under this contract, the purchaser did not acquire an equitable estate, so as to gain a settlement under Poor Relief Act, 1822 (c. 7), s. 5.—*R. v. GEDDINGTON (INHABITANTS)* (1823), 2 B. & C. 129; 3 Dow. & Ry. K. B. 403; 2 Dow. & Ry. M. C. 101; 107 E. R. 331.

*Annotations*.—*Apld.* *R. v. Llantillo Grosvenny* (1826), 5 B. & C. 461. *Refd.* *R. v. Woolpit* (1824), 4 Dow. & Ry. K. B. 456; *R. v. Aslackby* (1836), 5 Ad. & El. 200; *R. v. St. Margaret, Leicester* (1842), 2 Q. B. 559; *R. v. Carlton* (1849), 14 Q. B. 110. *Mentd.* *Trotter v. Watson* (1869), 1 Hop. & Colt, 216.

760. ———.]—Where a pauper contracted in writing for the purchase of two cottages & gardens at the price of £70 & paid £10 on account, at the date of the agreement, but never afterwards paid the remainder of the purchase money :—*Held* : he had not such an equitable estate as to render him irremovable from the parish in which the property was situated.—*R. v. WOOLPIT (INHABITANTS)* (1824), 4 Dow. & Ry. K. B. 456; 2 Dow. & Ry. M. C. 272.

*Annotations*.—*Apld.* *R. v. Llantillo* (1826), 8 Dow. & Ry. K. B. 320. *Consd.* *R. v. Carlton* (1849), 14 Q. B. 110.

761. ———.]—A. made a parol agreement with B. for the purchase of a cottage & garden for £40. A. took possession, & paid £30 on account, & resided upon the premises. No conveyance was executed. After A. had been in possession twelve months, he sold the property

for £40 to C., to whom he gave up possession. A. afterwards paid the remainder of the purchase-money to B. :—*Held* : A. did not gain any settlement by the purchase of any estate or interest within Poor Relief Act, 1722 (c. 7), s. 5.—*R. v. LLANTILLO GROSSENNY (INHABITANTS)* (1826), 5 B. & C. 461; 8 Dow. & Ry. K. B. 320; 4 Dow. & Ry. M. C. 73; 5 L. J. O. S. M. C. 5; 108 E. R. 172. *Annotation*.—*Mentd.* *Trotter v. Watson* (1869), 1 Hop. & Colt, 216.

762. ——— Purchase from licensee.]—A. built a house on the waste of a manor by license from the lord, resided in it two years, & then sold it to B. The latter sold it to C. for £30, but no conveyance was executed. C. resided in it five years, & paid 1s. per annum rent to the lord, & then sold his interest. No adverse claim was made :—*Held* : although C. paid a consideration of £30 when he purchased his interest, he did not acquire by purchase an interest or estate sufficient to confer a settlement within Poor Relief Act, 1722 (c. 7), s. 5.—*R. v. HAGWORTHINGHAM (INHABITANTS)* (1823), 1 B. & C. 634; 3 Dow. & Ry. K. B. 16; 1 Dow. & Ry. M. C. 476; 107 E. R. 233.

*See Poor Law Act, 1927 (c. 14), s. 113.*

763. Residence for forty days in parish where estate is.]—*RICELIP PARISH v. HENDEN PARISH*, No. 995, *post*.

764. ———.]—If a woman marry a man who had a settlement & never used it, & she never there, she cannot be said to be last legally settled there according to the Act, which requires forty days; so if a man had an estate in a parish, & do not live there, he cannot be sent there; but if he had lived there forty days, he had been settled there (*PARKER, C.J.*).—*APPOTENS PARISH v. DUNKSWELL* (1714), 1 Sess. Cas. K. B. 85; 93 E. R. 25.

765. ———.]—A settlement cannot be gained, by residing less than forty days upon an estate for years, which a man becomes entitled to by act of law.—*R. v. WEST SHEFFORD (INHABITANTS)* (1751), Say. 2; Burr. S. C. 307; 2 Bott, 556; 96 E. R. 782.

766. ——— Not necessarily on estate—Residence need not be continuous.]—Residence for forty days in the parish, wherein a man has an estate of his own, except it be by purchase under £30, is sufficient to gain a settlement; though it be not on the estate or successive. It gains a settlement also for his children, they not having gained a settlement of their own, but remaining part of his family though living elsewhere.—*R. v. SOWTON (INHABITANTS)* (1738), Andr. 345; Burr. S. C. 125; 2 Bott, 555; 95 E. R. 427; *sub nom.* *SOUTON PARISH v. SIDBERRY*, 2 Sess. Cas. K. B. 211.

*Annotations*.—*Consd.* *R. v. Houghton le Spring* (1801), 1 East, 247. *Refd.* *R. v. Dunchurch* (1766), Burr. S. C. 553. *Mentd.* *Beal v. Ford* (1877), 26 W. R. 146.

767. ———.]—*ST. NEOTS PARISH v. ST. CLEER PARISH* (1739), 2 Stra. 1116; 1 Sess. Cas. K. B. 400; 93 E. R. 1068; *sub nom.* *R. v. ST. NYOTTS*, Burr. S. C. 132; 2 Bott, 550.

*Annotations*.—*Consd.* *R. v. Houghton le Spring* (1801), 1 East, 247. *Refd.* *Doddington Parish v. Dunfrew Parish* (1743), 2 Stra. 1193.

768. ———.]—*R. v. KNARESBOROUGH (INHABITANTS)*, No. 300, *ante*.

769. ——— Residence by licence of tenant to effect repairs.]—A pauper, having a freehold estate in the parish of A. in the occupation of a tenant to whom he had let it, was deemed to gain a settlement by residing thereon forty days with the licence of his tenant for the purpose of making some repairs,

**Sect. 7.—Settlement by estate: Sub-sects. 3 & 4.**

**Sect. 8: Sub-sect. 1, A. (a) & (b), & B. (a).]**

such residence being considered as equivalent to a residence in any other part of the parish.—*R. v. HOUGHTON LE SPRING (INHABITANTS)* (1801), 1 East, 247; 2 Bott, 557; 102 E. R. 90.

**Annotations:—***Reid. R. v. Staplegrave* (1819), 2 B. & Ald. 527; *R. v. Bardwell* (1823), 3 Dow. & Ry. K. B. 369; *R. v. Ynyscynhalarn* (1827), 1 Man. & Ry. K. B. 16; *R. v. Ringstead* (1829), 7 L. J. O. S. M. C. 103; *R. v. Willoughby-with-Sloothby* (1829), 10 B. & C. 62; *R. v. Aslackby* (1836), 5 Ad. & El. 200.

**770. — Trustees in occupation of property.]—***R. v. ASLACKBY (INHABITANTS)*, No. 706, *ante*.

#### SUB-SECT. 4.—CEASING TO INHABIT WITHIN TEN MILES.

See Poor Law Act, 1927 (c. 14), s. 113.

**771. Settlement lost thereby—Not merely suspended.]—**Poor Law (Amendment) Act, 1834 (c. 76), s. 68, “that no person shall be deemed, etc., to retain any settlement gained by virtue of any possession of any estate or interest in any parish, for any longer or further time than such person shall inhabit within ten miles thereof,” enacts, that a settlement is destroyed by such removal, & not merely suspended, so as to be revived by the pauper's returning to inhabit within the limited distance.

Where a person purchased a leasehold interest, subject to a rent of 150 guineas a year (in the year 1826), & after ten months left the house, which was shut up, but the rent continued to be paid; & afterwards ceased to inhabit in the parish, or within ten miles thereof:—*Held*: he possessed no settlement in that parish, either by estate, or by “coming to settle,” within Poor Relief Act, 1662 (c. 12).—*R. v. ST. GILES IN THE FIELDS (INHABITANTS)* (1842), 2 Q. B. 446; 1 Gal. & Dav. 557; 11 L. J. M. C. 18; 6 J. P. 217; 6 Jur. 192; 114 E. R. 176.

**772. — — —.]—**Pauper, being settled by apprenticeship in M., gained a subsequent settlement in W. by residing on an estate there, but, becoming lunatic while he continued to reside on the same estate, he was, after the passing of Poor Law (Amendment) Act, 1834 (c. 76), removed by his relations to the county lunatic asylum, more than ten miles from W., & was for several years maintained in that asylum, partly by his relatives, partly by the rents of his estate, until, those resources proving inadequate, he was taken from the asylum & brought to W. for one night, & was then removed as a pauper lunatic to the same asylum, by warrant under 9 Geo. 4, c. 40, s. 38:—*Held*: an order of justices on the overseers of W., under the last-mentioned clause, for the payment of a weekly sum for his maintenance in the asylum, was wrong, the pauper having, under Poor Law (Amendment) Act, 1834 (c. 76), s. 68, lost his settlement in W. by ceasing to inhabit.—*R. v. WHISENDINE (INHABITANTS)* (1842), 2 Q. B. 450; 1 Gal. & Dav. 560; 11 L. J. M. C. 42; 6 J. P. 185; 6 Jur. 192; 114 E. R. 178.

**Annotation:—***Reid. R. v. Whitby* (1870), L. R. 5 Q. B. 325.

**773. — Whether child's settlement also lost.]—**By Poor Law (Amendment) Act, 1834 (c. 76), s. 68, if a party settled in a parish by possession of an estate ceases to inhabit within ten miles, his settlement is thereby lost; but the settlement communicated to his child by such possession is not affected by the statute.—*R. v. HENDON (INHABITANTS)* (1842), 2 Q. B. 455; 2 Gal. & Dav.

394; 12 L. J. M. C. 3; 7 J. P. 50; 6 Jur. 948; 114 E. R. 180.

**Annotation:—***Reid. R. v. Llansaintffraid* (1853), 2 E. & B. 803.

**774. — — — & settlement of wife.]—**Where a man loses his settlement by estate, by removal to a greater distance than ten miles, under Poor Law (Amendment) Act, 1834 (c. 76), s. 68, the settlement of his wife & unemancipated children are also put an end to.—*R. v. LLANSAINTEFFRAID (INHABITANTS)* (1853), 2 E. & B. 803; 2 C. L. R. 219; 23 L. J. M. C. 5; 22 L. T. O. S. 96; 18 J. P. 23; 17 Jur. 1101; 2 W. R. 20; 118 E. R. 968.

**775. — Settlement by estate—Not settlement by renting.]—**A pauper who was the legitimate son of G. deceased, & who had acquired no settlement of his own, was born in the parish of St. P. in 1880. The pauper's father had acquired a settlement in the parish of R. by renting a dwelling-house there of the annual value of £30, & paying rates. He left R. in 1873, & had never acquired any other settlement. An order having been made for the removal of the pauper child to St. P. as its birth settlement, this had been quashed at quarter sessions on the ground that pauper's last legal settlement had been in the parish of R. On appeal:—*Held*: it was right, as the settlement acquired by the pauper's father at R. had not been lost by him under Poor Law (Amendment) Act, 1834 (c. 76), s. 68, by reason of his having gone to reside at a greater distance than ten miles therefrom.—*R. v. KEYNSHAM UNION* (1885), 1 T. L. R. 453; 49 J. P. Jo. 308, D. C.

**776. How ten miles is measured.]—**Poor Law (Amendment) Act, 1834 (c. 76), s. 68, enacts that no person shall retain a settlement, gained by possessing an estate or interest in a parish, for a longer time than he shall inhabit “within ten miles thereof”:—*Held*: where the pauper resided out of the parish, these words mean ten miles measured in a direct line from the residence to the nearest point of the parish.—*R. v. SAFFRON WALDEN (INHABITANTS)* (1846), 9 Q. B. 76; 1 New Mag. Cas. 557; 2 New Sess. Cas. 360; 15 L. J. M. C. 115; 7 L. T. O. S. 204; 10 J. P. 499; 10 Jur. 639; 115 E. R. 1204.

**Annotations:—***Apld. Lake v. Butler* (1855), 5 E. & B. 92; *Mouffet v. Cole* (1872), L. R. 8 Exch. 32. *Mentd. Backhouse v. Bishopwearmouth* (1861), 7 Jur. N. S. 338.

#### SECT. 8.—SETTLEMENT BY RENTING AND RATING.

##### SUB-SECT. 1.—RENTING.

##### A. Nature of Tenancy.

##### (a) In General.

See Poor Law Act, 1927 (c. 14), s. 114.

**777. Must be hiring for a year—Necessity for bona fides.]—**Whether when the sessions state facts fully & particularly, from whence they infer fraud, this ct. can draw their own conclusion from those facts, without having regard to the adjudication of the ct. of sessions. *Qu.*: A fraudulent renting of £10 *per annum*, will not give a settlement.—*R. v. WOODLAND (INHABITANTS)* (1786), 1 Term Rep. 261; 99 E. R. 1084.

**Annotation:—***Mentd. R. v. St. Mary Magdalen, Bormondsey* (1802), 3 East, 7.

**778. — — — Actual value immaterial.]—**After the passing of 59 Geo. 3, c. 50, & before Poor Relief (Settlement) Act, 1825 (c. 57), came into operation, a pauper *bona fide* hired a tenement at & for the sum of £10 a year, & held & occupied & paid rent for the same for the term of one whole



**791.** — — —.]—Where the lessee of tolls & a toll house of a navigation underlet the same for the remainder of a term of three years, at the annual rent of £42, & the underlessee occupied them for upwards of a year, & paid a year's rent, & it was found as a fact that the toll house had always been

**Sect. 8.—Settlement by renting and rating: Sub-sect. 1, B. (a), (b) & (c), & C. (a).]**

used as a public house as well as for the collection of tolls, & was worth £25 a year if let as a public house without the tolls, & £4 a year if not so let:—*Held*: the underlessee did not gain any settlement by the renting of a tenement, inasmuch as he was a person renting the tolls, & residing in a toll house of a navigation, within Poor Relief Act, 1814 (c. 170), s. 5.

*Semble*: the renting of a house & land with an incorporeal hereditament, or other subject matter not being house & land, at an entire rent, is insufficient for the purpose of a settlement under Poor Relief (Settlement) Act, 1825 (c. 57).—*R. v. ST. ANDREW THE LESS, CAMBRIDGE* (1830), 10 B. & C. 742; 5 Man. & Ry. K. B. 639; 3 Man. & Ry. M. C. 57; 8 L. J. O. S. M. C. 84; 109 E. R. 626.

**792. — Tolls of a bridge.**—Renting the tolls of a bridge, vested by Act of Parliament in a co. of proprietors who are declared a corp., will confer a settlement, although the tolls are made personal estate, & the renting is not stated to be by deed.

13 Geo. 3, c. 84, which prohibits persons from gaining a settlement by renting the tolls of turnpike roads, does not extend to the tolls of a bridge, which bridge does not appear to be part of the turnpike road.—*R. v. HUBWITH (INHABITANTS)* (1813), 1 M. & S. 514; 105 E. R. 192.

**793. — House & land with incorporeal hereditament—At entire rent.**—*R. v. ST. ANDREW THE LESS, CAMBRIDGE*, No. 791, *ante*.

**794. — Tenement consisting partly of dwelling-house & partly of building—Hired at different times—Under different landlords.**—A pauper in Nov. 1827, took a dwelling-house of A., at an annual rent of £6 10s. In May, 1828, he took of B. a building used as a shed, situate in the same parish, but entirely separated & distinct from the dwelling-house, at an annual rent £5. He occupied both, & duly paid the rents, until Sept. 1830:—*Held*: he thereby gained a settlement by renting a tenement under Poor Relief (Settlement) Act, 1825 (c. 57).—*R. v. TADCASTER (INHABITANTS)* (1833), 4 B. & Ad. 703; 1 Nev. & M. K. B. 460; 1 Nev. & M. M. C. 113; 2 L. J. M. C. 63; 110 E. R. 620.

*Annotations*.—*Distd. R. v. Banbury* (1834), 1 Ad. & El. 136. *Appl. R. v. Gosforth* (1834), 1 Ad. & El. 226. *Reid. R. v. Caverswall* (1839), 8 L. J. M. C. 57.

**795. —**—A person hiring a house & stable for a year in a parish under different landlords, at rents amounting together to £10 holding such house & stable, & residing in the house, for the year, & paying the whole rent, acquired a settlement in such parish, under 59 Geo. 3, c. 50, though the house & stable were entirely separate from each other.—*R. v. GOSFORTH (INHABITANTS)* (1834), 1 Ad. & El. 226; 3 Nev. & M. K. B. 303; 2 Nev. & M. M. C. 222; 110 E. R. 1192.

**796. — Two tenements in same parish.**—*R. v. SANDWICH PARISH (INHABITANTS)* (1735), 2 Sess. Cas. K. B. 245; Burr. S. C. 44; 93 E. R. 197. *Annotation*.—*Reid. R. v. South Benfleet* (1813), 1 M. & S. 154.

**797. —**—Where a person rented & resided on a tenement of £9 10s. a year, & during the same time contracted by the year for two ponds, or for the rushes & flags growing therein, he being by business a chair bottomer, the owner of the ponds reserving to himself the use of the water as he thought proper, the rent agreed for being 5s. a year for one pond, & 6s. & two door mats of the value of 2s. for the other:—*Held*:

he thereby acquired a settlement.—*R. v. ALL SAINTS, CAMBRIDGE (INHABITANTS)* (1822), 1 B. & C. 23; 2 Dow. & Ry. K. B. 47; 1 Dow. & Ry. M. C. 133; 107 E. R. 10.

**798. —**—A settlement was gained under Poor Relief (Settlement) Act, 1825 (c. 57), by renting, under distinct hirings, of the same owner, for the same year, two dwelling-houses, one of which the tenant underlet, & never personally occupied, at the rents of £8 & £5 a year, in different parts of a parish.—*R. v. WOOTTON (INHABITANTS)* (1834), 1 Ad. & El. 232; 3 Nev. & M. K. B. 312; 2 Nev. & M. M. C. 232; 3 L. J. M. C. 98; 110 E. R. 1195.

*Annotations*.—*Consd. R. v. Great & Little Usworth & North Biddick* (1836), 5 Ad. & El. 261. *Distd. R. v. Caverswall* (1839), 3 J. P. 484; *R. v. Elswick* (1860), 3 E. & E. 437. *Mentd. Jolliffe v. Rice* (1848), 2 Lut. Reg. Cas. 90.

**799. — Coal mine.**—*R. v. WEST ARDSLEY (INHABITANTS)*, No. 821, *post*.

**(b) Separate and Distinct Dwelling-House or Building.**

See Poor Law Act, 1927 (c. 14), s. 114 (a).

**800. What amounts to—Building consisting of two houses—Under common roof—Without internal communication.**—The pauper took a house, consisting of a house-place, a chamber over it, & above that a garret, which extended over the lower rooms in the adjoining house. He afterwards took the adjoining house, in addition to the rest of the premises, from the same landlord, for a year, at £10 rent. The whole was under the same roof, though there was no internal communication. He dwelt in that part which he first hired, & put a journeyman to work in the other:—*Held*: he gained a settlement under Poor Relief (Settlement) Act, 1825 (c. 57), by renting a tenement consisting of a distinct building.—*R. v. MACCLESFIELD (INHABITANTS)* (1831), 2 B. & Ad. 870; 1 L. J. M. C. 6; 109 E. R. 1366.

*Annotations*.—*Folld. R. v. Ivor* (1834), 1 Ad. & El. 228. *Ext'd. R. v. Wootton* (1834), 1 Ad. & El. 232. *Reid. R. v. Tadcastle* (1833), 4 B. & Ad. 703.

**801. —**—A person rented two houses under one continuous roof, having distinct outer doors, & no internal communication; he took the whole at one hiring, but paid distinct rents for them of £6 each *per annum*, occupied one house himself, & allowed his son exclusive possession of the other:—*Held*: by such renting & occupation for a year, he acquired a settlement under Poor Relief (Settlement) Act, 1825 (c. 57), s. 2.—*R. v. IVER (INHABITANTS)* (1834), 1 Ad. & El. 228; 3 Nev. & M. K. B. 28; 2 Nev. & M. M. C. 9; 3 L. J. M. C. 37; 110 E. R. 1193.

*Annotations*.—*Consd. R. v. Wootton* (1834), 1 Ad. & El. 232. *Reid. R. v. Great & Little Usworth* (1836), 5 Ad. & El. 261.

**802. — Shop held jointly with adjoining house—With internal communication.**—A shop held jointly with an adjoining house, with which it has an internal communication, is not to be considered as a distinct & separate building.—*R. v. RICKINGHALL-SUPERIOR (INHABITANTS)* (1832), 1 Nev. & M. K. B. 47; 1 Nev. & M. M. C. 36; 2 L. J. M. C. 22.

**803. — Floor under common roof—Separate external communication—As to part only.**—W. rented & occupied the middle floor of a house. Two outer doors, & some steps, which gave access to that floor, were appropriated to him exclusively. A separate flight of steps on the outside of the house led, by a different outer door, to a passage on the middle floor, from which passage a tenant occupying the upper floor reached his premises, by a staircase of his own. One of W.'s rooms opened into this passage, & W. could not reach that



813. Rent must be not less than £10 a year.]—  
A. takes an inn for one year at £8 5s. from Lady  
Day, 1714. About the end of May following he  
takes a meadow which had been hained from said  
Lady Day, to hold to Lady Day following; it is  
a good settlement.—NORTH NIBLEY PARISH v.  
WOTTON UNDRIDGE (1714), 1 Sess. Cas. K. B. 80;  
93 E. R. 24.

**Sect. 8.—Settlement by renting and rating: Sub-sect. 1, C. (a) & (b).]**

**814. — Whether value of tenement considered.]—**(1) Pauper agreeing to pay £10 a year for a house worth but £6, & never lay in the house, does not gain a settlement.

A mere reservation of rent is not sufficient to gain a settlement (LEE, C.J.).

(2) Justices of the peace have a right to inquire into the real value (LEE, C.J.).—*SOUTHWOLD PARISH v. YOXFORD* (1739), 2 Sess. Cas. K. B. 371; 2 Stra. 1127; 93 E. R. 233; *sub nom.* *R. v. SOUTHWOLD (INHABITANTS)*, Burr. S. C. 140.

*Annotation:—As to (1) Refd. Colvill v. Wood* (1846), 1 Lut. Reg. Cas. 483.

**815. — Subsequent increase in value.]—**A tenement under value of £10 a year rented from year to year which at any time during occupation of pauper becomes of value of £10 a year will gain settlement though rent unaltered.—*R. v. BILSDALE KIRKHAM* (1775), 2 Bott. 147; Burr. S. C. 828.

*Annotation:—Apld. R. v. Aston* (1817), 6 M. & S. 54.

**816. — ———.]—**The value of a tenement, in respect of acquiring a settlement, is to be taken as of the time when the party comes to settle on it; hence where a man took a piece of land for ninety-nine years at the rent of two guineas a year, on which he built two houses, each of the yearly value of five guineas, in one of which he lived, & let the other at five guineas a year:—*Held*: he did not thereby gain a settlement.—*R. v. ASTON NEAR BIRMINGHAM (INHABITANTS)* (1817), 6 M. & S. 54; 2 Bott. 154; 105 E. R. 1162.

*Annotation:—Distd. R. v. Poulton-with-Fearnhead* (1817), 6 M. & S. 252.

**817. — Landlord paying rates & outgoings.]—**Under Poor Relief (Settlement) Act, 1825 (c. 57), s. 2, a settlement is acquired by renting a tenement for £10, though the landlord agree to pay, & do pay, tithes to an amount which, if deducted from the rent, would reduce it below £10; & though it appear that the rent demanded would have been only £9 if the landlord had not so agreed.—*R. v. ST. JOHN, BEDWARDINE (INHABITANTS)* (1838), 8 Ad. & El. 192; 3 Nev. & P. K. B. 302; 1 Will. Woll. & Il. 211; 7 L. J. M. C. 64; 2 Jur. 819; 112 E. R. 810.

**818. — ———.]—**The hiring of a house at £10 a year, the landlord paying all levies & rates chargeable on the house, is a sufficient hiring & renting of a tenement at & for the sum of £10 a year at the least within 59 (Geo. 3 (c. 50), & Poor Relief (Settlement) Act, 1825 (c. 57)).—*R. v. THURMASTON (INHABITANTS)* (1831), 1 B. & Ad. 731; 9 L. J. O. S. M. C. 53; Pratt, 174; 109 E. R. 959.

*Annotations:—Folld. R. v. St. John in Bedwardine* (1838), 8 Ad. & El. 192. *Mentd. Sheffield Waterworks Co. v. Bennett* (1872), L. R. 7 Exch. 409.

**819. — ———.]—**A public-house taken at £10 a year though landlord to pay all parish rates & charges assessed thereon is a tenement of sufficient value to gain a settlement.—*R. v. FRAMLINGHAM (INHABITANTS)* (1773), Burr. S. C. 748; 2 Bott. 146.

*Annotations:—Folld. R. v. St. Paul, Deptford* (1811), 13 East, 320; *R. v. Thurmaston* (1831), 1 B. & Ad. 731. *Mentd. Sheffield Waterworks Co. v. Bennett* (1872), L. R. 7 Exch. 409.

**820. — ———.]—**Settling for forty days upon a tenement at the yearly rent of £10 the landlord paying rates & taxes, will confer a settlement upon the tenant.—*R. v. ST. PAUL, DEPTFORD (INHABITANTS)* (1811), 13 East, 320; 2 Bott. 152; 104 E. R. 393.

*Annotations:—Apld. R. v. Thurmaston* (1831), 1 B. & Ad. 731. *Mentd. Sheffield Waterworks Co. v. Bennett* (1872), L. R. 7 Exch. 409.

**821. — Payable for whole year—Increase on contingency insufficient.—**Though more than ten pounds actually paid.]—In order that there may be an occupation of a tenement "at the sum of £10 a year at the least, for the term of one whole year," within Poor Relief (Settlement) Act, 1825 (c. 57), s. 2, it is not enough that the tenant should occupy during a whole year, at a rent, during part of that year, of less than £10, paying, nevertheless, more than £10 in respect of the whole year's occupation; the rent of "£10 a year at the least" must have been paid in respect of the whole & every part of the occupation.

*Qu.*: whether a coal mine is a "tenement" sufficient to confer a settlement within Poor Relief (Settlement) Act, 1825 (c. 57), s. 2.—*R. v. WEST ARDSLEY (INHABITANTS)* (1863), 4 B. & S. 95; 32 L. J. M. C. 255; 27 J. P. 567; 9 Jur. N. S. 1287; 122 E. R. 395; *sub nom.* *WEST ARDSLEY OVERSEERS v. BATLEY OVERSEERS*, 2 New Rep. 318; 11 W. R. 777.

**822. Whether entire rent must be paid—Where exceeding £10.]—**By Poor Relief (Settlement) Act, 1825 (c. 57), it is enacted, that no settlement shall be gained by reason of settling upon or paying parochial taxes for a tenement, unless the house, or building, or land, of which the tenement consists, shall be occupied under such yearly hiring, & the rent for same, to the amount of £10, be actually paid for the term of one whole year:—*Held*: no settlement is gained by settling upon a tenement, unless the rent for the term of one whole year, whatever be its amount, be actually paid.—*R. v. RAMSGATE (INHABITANTS)* (1827), 6 B. & C. 712; 9 Dow. & Ry. K. B. 688; 4 Dow. & Ry. M. C. 470; 108 E. R. 613; *sub nom.* *R. v. ST. LAWRENCE, RAMSGATE (INHABITANTS)*, 5 L. J. O. S. M. C. 69.

*Annotation:—Folld. R. v. Ashley Hay* (1828), 8 B. & C. 27.

**823. — ———.]—**Since Poor Relief (Settlement) Act, 1825 (c. 57), in order to gain a settlement by settling upon a tenement, the reserved rent for one whole year, whatever be its amount, must be paid.—*R. v. ASHLEY HAY (INHABITANTS)* (1828), 8 B. & C. 27; 108 E. R. 953; *sub nom.* *R. v. ASHBY-DE-LA-HAY (INHABITANTS)*, 2 Man. & Ry. K. B. 21; 1 Man. & Ry. M. C. 273; 6 L. J. O. S. M. C. 74.

*Annotation:—Refd. R. v. Balsall* (1837), 6 L. J. M. C. 35.

**824. — ———.]—**Poor Relief (Settlement) Act, 1831 (c. 18), s. 2, is retrospective, & therefore, where a pauper in 1829 hired a house at a yearly rent exceeding £10, occupied it for more than a year, & paid not a whole year's rent but above £10:—*Held*: he thereby gained a settlement.—*R. v. DURSLEY (INHABITANTS)* (1832), 3 B. & Ad. 405; 1 L. J. M. C. 37; 110 E. R. 168.

*Annotation:—Mentd. Young v. Adams*, [1898] A. C. 469.

**825. — ———.]—**The proviso of Poor Relief Settlement Act, 1831 (c. 18), s. 2, applies both to settlements by renting a tenement & by payment of parochial taxes.

Therefore, where a pauper rented a tenement for a year, at upwards of £80, but underlet a part, & paid a portion of his rent, amounting to £10, & was rated to & paid poor rates for the whole:—*Held*: he gained a settlement by payment of the rate.—*R. v. BRIGHTHELMSTONE (INHABITANTS)* (1841), 1 Q. B. 674; 1 Gal. & Dav. 54; 10 L. J. M. C. 93; 5 J. P. 421; 5 Jur. 506; 113 E. R. 1289.

*See, now, Poor Law Act, 1927 (c. 14), s. 114 (b).*

**(b) Payment.**

*See Poor Law Act, 1927 (c. 14), s. 114.*

**826. By whom payable.—**Whether must be by person hiring.]—59 Geo. 3, c. 50, makes the pay-

ment of a year's rent by the person hiring a tenement a condition precedent to the gaining of a settlement by reason of dwelling therein for forty days. Poor Relief (Settlement) Act, 1825 (c. 57), repeals 59 Geo. 3, c. 50, but still makes the payment of the year's rent, but not by the party having the same, a condition precedent to the gaining of a settlement, & therefore, where a person, after the passing of 59 Geo. 3, c. 50, hired a tenement of the annual value of £10, & held it for more than a year, but died before a whole year's rent was paid:—*Held*: no settlement, although after his death, & after the passing of Poor Relief (Settlement) Act, 1825 (c. 57), the rent was paid out of money produced by the sale of his goods.—*It. v. CARSHALTON (INHABITANTS)* (1826), 6 B. & C. 93; 2 Bott, 102; 9 Dow. & Ry. K. B. 132; 4 Dow. & Ry. M. C. 240; 5 L. J. O. S. M. C. 14; 108 E. R. 387.

**827.** ————*J*.—Where a pauper *bonâ fide* hired a house & garden in A. for a year at the rent of £10, & occupied it for a year, & the whole rent was paid to the landlord, but not by the pauper:—*Held*: he nevertheless gained a settlement in A., inasmuch as Poor Relief (Settlement) Act, 1825 (c. 57), did not require that the rent should be paid by him.—*R. v. KIBWORTH HARCOURT (INHABITANTS)* (1828), 7 B. & C. 790; 1 Man. & Ry. K. B. 691; 1 Man. & Ry. M. C. 255; 6 L. J. O. S. M. C. 60; 108 E. R. 918.

*Annotation*:—*Reid. R. v. Dilcheat* (1829), 9 B. & C. 176.

**828.** ————*J*.—Under Poor Relief (Settlement) Act, 1825 (c. 57), a settlement may be gained by hiring a tenement if the rent be actually paid to the landlord, whether it be paid by the tenant or by another person.—*R. v. RUTHIN (INHABITANTS)* (1833), 5 B. & Ad. 215; 2 Nev. & M. K. B. 97; 1 Nev. & M. M. C. 139; 2 L. J. M. C. 71; 110 E. R. 771.

**829.** ————*J*.—M., being tenant of premises from year to year, on a hiring from Martinmas at £10 rent, payable half-yearly, gave them up to pauper in Jan. 1831, & the landlord agreed to accept him as yearly tenant from Martinmas to Martinmas on the above terms, if pauper would be answerable for the current half year's rent. Pauper agreed, & occupied accordingly, from Jan. 1831 to Oct. 1832. At May Day, 1831, he paid £5 rent for the preceding half year; & at Martinmas the next half year's rent of £5. In Oct. 1832, pauper gave up the premises to R. No rent had been paid since Martinmas, 1831. Pauper agreed with R. that R. should take his furniture & fixtures at £9 5s., & in consideration thereof pay the landlord the rent due from Martinmas, 1831. The landlord agreed with pauper & R. to accept R. as his tenant, & received an undertaking from R. to pay the rent as above stated. At Martinmas, 1833, no rent having been paid, the landlord distrained, & sold the goods seized, which produced enough to pay the whole rent. Among them was part of the furniture, etc., left by the pauper, to the value of £5; but there was no specific account of the sum produced by these articles:—*Held*: pauper did not gain a settlement by renting a tenement, under Poor Relief (Settlement) Act, 1831 (c. 18), s. 1; for he was not, during the entire half year from Martinmas, 1830, to May, 1831, the person hiring the premises; & the rent due in respect of his occupation from Martinmas, 1831, was not paid by him.—*R. v. MELSONBY (INHABITANTS)* (1840), 12 Ad. & El. 687; Arn. & H. 34; 4 Per. & Dav. 515; 10 L. J. M. C. 2; 4 J. P. 731; 5 Jur. 242; 113 E. R. 975.

**830.** ————*J*.—Payment by trustee for benefit of creditors.—The pauper who rented a farm in

C. assigned it to P. upon trust, to cultivate it & pay the pauper's debts, etc. The lease expired in 1817; no settlement of accounts took place, but P., without the authority of the pauper, then hired a house in H. at the yearly rent of £18, to which the pauper & his family removed, & they resided there for more than two years. The pauper never paid any rent or taxes, but P. was rated, & paid the rent & taxes:—*Held*: the pauper gained a settlement in H. by the occupation of the house.—*R. v. CHEDISTON (INHABITANTS)* (1825), 4 B. & C. 230; 6 Dow. & Ry. K. B. 269; 3 Dow. & Ry. M. C. 137; 3 L. J. O. S. K. B. 208; 107 E. R. 1044.

*Annotation*:—*Reid. R. v. Woolpit* (1835), 4 Ad. & El. 205.

**831.** ————*J*.—Pauper hired a house & lands, from Michaelmas, 1832, to Michaelmas, 1833, for £30, & entered into occupation at Michaelmas, 1832. In July, 1833, he assigned to W. all his debts, securities, stock, effects, utensils in trade, household goods, furniture, crops growing or severed, implements of husbandry, cattle, live & dead stock, & all other personal estate & effects, to have, hold, & take the said moneys, etc., live & dead stock, & all other the premises assigned, to W., on trust to cultivate the lands as long as the crops then growing should remain, & to sell the stock, crops, etc., & receive the amount of the valuation to be made as between outgoing & incoming tenant at quitting the land; & W. was to be possessed of the moneys, on trust, first, to pay costs & charges, next to pay the rent, taxes, etc., which were or should be due during the continuance of the trusts, & next to pay creditors of the pauper, parties to the deed. In Aug. 1833, W. sold the stock, effects, & crops, which were cut & carried away by the purchasers; & afterwards W. paid the rent for the year out of the produce of the property assigned. Pauper, by himself or family, occupied the house till Michaelmas, 1833:—*Held*: there was neither an undivided occupation for the year, nor a payment of rent by the pauper, to satisfy Poor Relief (Settlement) Act, 1831 (c. 18), s. 1; & no settlement was gained.—*R. v. PAKFIELD (INHABITANTS)* (1836), 4 Ad. & El. 612; 1 Har. & W. 697; 6 Nev. & M. K. B. 16; 3 Nev. & M. M. C. 488; 5 L. J. M. C. 63; 111 E. R. 917.

*Annotations*:—*Consol. R. v. Melsonby* (1840), 12 Ad. & El. 687. *Reid. R. v. South Kilvington* (1843), 8 J. P. 38.

**832.** ————*J*.—Payment by officers of parish where pauper settled.—Must be *bonâ fide*.—Where upon the trial of an appeal the question was, whether the pauper had gained a settlement by renting a tenement in parish A., & it appeared that he being then settled in parish B., had applied to the officers of the latter parish for relief, & they gave him a sum of money, which enabled him to pay his landlord a year's rent for the tenement in parish A., whereby, if that payment were not fraudulently made by the parish officers of B., to enable him to acquire a settlement in A., he would become settled in the latter parish. It is a question of fact for the sessions whether that payment was fraudulent or not; & if the justices at sessions are of opinion upon the evidence that the money was paid solely to enable the pauper to gain a settlement in parish A., they ought to find fraud; but if, on the other hand, they are of opinion that the money was paid for the purpose of relieving him, they ought to negative fraud.—*R. v. TILLINGHAM (INHABITANTS)* (1830), 1 B. & Ad. 180; 9 L. J. O. S. M. C. 3; 109 E. R. 754.

*Annotation*:—*Consol. R. v. St. Sepulchre, Cambridge* (1831), 9 L. J. O. S. M. C. 56.

**833.** ————*J*.—A pauper, being previously settled in the parish of S., hired a house

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in the parish of A. for a year, at the rent of £10 payable quarterly, & paid the first two quarters' rent, & part of the third; & having occupied the house for more than a year, applied for relief to the parish officers of S., who paid the residue of the year's rent. The sessions having found that this payment was fraudulent & made with an intention of settling the pauper in the parish of A.:—*Held*: no settlement was gained in that parish, though the hiring of the house was *bond fide*.—*R. v. ST. SEPULCHRE, CAMBRIDGE (INHABITANTS)* (1831), 1 B. & Ad. 924; 9 L. J. O. S. M. C. 56; 109 E. R. 1030.

**834. — Dwelling-house hired by church officers—Payment by resident minister insufficient.]**—By the practice of a Wesleyan congregation, certain of its members were appointed stewards for a given circuit, & were called circuit stewards. One of their duties was to take & furnish houses for their ministers officiating within the circuit. The rents of such houses were sometimes paid by the circuit stewards, & sometimes by the ministers; if by the ministers, the stewards repaid them the amount, together with the amount of the rates & taxes in respect of the houses, which were paid by the ministers in the first instance. It was the custom of the congregation to appoint a minister to officiate in a given place for one year certain, during which he could not be removed; & no minister officiated for more than three years in the same place. At Michaelmas, 1832, the circuit stewards took & furnished a house at C., a place in the circuit, for a year certain, at the rent of £20, as a residence for W., who was then appointed to be minister at C. W. immediately took possession & occupied the house, as minister, till Michaelmas, 1835. During the three years of his occupation, W. paid the annual rent of £20 for the house to the landlord: he was also in each of those years assessed to & paid the poor rates for C. Both rent & poor rates, however, were repaid to him by the circuit stewards.—*Held*: W. did not gain a settlement in C. by renting a tenement, or by assessment to & payment of rates & taxes, under Poor Relief (Settlement) Act, 1825 (c. 57), s. 2; Poor Relief (Settlement) Act, 1831 (c. 18), s. 1; & Poor Law (Amendment) Act, 1834 (c. 76), s. 66.—*R. v. TIVERTON OVERSEERS* (1861), 3 E. & E. 555; 30 L. J. M. C. 79; 3 L. T. 696; 121 E. R. 550; *sub nom.* TIVERTON (CHURCHWARDENS) *v.* MANGOTSFIELD (CHURCHWARDENS), 25 J. P. 357; 7 Jur. N. S. 209.

**835. When rent may be paid—Not after death of person hiring.]—R. v. CARSHALTON (INHABITANTS), No. 826, ante.**

**836. — ]—The husband of a pauper took a house in parish M. at £30 per year from Sept. 29, 1853, paid three quarters' rent & taxes, & occupied until Sept. 16, 1854, when he died. The widow continued to occupy until Sept. 29, 1854, & paid that quarters' rent, & then left:—Held: the widow did not acquire a settlement by such occupation in the parish.—*R. v. ST. MARYLEBONE* (1855), 20 L. T. O. S. 58; 4 W. R. 26; 19 J. P. Jo. 722.**

**837. — Pending 'appeal against removal order.]—Pauper hired a house in W. at £17 per annum, for a year, 1832, 1833, & resided in it, & occupied it for a year. After the expiration of the year, while some rent was unpaid, he was removed to B. The order was appealed against. Pending the appeal, the pauper returned to W., resided in the house from Dec. 7, 1833, to Jan. 27, 1834, & paid the arrear of rent due for the expired**

year. On Jan. 1, the order of removal was, upon the appeal, confirmed on the merits:—*Held*: the pauper gained a settlement at the time of the payment of the arrear, & the confirmation of the order of removal showed only that he had not completed a settlement at the time of the order.—*R. v. WILLOUGHBY (INHABITANTS)* (1835), 4 Ad. & El. 143; 1 Har. & W. 493; 5 Nev. & M. K. B. 457; 3 Nev. & M. M. C. 325; 5 L. J. M. C. 35; 111 E. R. 742.

**838. What is sufficient payment—Landlord recovering arrears by distress.]—R. v. MELSONBY (INHABITANTS), No. 829, ante.**

**839. — Occupation rent free in lieu of wages.]—The pauper was hired for a year as a shepherd: he was to have a house & garden rent free, 7s. a week, & the going of thirty sheep with his master's flock, as wages. He served for two years at those wages in the parish of I., during all which time the sheep went on his master's farm, the whole of which was situated in that parish. The feed of the sheep was worth £16 *per annum*:—*Held*: this did not confer a settlement, it not being any part of the bargain that the sheep should be pasture-fed.—*R. v. BARDWELL (INHABITANTS)* (1823), 2 B. & C. 161; 3 Dow. & Ry. K. B. 369; 2 Dow. & Ry. M. C. 53; 107 E. R. 343.**

*Annotations*:—*Dtd.* R. v. Kenardington Overseers, etc. (1826), 6 B. & C. 70. *Expld.* R. v. Thornham (1827), 6 B. & C. 733. *Refd.* R. v. Shipdham (1823), 3 Dow. & Ry. K. B. 384. *Mentd.* Hughes v. Chatham Overseers (1843), 1 Lut Reg. Cas. 51.

• See, also, Nos. 862–864, *post*.

#### D. Occupation.

See Poor Law Act, 1927 (c. 14), s. 114 (a).

**840. Necessity for occupation for a year.]—A pauper was removed to S. on the examination of P. & A. P. deposed that on July 22, 1839, he let to pauper's husband a house in S., "at the rent of £10 per year," that the husband "occupied the house until July 22, 1841," & paid P. "the whole of the rent during that time." A. deposed that the husband in July, 1839, went to the house, & "resided in that house until Mar. 1842":—*Held*: the sessions were not entitled to affirm the order of removal, the examinations not showing that the house had been occupied for a year under a yearly hiring within Poor Relief (Settlement) Act, 1831 (c. 18), s. 1.**

Nothing can be left to intentment, unless it be a necessary intentment. It will not be enough, that the examination be consistent with either a conformity or a nonconformity to the statute applicable to the particular settlement (WIGHTMAN, J.).—*R. v. ST. SEPULCHRE (INHABITANTS)* (1844), 6 Q. B. 580; 1 Dav. & Mer. 272; 1 New Sess. Cas. 400; 14 L. J. M. C. 8; 4 L. T. O. S. 133 a; 9 J. P. 150; 8 Jur. 1092; 115 E. R. 217.

**841. — Effect of underletting part—Whether settlement gained.]—A pauper held a house at the annual rent of £3, from Lady Day to Michaelmas, 1821, & a different house from Michaelmas, 1824, to Lady Day, 1822, at the annual rent of £9, & during the whole of that period he was the tenant of a garden at an annual rent of two guineas; but he had agreed with another person that they should share the expense & the profits arising from the cultivation of the garden, & that person paid him half of the rent, but he paid the whole to the landlord:—*Held*: he did not gain a settlement, because he did not during the whole year, as required by the 59 Geo. 3, c. 50, hold a house & occupy land which together were of the annual value of £10.—*R. v. TONBRIDGE (INHABITANTS)* (1826), 6 B. & C. 88; 9 Dow. & Ry. K. B. 128;**

4 Dow. & Ry. M. C. 245; 5 L. J. O. S. M. C. 13; 108 E. R. 385.

*Annotations*.—*Consd.* R. v. Ditcheat (1829), 7 L. J. O. S. M. C. 110. *Refd.* R. v. Great Bolton (1828), 2 Man. & Ry. K. B. 227; R. v. Stow Bardolph (1830), 1 B. & Ad. 219. *Mentd.* R. v. Kensington (1848), 12 Q. B. 654; Rogers v. Harvey (1858), K. & G. 169.

**842.** ————.]—59 Geo. 3, c. 50, requires (*inter alia*) that in order to acquire a settlement by the renting of a tenement, it shall consist of a separate & distinct dwelling-house or building, or of land, or of both, *bonâ fide* hired at & for £10 a year at the least, for the term of one whole year, & that such house or building shall be held, & the land occupied, for the term of one whole year:—*Held*: a settlement was gained under this statute by a pauper hiring & holding for one year a distinct & separate dwelling-house, although part of the house was let to an undertenant.—R. v. GREAT BOLTON (INHABITANTS) (1828), 8 B. & C. 71; 2 Man. & Ry. K. B. 227; 1 Man. & Ry. M. C. 404; 6 L. J. O. S. M. C. 81; 108 E. R. 969.

**843.** ————.]—By Poor Relief (Settlement) Act, 1825 (c. 57), which repealed 59 Geo. 3, c. 50, it is enacted, that no person shall acquire a settlement by reason of settling upon any tenement, unless it shall consist of a separate & distinct dwelling-house, or of land, or of both, *bonâ fide* rented by such person, at the sum of £10 a year at the least, for the term of one whole year, nor unless such house or building, or land, shall be occupied under such yearly hiring:—*Held*: under this statute, a pauper who rented a dwelling-house at the yearly value of £10, & resided in it, but underlet part, thereby gained a settlement.—R. v. DITCHHEAT (INHABITANTS) (1829), 9 B. & C. 176; 4 Man. & Ry. K. B. 151; 2 Man. & Ry. M. C. 144; 7 L. J. O. S. M. C. 110; 109 E. R. 66.

*Annotations*.—*Consd.* R. v. Westbury on Trym (1857), 7 E. & B. 444. *Refd.* R. v. St. Nicholas, Rochester (1834), 5 B. & Ad. 219; R. v. St. Mary Kalender (1839), 9 Ad. & El. 626. *Mentd.* Harris v. Amery (1865), Hop. & Ph. 294.

**844.** ————.]—By Poor Relief (Settlement) Act, 1825 (c. 57), which repealed 59 Geo. 3, c. 50, it is enacted, that no person shall acquire a settlement by reason of settling upon any tenement, unless it shall consist of a separate & distinct dwelling-house or building, or of land, or of both, *bonâ fide* rented by such person at the sum of £10 a year at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied under such yearly hiring, & the rent for the same to the amount of £10 actually paid for the term of one whole year at the least, etc.:—*Held*: under that statute a pauper who rented for a year a dwelling-house & land at a rent exceeding £10 *per annum*, which was actually paid, but who underlet the land, gained a settlement.—R. v. GREAT BENTLEY (INHABITANTS) (1830), 10 B. & C. 520; 5 Man. & Ry. K. B. 559; 3 Man. & Ry. M. C. 48; 8 L. J. O. S. M. C. 55; 109 E. R. 544.

*Annotations*.—*Consd.* R. v. Macclesfield (1831), 2 B. & Ad. 870; R. v. St. Mary Kalender (1839), 9 Ad. & El. 626. *Refd.* R. v. Westbury-upon-Trym (1857), 3 Jur. N. S. 694; Durant v. Carter (1873), 43 L. J. C. P. 17.

**845.** ————.]—In 1824 the pauper rented a dwelling-house in the parish of D., at the rent of £7 *per annum*, & continued to occupy it till 1826. At Michaelmas, 1824, he hired land to Michaelmas, 1825, at the yearly rent of £8 10s., & then entered into possession, but in Apr. 1825, he underlet the land for the remainder of his term; the under tenant had possession of the land till Michaelmas, 1825; & he, by agreement with the pauper, paid the original landlord the

rent accruing due from Apr. to Michaelmas, 1825, the rest having been paid by the pauper:—*Held*: the pauper did not gain a settlement by occupation for a year, inasmuch as he had not continued to fulfil the conditions of 59 Geo. 3, c. 50, by personally occupying the land down to the time when Poor Relief (Settlement) Act, 1825 (c. 57), passed. *Qu.*: if he had done so, whether the Poor Relief (Settlement) Act, 1825 (c. 57), which only requires that the land be occupied under the yearly hiring, could have had a retrospective effect, so as to make the former occupation available in conjunction with that under the new statute.—R. v. OCKLEY (INHABITANTS) (1831), 1 B. & Ad. 818; 9 L. J. O. S. M. C. 123; 109 E. R. 991.

**846.** ————.]—Settlement by paying rates in respect of a tenement subsists notwithstanding Poor Relief (Settlement) Act, 1825 (c. 57), & Poor Relief (Settlement) Act, 1831 (c. 18), & the actual occupation, required by the latter Act, does not apply to it. Where therefore, the pauper occupied, etc., & paid rent for a tenement conformably to the former Act:—*Held*: a settlement was gained by payment of rates although he had underlet part, & could not therefore gain a settlement by renting a tenement.—R. v. STROKE DAMEREL (INHABITANTS) (1837), 6 Ad. & El. 308; 1 Nev. & P. K. B. 453; Nev. & P. M. C. 169; Will. Woll. & Dav. 25; 6 L. J. M. C. 55; 1 J. P. 36; 1 Jur. 39; 112 E. R. 117.

*Annotation*.—*Consd.* R. v. Westbury on Trym (1857), 7 E. & B. 444.

**847.** ————.]—Rent of occupied part exceeding ten pounds.]—To give a settlement by renting a tenement, since the Poor Relief (Settlement) Act, 1831 (c. 18), there must be an occupation in fact of the whole dwelling-house or building of which the tenement consists, by the party hiring the same; & therefore, where A. took a lease for a year of a house consisting of three floors, at the rent of £40 *per annum*, & after he had been in possession three months, underlet two floors by the quarter, at the rate of £22 *per annum*, to another person, who occupied them for two quarters, the ground floor only, during that time, being occupied by A., & in all other respects the provisions of Poor Relief (Settlement) Act, 1825 (c. 57), & Poor Relief (Settlement) Act, 1831 (c. 18), were complied with:—*Held*: A. did not gain a settlement.—R. v. ST. NICHOLAS, ROCHESTER (INHABITANTS) (1834), 5 B. & Ad. 219; 3 Nev. & M. K. B. 21; 2 Nev. & M. M. C. 1; 3 L. J. M. C. 45; 110 E. R. 773.

*Annotations*.—*Follâ.* R. v. St. Nicholas, Rochester (1835), 2 Ad. & El. 599. *Distâ.* R. v. St. Giles-in-the-Fields (1836), 4 Ad. & El. 495. *Follâ.* R. v. Deeping Gate (1838), 2 Jur. 274. *Refd.* R. v. Great & Little Usworth & North Biddick (1836), 5 Ad. & El. 261. *Mentd.* R. v. Kensington (1848), 12 Q. B. 654; Harris v. Amery (1865), Hop. & Ph. 294; Smith v. Lancaster (1869), L. R. 5 C. P. 246.

**848.** ————.]—To gain a settlement under the Poor Relief (Settlement) Act, 1831 (c. 18), the whole of the subject-matter of the renting must be occupied. It is not sufficient if part to the annual value of £10 is occupied. Thus, A. hired two cottages, being separate & distinct dwelling-houses, but adjoining to each other & under one continuous roof, together with three acres of land, for a year, from Lady Day, 1832, at the rent of £14 a year. At Lady Day A. entered upon one of the cottages & the land, & occupied the same under the hiring till Lady Day, 1833. The other cottage he underlet to S. at a rent of £4, & S. occupied it till Lady Day, 1833, & paid A. rent for it. A. paid the whole rent £14 to the landlord. The cottage & land occupied by A. were worth more than £10 a year:—*Held*:

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A. did not gain a settlement by this hiring & occupation of one of the cottages & land.—*R. v. BERKSWELL (INHABITANTS)* (1837), 6 Ad. & El. 282; 1 Nev. & P. K. B. 432; Nev. & P. M. C. 146; Will. Woll. & Dav. 30; 1 J. P. 23; 112 E. R. 107; *sub nom.* *R. v. BALSALL (INHABITANTS)*, 6 L. J. M. C. 35; *sub nom.* *R. v. BARKSWELL (INHABITANTS)*, 1 Jur. 39.

**849.** ————] — Where a pauper took an inn & stable under the same hiring, & let part of the stable, but continued to occupy the inn, the annual value of which exceeded £10:—*Held*: he did not gain a settlement under Poor Relief (Settlement) Act, 1831 (c. 18).—*R. v. DEEPING GATE (INHABITANTS)* (1838), 2 Jur. 274.

**850.** ———— **Exclusive occupation by sub-tenant.**—If a tenement has been hired, & the occupation of it has commenced, less than a year before the passing of Poor Relief (Settlement) Act, 1831 (c. 18) (Mar. 30, 1831), the occupation, to give a settlement, must be such as will satisfy the requisites of that Act. If a person, hiring a tenement, underlet any part of it, he has not the actual occupation, of the tenement within the terms of Poor Relief (Settlement) Act, 1831 (c. 18), s. 1, if there be any exclusive occupation given by such underletting. & the smallness of the part underlet, & of the rent paid for it, & the shortness of the term for which it is underlet, make no difference.—*R. v. ST. NICHOLAS, COLCHESTER (INHABITANTS)* (1835), 2 Ad. & El. 599; 1 Har. & W. 47; 4 Nev. & M. K. B. 422; 3 Nev. & M. M. C. 1; 4 L. J. M. C. 46; 111 E. R. 231.

*Annotations* :—*Reid*, *R. v. Great & Little Usworth & North Biddick* (1836), 5 Ad. & El. 261. *Mentd.* *R. v. Kensington* (1848), 12 Q. B. 654; *Smith v. Lancaster* (1869), L. R. 5 C. P. 246.

**851.** ———— **Effect of removal order.**—A pauper on Apr. 6, 1823, hired a house for a year at the rent of £12 *per annum* in the parish of A. In Jan. 1824, he became chargeable to that parish, & was, by an order of justices, removed to the parish of B. There was no appeal against the order of removal. The pauper returned on the same day to his house in the parish of A., & continued to occupy it until the expiration of the year for which he had hired it, & paid the rent for a year:—*Held*: as the pauper had hired & held the house for a year, & paid the rent for that period, all the requisites of 59 Geo. 3, c. 50, had been complied with, & he gained a settlement in the parish of A. by renting a tenement.—*R. v. BARHAM (INHABITANTS)* (1828), 8 B. & C. 99; 6 L. J. O. S. M. C. 78; 108 E. R. 980.

*Annotations* :—*Consd.* *R. v. St. John's, Hackney* (1835), 2 Ad. & El. 548. *Reid*, *R. v. Willoughby* (1835), 6 Nev. & M. K. B. 457. *Mentd.* *Floyer v. Banks* (1863), 32 L. J. Ch. 610.

**852.** ———— **Suspension of order.**—A man rented a tenement at £10 a year in A., & occupied for seven months, at the end of which an order for his removal to B. was made, but suspended by reason of his sickness during which he continued to occupy the tenement. Afterwards he was removed to B., but returned on the same day to A., & continued to reside until the expiration of more than twelve months from the commencement of his occupation:—*Held*: the occupation was, for the purposes of settlement, interrupted by the residence under the suspension of the order, & therefore no settlement was gained; also the execution of the order by actual removal was, under the circumstances, no interruption of the occupation.—*R. v. ST. JOHN'S, HACKNEY (INHABITANTS)* (1835), 2 Ad. & El. 548; 1 Har. &

W. 30; 4 Nev. & M. K. B. 336; 2 Nev. & M. M. C. 513; 4 L. J. M. C. 51; 111 E. R. 212.

**853.** ———— **Permissive occupation of part.**—*R. v. IVER (INHABITANTS)*, No. 801, *ante*.

**854.** ———— **Pauper letting beds for night—Retaining control of house.**—Pauper rented a house at £24 a year, which he paid, & resided in the house with his family. He was in the habit of taking in persons to sleep in some of the rooms, letting sometimes a bed, sometimes half a bed, generally by the night, but occasionally for a week, in which case, however, the bed only was let, & the pauper reserved the right of putting another bed into the room. The lodgers had no right to the rooms by day. The pauper had constant access to & control over the whole house, & kept the keys of all the rooms:—*Held*: an actual occupation of the dwelling-house, within Poor Relief (Settlement) Act, 1831 (c. 18), s. 1.—*R. v. ST. GILES-IN-THE-FIELDS (INHABITANTS)* (1836), 4 Ad. & El. 495; 1 Har. & W. 693; 6 Nev. & M. K. B. 5; 3 Nev. & M. M. C. 476; 5 L. J. M. C. 51; 111 E. R. 873.

**855.** **What amounts to occupation for a year—Whether occupation under two hirings connected.**]

—A pauper, three weeks after May Day, 1820, hired a house & land in the parish of S. for a year from the preceding May Day, at the rent of £15, & at the expiration of that time hired it again for another year at the same rent. He occupied the premises from the time of the first hiring until six months after the second hiring, & paid the rent during the whole period, calculated from May Day, 1820:—*Held*: he thereby gained a settlement in S., for that the occupation under the different hirings might be connected so as to make an occupation for one whole year within 59 Geo. 3, c. 50.—*R. v. STOW PARISH* (1825), 4 B. & C. 87; 3 L. J. O. S. K. B. 154; 107 E. R. 992; *sub nom.* *R. v. STURTON-BY-STOW (INHABITANTS)*, 6 Dow. & Ry. K. B. 110; 3 Dow. & Ry. M. C. 50.

*Annotations* :—*Apld.* *R. v. Tadcaster* (1833), 4 B. & Ad. 703. *Consd.* *R. v. Banbury* (1834), 1 Ad. & El. 136. *Reid*, *R. v. Caverswell* (1839), 3 Jur. 480.

**856.** ————] — *R. v. OCKLEY (INHABITANTS)*, No. 845, *ante*.

**857.** ———— **Must be under same landlord.**—Under Poor Relief (Settlement) Act, 1831 (c. 18), no settlement is gained by occupying the same tenement for a continuous year, the occupation during part of the year being under one hiring for a year, & during the remainder under another hiring for a year. If W., being tenant from year to year to C., let to T. from year to year, & W. give up his own interest to C. by verbal agreement, & afterwards T. agree verbally with C. to become his tenant from year to year, such last agreement is a new hiring by T., & puts an end to his former hiring.—*R. v. BANBURY (INHABITANTS)* (1834), 1 Ad. & El. 136; 3 Nev. & M. K. B. 292; 2 Nev. & M. M. C. 210; 3 L. J. M. C. 76; 110 E. R. 1159.

*Annotations* :—*Reid*, *R. v. Gosforth* (1834), 1 Ad. & El. 266. *Mentd.* *Stamper v. Sunderland, Overseers* (1868), L. R. 3 C. P. 388.

**858.** ———— **Periods beginning & terminating on different dates.**—In 1827 a cottage & land were hired for a year, at the rent of £11 10s., & it was agreed that the land should be entered on at Lady Day, 1827, & held till Lady Day, 1828, & the cottage entered on at May Day, 1827, & held till May Day, 1828. The land & cottage were occupied for a year respectively, commencing & ending at the days agreed on, & the rent paid:—*Held*: that was an occupation of a tenement for one whole year, sufficient to give a settlement



under Poor Relief (Settlement) Act, 1825 (c. 57).—*R. v. ORMESBY (INHABITANTS)* (1832), 4 B. & Ad. 214; 1 Nev. & M. K. B. 27; 1 Nev. & M. M. C. 17; 2 L. J. M. C. 19; 110 E. R. 436.

**859. — Occupation under agreement with mill owner employing pauper's children—Rent deducted from children's wages.]—**Pauper, whose children were engaged to work for three years at a mill, removed with his family to a cottage rented by the mill owner, C., for the convenience of families so employed. The bargain between him & C. was, that a stated weekly payment for the use of the cottage should be deducted from the children's wages. Pauper, who was not himself in the service of C., continued to occupy the cottage for sixteen years, during all which time, & after he quitted it, some one or more of his children continued to work at the mill. He quitted without regular notice, in consequence of the sale of the cottage:—*Held*: pauper's occupation was as tenant, & not as servant, & was sufficient to gain a settlement.—*R. v. BISHOPTON (INHABITANTS)* (1839), 9 Ad. & El. 824; 1 Per. & Dav. 598; 8 L. J. M. C. 25; 3 J. P. 273; 112 E. R. 1426.

**860. — Term beginning before entry—**Occupation for more than year.]—A. in Feb. 1836 hired, a house at the yearly rent of £50 for one year from the Christmas preceding " & so on from year to year, unless either of the parties give to the other three months' notice of an intention to determine the tenancy." A. occupied until Nov. 1837, & was all that time assessed to & paid the rates, & regularly paid his rent:—*Held*: A. gained a settlement as occupying for a year, under a yearly hiring.—*R. v. ST. GILES-IN-THE-FIELDS (INHABITANTS)* (1850), 4 New Mag. Cas. 66; 14 L. T. O. S. 486; 14 J. P. Jo. 94.

**861. — Occupation from noon of first to afternoon of last day.]—**A building was let at £30 *per annum* to C., by a written agreement, stating that C. had taken it "from Sept. 30, 1850"; "the tenancy is for one year, commencing on Sept. 30 instant," 1850. C. entered at noon, Sept. 30, 1850, & quitted at four in the afternoon of Sept. 29, 1851:—*Held*: C. gained a settlement by renting & occupying a tenement "for the term of one whole year at least," within Poor Relief (Settlement) Act, 1831 (c. 18), s. 1.—*R. v. ST. MARY, WARWICK (INHABITANTS)* (1853), 1 E. & B. 816; 1 C. L. R. 192; 22 L. J. M. C. 109; 21 L. T. O. S. 74; 17 J. P. 552; 17 Jur. 551; 1 W. R. 307; 118 E. R. 642.

*Annotation:—Mentd. Sidebotham v. Holland, [1895] 1 Q. B. 378.*

**862. Occupation must be as tenant—Occupation as servant insufficient.]—**A pauper employed as a labourer by the Board of Ordnance, having previously occupied a house at an annual rent of £7, which was then purchased by the Board, still continued to reside in part of the premises, at a weekly rent of 2s., which was deducted out of his wages, & during such last occupation he also occupied a shop, the shop & house together being of the annual value of £10, & upon his dismissal from his employment he gave up possession of the house as required:—*Held*: his last occupation of the house was not as tenant, but as servant, & no settlement was thereby gained.—*R. v. CHESHUNT (INHABITANTS)* (1818), 1 B. & Ald. 473; 106 E. R. 174.

*Annotations:—Distd. R. v. Lakenheath* (1823), 1 B. & C. 531; *R. v. St. Mary, Newington* (1833), 5 B. & Ad. 540. *Consd. Hughes v. Chatham Overseers* (1843), 1 Lut. Reg. Cas. 51. *Refd. R. v. St. Pancras, Middlesex* (1823), 3 Dow. & Ry. K. B. 343; *Hunt v. Colson* (1833), 3 Moo. & S. 790; *R. v. Iken* (1834) 2 Ad. & El. 147. *Mentd. R. v. Wall Lynn* (1838), 2 J. P. 440.

**863. — — — — —]**—Where the owner of a

mansion house & gardens agreed with the pauper to take care of the garden, & for his so doing he was to take the issues & profits of part thereof, & to live in a cottage contiguous thereto, belonging to his master, & he was to continue in the premises for a year, unless some other person before that time should occupy the mansion, in which case the gardens were to be delivered up; & the pauper continued in the occupation of the garden on these terms for more than a year, the produce being worth to him £70 *per annum*:—*Held*: the pauper being only a servant, & the residence not being his own, he did not come to settle within Poor Relief Act, 1862 (c. 12).—*R. v. SHIPDHAM (INHABITANTS)* (1823), 3 Dow. & Ry. K. B. 384; 2 Dow. & Ry. M. C. 89.

*Annotation:—Consd. R. v. Kenardington* (1826), 9 Dow. & Ry. K. B. 72.

**864. — — — — —]**—*R. v. BISHOPTON (INHABITANTS)*, No. 859, *ante*.

**865. Widow cannot complete qualification of husband—By continuing residence for one year— & payment of balance of year's rent.]—**A house of the annual value of £10 was hired by A. at Michaelmas, 1824, & he died three days before the year expired, but his corpse continued in the house after the expiration of the year, & after his death his widow resided there, & paid the year's rent:—*Held*: A.'s widow & children did not gain any settlement.—*R. v. CRAYFORD (INHABITANTS)* (1826), 6 B. & C. 68; 9 Dow. & Ry. K. B. 80; 4 Dow. & Ry. M. C. 208; 108 E. R. 378.

**Occupation by alien.]—***See ALIENS*, Vol. II. p. 129, No. 57.

#### *E. Residence.*

*See Poor Law Act, 1927 (c. 14), s. 114 (d).*

**866. Necessity for forty days' residence.]—***HARROW PARISH v. EDGAR*, No. 376, *ante*.

**867. — — — — —]**—A soldier, whilst his regiment lay in barracks at B., took a house there for himself & family, of the yearly value of £10, & resided therein more than forty days:—*Held*: this was a coming to settle in a tenement, & he thereby gained a settlement.—*R. v. BRIGHTHELMSTONE (INHABITANTS)* (1818), 1 B. & Ald. 270; 106 E. R. 100.

**868. — — — — —]**—Taking a butcher's stall, attached to the freehold, in an inclosed market place, to which the pauper has access only on the market days, but of which he has the exclusive possession on those days, is, it seems, coming to settle on a tenement within Poor Relief Act, 1862 (c. 12), s. 1; but he can be considered as an occupier, on the market days only; & therefore where the pauper occupied such a stall for thirty-eight market days, during a period of four months:—*Held*: he gained no settlement.—*R. v. CAVERSHAM (INHABITANTS)* (1825), 4 B. & C. 683; 7 Dow. & Ry. K. B. 160; 3 Dow. & Ry. M. C. 429; 107 E. R. 1214.

**869. — — — — —]**—The being charged with, & paying parochial taxes, did not, before 6 Geo. 4, c. 57, s. 2, confer any settlement until the party charged with, & paying the same, had resided within the parish forty days after he had been so charged, & since that statute passed, no person can acquire a settlement by reason of renting or paying parochial taxes for any tenement, unless it be of a certain description; & therefore, where a pauper had rented a tenement, insufficient to confer a settlement under 6 Geo. 4, c. 57, & in respect thereof, had been rated & paid parochial taxes, but had not resided thereon after such rating & payment forty days before the

of 6 Geo. 4, c. 57:—*Held*: he did not thereby

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acquire any settlement.—*R. v. RINGSTEAD (INHABITANTS)* (1827), 7 B. & C. 607; 1 Man. & Ry. K. B. 448; 1 Man. & Ry. M. C. 150; 6 L. J. O. S. M. C. 31; 108 E. R. 849.

*Annotations*.—*Consd. R. v. Westbury on Trym* (1857), 7 E. & B. 444. *Reid. Cheltenham Union v. Birmingham Union* (1874), 39 J. P. 39.

**870.** —[The examination of a pauper stated "about sixteen years ago, my husband & I went to live at a house in, etc., which I hired of, etc., for £11 a year: my husband & I occupied it from that time until his death, which happened about nine years back. I continued to occupy the same house until the month of Mar., in the year 1841, when I came to the house I am now residing in":—*Held*: the statement was not a sufficient averment of a forty days residence.—*R. v. ST. MARGARET'S, ROCHESTER (INHABITANTS)* (1843), 2 Q. B. 533; 2 Gal. & Dav. 669; 12 L. J. M. C. 77; 1 L. T. O. S. 77; 7 J. P. 239; 7 Jur. 438; 114 E. R. 209.

**871.** —Residence for one month on trial—Subsequent residence for month.]—Pauper, on Nov. 1, 1813, came to reside on a tenement of the yearly value of £10. The bargain with the owner was, that the pauper should live a month in it for nothing, on trial; & that if, on that trial, he liked it, he should take it at Martinmas at the yearly rent of £14. The pauper resided on it for a month on trial, & then took it at the rent agreed upon, & without any interruption in the residence continued on it for the following month:—*Held*: he thereby gained a settlement.—*R. v. HELSHAM (INHABITANTS)* (1831), 2 B. & Ad. 620; 109 E. R. 1273; *sub nom. R. v. HALSHAM (INHABITANTS)*, 9 L. J. O. S. M. C. 93.

*Annotation*.—*Reid. R. v. Woolpit* (1835), 4 Ad. & El. 205.

**872.** —By tenant of premises—Residence of widow not coupled with that of husband.]—A residence of thirty-three days by a widow on a tenement of £10 a year, cannot be coupled with a residence on the same tenement with her husband for sixteen days preceding, so as to give her a settlement. In order to gain a settlement by forty days' residence on a tenement of the yearly value of £10 the party must stand in the relation of a tenant to the premises.—*R. v. SOUTH LYNN (INHABITANTS)* (1794), 5 Term Rep. 604; 101 E. R. 370.

*Annotations*.—*Reid. R. v. Kirdford* (1802), 2 East, 559; *R. v. South Beinfleet* (1813), 1 M. & S. 154.

**873.** —Residence of wife & children not computed.]—A. took a tenement of £10 *per annum* in the parish of B. & after living in it with his family five days he was arrested & sent to prison in the parish of C. but his wife & children continued in it seven weeks longer:—*Held*: no settlement was gained in B. either by the husband or wife.—*R. v. ST. GEORGE THE MARTYR, SOUTH-WARK (INHABITANTS)* (1798), 7 Term Rep. 466; 101 E. R. 1079.

*Annotation*.—*Reid. R. v. Ditchet* (1839), 9 B. & C. 176.

**874.** —In parish—Not necessarily on land.]—One may gain a settlement by renting a tenement of above £10 a year in the parish where he resided, though such residence were in a turnpike house, as servant to the collector for whom he received the tolls; for 13 Geo. 3, c. 84, s. 56, only says that no gate-keeper or person renting the tolls & residing in the toll house shall thereby gain a settlement, i.e. by such taking of the toll house or renting the tolls.—*R. v. DENBIGH (INHABITANTS)* (1804), 5 East, 383; 1 Smith, K. B. 506; 102 E. R. 1098.

*Annotation*.—*Distd. R. v. Bardwell* (1833), 2 B. & C. 161.

**875.** —[It seems that residence on the tenement, or some part of it, is not necessary to confer a settlement; & that the words "coming to settle," in the Poor Relief Act, 1662 (c. 12), are satisfied by renting to the amount of £10, & residing in the parish.—*R. v. KENARDINGTON (CHURCHWARDENS)* (1826), 6 B. & C. 70; 9 Dow. & Ry. K. B. 72; 4 Dow. & Ry. M. C. 200; 5 L. J. O. S. M. C. 11; 108 E. R. 379.

**876.** —[Since 59 Geo. 3, c. 50, a settlement may be gained by a residence of forty days in a parish, provided the party comply with the conditions mentioned in that Act. Therefore, where a pauper, since that statute, hired land for a year at the sum of £10, & paid that rent, & occupied the land for the whole year, but resided only forty days in the parish, & not upon the land:—*Held*: he gained a settlement.—*R. v. WAINFLEET ALL SAINTS (INHABITANTS)* (1828), 8 B. & C. 227; 6 L. J. O. S. M. C. 112; 108 E. R. 1028; *sub nom. R. v. WAYNFLEET ALL SAINTS (INHABITANTS)*, 1 Man. & Ry. M. C. 400; 2 Man. & Ry. K. B. 223.

**877.** Settlement not lost by ceasing to reside within ten miles.]—*R. v. KEYNSHAM UNION*, No. 775, *ante*.

*Allen's settlement by residence.*—*See ALIENS*, Vol. II., p. 129, No. 57.

**F. Evidence.**

*See EVIDENCE*, Vol. XXII., pp. 100, 207, 208, 212, 229, 235, 267, 269, 275, 471, Nos. 705, 1812, 1814, 1818, 1857, 2034, 2099, 2518, 2537, 2617, 4951.

**878.** Contract alleged to be in writing—Onus on party alleging to produce.]—On the trial of an appeal against an order of removal, *resps.* having proved, by parol, the renting of two fields in applt. parish, at £15 a year, & an occupation & payment of the rent for a whole year, *appts.* then gave evidence, that the contract for taking the two fields was reduced into writing:—*Held*: it lay upon the latter to produce the written contract.—*R. v. PADSTOW (INHABITANTS)* (1832), 4 B. & Ad. 208; 1 Nev. & M. K. B. 9; 1 Nev. & M. M. C. 1; 2 L. J. M. C. 15; 110 E. R. 434.

*Annotation*.—*Mentd. Magnay v. Knight* (1840), 1 Man. & G. 944.

**879.** Tenant underletting part of premises—Payment by sub-tenant direct to landlord—Payment on account of tenant's rent not inferred—To bring amount paid to £10.]—The pauper rented & occupied a tenement of D. at the yearly rent of £18 from Christmas, 1838, to Apr. 1841; during the whole of which time he underlet part of the premises to W., at the rent of £5 4s. a year. W.'s first year's rent was paid to the pauper by a cheque, which the pauper handed over to D.; & also paid him £3 2s. 6d., making together the sum of £8 6s. 6d. paid during the year 1839 on account of the rent due at Christmas in that year. In the course of the second year, 1840, W. paid his rent of £5 4s. for that year direct to D. In Oct. 1840, the pauper was rated to the poor rate for the premises in question; which rate he paid in Jan. 1841, & resided thereon for more than forty days afterwards:—*Held*: the ct. would not infer from the facts stated that the last payment of £5 4s. by W. was a payment on account of the first year's rent, so as to make up the sum of £10 of rent actually paid in one year, required by Poor Relief (Settlement) Act, 1825 (c. 57), to enable the pauper to gain a settlement by payment of rates, the sessions not having expressly found that that payment was to be so



appropriated.—*R. v. CRANBROOK (INHABITANTS)* (1844), 1 New Sess. Cas. 5; 8 J. P. 488.

**880. Secondary evidence of rate books — Production refused on subpoena.]**—Where, upon appeal against an order of removal, applts. set up a subsequent settlement by renting a tenement in a third parish, they are not entitled to give secondary evidence of the rate books of that parish, because the parish officers, who have been subpoenaed to produce them, refuse to do so.—*R. v. LLANFAETHLY (INHABITANTS)* (1853), 2 E. & B. 940; 2 C. L. R. 230; 23 L. J. M. C. 33; 22 L. T. O. S. 117; 18 J. P. 8; 17 Jur. 1123; 2 W. R. 61; 118 E. R. 1018.

*Annotation*.—*Mentd.* *Phelps v. Prew* (1854), 3 E. & B. 430.

**881. Lease not produced or accounted for — Evidence of occupation & agreement for lease.]**—On appeal against an order of removal, the settlement turned on an alleged hiring by H. of a dwelling-house & occupation for a year thereunder. An agreement for a lease was put in, & occupation proved. A counterpart of a lease, dated three months back, was also produced but objected to, & the original lease was not produced or accounted for:—*Held*: the evidence of the agreement for a lease & the occupation was sufficient without the lease itself.—*ST. MARGARET'S, ROCHESTER OVERSEERS v. ST. ANDREW, NORTHAMPTON OVERSEERS* (1867), 32 J. P. 134.

**882. Statement by deceased occupier—That land occupied as tenant—Admissible.]**—(1) A declaration or written entry by deceased person when occupier of a house that he was tenant at so much rent, & had paid it, is admissible evidence as a declaration against proprietary interest, to prove the fact of the payment as well as of the tenancy, & so to show that deceased had acquired a settlement, under Poor Relief (Settlement) Act, 1825 (c. 51), s. 2, by renting a tenement. (2) *Qu.*: whether undisturbed occupation for four years by a person proved to be a tenant at a rent is not presumptive evidence that the rent has been paid.—*R. v. EXETER UNION* (1869), L. R. 4 Q. B. 341; 10 B. & S. 433; 38 L. J. M. C. 126; 20 L. T. 693; 33 J. P. 550; 17 W. R. 580.

*Annotations*.—*Generally*. *Mentd.* *Bowley v. Atkinson* (1879), 13 Ch. D. 283; *Watson v. Sandford* (1879), 40 L. T. 39; *Ward v. Pitt, Lloyd v. Powell Duffryn Steam Coal Co.* [1913] 2 K. B. 130; *Re Adams, Benton v. Powell*, [1922] P. 240.

**883. Undisturbed occupation for four years — By person proved to be tenant—Whether presumptive evidence of payment of rent.]**—*R. v. EXETER UNION*, No. 882, *ante*.

## SUB-SECT. 2.—RATING.

### A. In General.

*See* Poor Law Act, 1927 (c. 14), s. 115.

**884. In respect of what tenement settlement gained—Tenement of annual value of £10.]**—*R. v. ST. PANCRA'S (INHABITANTS)*, No. 903, *post*.

**885. ——— Tenant qualified for settlement by renting.]**—The land tax is a parochial rate within Poor Relief (Settlement) Act, 1825 (c. 57); & therefore, no settlement can be gained by the payment of that tax in respect of a tenement above the yearly value of £10, unless all the things required by that statute as to the taking, payment of rent, etc., have been done.—*R. v. EAST TEIGNMOUTH (INHABITANTS)* (1830), 1 B. & Ad. 244; Pratt, 187; 9 L. J. O. S. M. C. 24; 109 E. R. 778. *Annotation*.—*Mentd.* *R. v. Shaw* (1848), 12 Q. B. 419.

**886. ——— Though rated for less amount.]**—A landlord demised a house & fixtures to a tenant, at an annual rent of £10; & the tenant

paid rates in respect of same; but the house was not rated at £10 *per annum*:—*Held*: the fixtures, being parcel of the tenement demised, & the whole together being of the annual value of £10, the tenant gained a settlement by this payment of rates.—*R. v. ST. DUNSTAN, KENT (INHABITANTS)* (1825), 4 B. & C. 686; 7 Dow. & Ry. K. B. 178; 3 Dow. & Ry. M. C. 378; 107 E. R. 1216.

*Annotations*.—*Mentd.* *Danby v. Harris* (1841), 5 Jur. 988; *Walsley v. Milne* (1859), 7 C. B. N. S. 115.

**887. ——— Tenement rented at £10 or more — Payment of rent amounting to £10.]**—*R. v. BRIGHTHELMSTONE (INHABITANTS)*, No. 825, *ante*.  
**Residence necessary.]**—*See* Sub-sect. 1, B., *ante*.

### B. Public Taxes or Local Rates.

**888. What amount to — Scavenger's rate.]**—A rate to the scavenger where it is extended to the word is not good to make a settlement (*per cur.*).—*ST. MARY PARISH, READING v. ST. LAWRENCE, READING* (1710), 10 Mod. Rep. 13; 1 Sess. Cas. K. B. 2; 2 Bott. 173; 88 E. R. 603; *sub nom.* *ST. LAWRENCE, READING (INHABITANTS)*, *Forbes* Rep. 310; *sub nom.* *ST. LAWRENCE PARISH v. ST. MARY, READING, Sett. & Rem.* 3.

*Annotation*.—*Refd.* *It. v. Amlwch* (1825), 4 B. & C. 757.

**889. ———]**—Scavenger's rate, paying thereto gains no settlement.—*R. v. ST. MICHAEL'S, CORNHILL* (1710), 1 Sess. Cas. K. B. 11; 93 E. R. 4. *Annotation*.—*Apld.* *St. Mary v. St. Lawrence, Reading* (1710), 1 Sess. Cas. K. B. 2.

**890. ——— Land tax.]**—Paying land tax a settlement.—*FOSTON & DALBURY PARISHES (OR BLOOD'S CASE)* (1697), Comb. 410; 90 E. R. 559.

*Annotation*.—*Refd.* *Everton Overseers v. South Stoneham Overseers, etc.* (1860), 6 Jur. N. S. 606.

**891. ———]**—Payment of the land tax gains a settlement under Poor Relief Act, 1691 (c. 11), s. 3.—*ARMSLEY PARISH PARISH* (1735), *Lee temp. Hard.* 210; 95 E. R. 135; *sub nom.* *R. v. BRAMLEY, LLEDS (INHABITANTS)*, 2 Sess. Cas. K. B. 246; Burr. S. C. 75.

*Annotations*.—*Apld.* *St. George, Hanover Square Overseers v. Cambridge Union* (1867), L. R. 3 Q. B. 1. *Refd.* *It. v. Folkestone* (1789), 3 Term Rep. 505; *R. v. East Teignmouth* (1830), 1 B. & Ad. 244; *Everton Overseers v. South Stoneham Overseers* (1860), 24 J. P. 692; *R. v. St. Thomas Union* (1870), L. R. 5 Q. B. 371.

**892. ———]**—*R. v. ST. MARY, WHITE-CHAPEL (INHABITANTS)* (1777), Cald. Mag. Cas. 24.

**893. ———]**—*R. v. RAINHAM (INHABITANTS)* (1793), 5 Term Rep. 240; Nolan, 222; 2 Bott. 767; 101 E. R. 135.

**894. ———]**—*R. v. EAST TEIGNMOUTH (INHABITANTS)*, No. 885, *ante*.

**895. ———]**—A tenant of premises who has been assessed & paid the property tax under 5 & 6 Vict. c. 35, sched. A., & deducted it from the next rent paid to the landlord, acquires a settlement in the parish in which the premises are situate, under Poor Relief Act, 1691 (c. 11), s. 6.—*ST. GEORGE, HANOVER SQUARE OVERSEERS v. CAMBRIDGE UNION* (1867), L. R. 3 Q. B. 1; 8 B. & S. 764; 37 L. J. M. C. 17; 17 L. T. 142; 32 J. P. 358; 16 W. R. 77.

**896. ——— Parish rates.]**—Settlement by payment of parish rates.—*ST. MARY-LE-MORE (INHABITANTS) v. HEAVY-TREE, DEVONSHIRE (INHABITANTS)* (1697), 2 Salk. 478; 91 E. R. 411.

*Annotation*.—*Dbtd.* *R. v. Walsall* (1777), Cald. Mag. Cas. 35.

**897. ——— Church rate.]**—Payment by one who was assessed to a church rate upon householders only, & not upon the parishioners at large, will nevertheless gain him a settlement for it is not less a public tax because laid too narrowly; & it is charged & paid within the parish, which is all that is required by Poor Relief Act, 1691 (c. 11),

**Sect. 8.—Settlement by renting and rating: Sub-sect. 2, B., C., D.**

s. 6.—*R. v. ST. BEES (INHABITANTS)* (1808), 9 East, 203; 103 E. R. 550.

898. — **Watch rate.]**—Payment of watch rate in London does not confer a settlement.—*R. v. ST. ANN'S, BLACKFRIARS (INHABITANTS)* (1828), 3 Man. & Ry. K. B. 383; 2 Man. & Ry. M. C. 26.

899. — **—.]**—A party does not gain any settlement by reason of his having been assessed to & paid the watch rate in the City of London.—*R. v. CHRIST CHURCH, LONDON (INHABITANTS)* (1828), 8 B. & C. 660; 7 L. J. O. S. M. C. 24; Pratt, 190; 108 E. R. 1189.

*Annotations*.—*Consd. Everton Overseers v. South Stoneham* (1860), 2 E. & E. 771. *Appl. St. George, Hanover Square Overseers v. Cambridge Union* (1867), L. R. 3 Q. B. 1. *Dist. R. v. St. Thomas Union* (1870), L. R. 5 Q. B. 371. *Mentd. R. v. Kent JJ.* (1860), 24 J. P. 710.

900. — **—.]**—In Sept. 1857, A. entered into the occupation of a house in the township of E., & occupied the house until Nov. 1858. In Apr. 1858, one poor rate was made for the whole of the ensuing year, in which A. was assessed at £2 4s., but he paid only 14s., being in proportion to the period of his occupation after the rate was made: the house remained unoccupied until after the making of the next poor rate. The township of E. is wholly within the borough of L.; during A.'s occupation a watch rate was ordered by the town council to be made for the borough under the 5 & 6 Will. 4, c. 76, & 7 Will. 4, & 1 Vict. c. 81, the amount to be levied by a pound rate; & it was ordered that a certain quota should be assessed & levied on the whole of the township of E., except such parts as were more than 200 yards from any street or continuous line of houses which was regularly watched in the borough under the provisions of the Acts. The rate was made accordingly by the overseers of E. upon the ratable parts of the parish, & collected by them, & in it A. was properly assessed, & paid the amount:—*Held*: (1) A. did not acquire a settlement, under the Poor Relief Act, 1691 (c. 11), s. 6, by reason of the above payment of the poor rate, not having paid that with which he was charged; (2) the non-payment of the poor rate did not prevent him from acquiring a settlement by being charged & paying any other distinct levy or tax of the township; (3) the watch rate was a "public tax or levy of the township" of E., within Poor Relief Act, 1691 (c. 11), s. 6; & A. had therefore acquired a settlement in E.—*EVERTON OVERSEERS v. SOUTH STONEHAM (CHURCHWARDENS)* (1860), 2 E. & E. 771; 2 L. T. 281; 24 J. P. 602; 6 Jur. N. S. 606; 121 E. R. 289; *sub nom. R. v. EVERTON OVERSEERS*, 29 L. J. M. C. 165; 8 W. R. 523.

*Annotations*.—*As to* (3) *Reid. R. v. Kent JJ.* (1860), 6 Jur. N. S. 894; *R. v. St. Thomas Union* (1870), L. R. 5 Q. B. 371.

901. — **Property tax.]**—*ST. GEORGE, HANOVER SQUARE OVERSEERS v. CAMBRIDGE UNION*, No. 895, *ante*.

902. — **Paving & lighting rates.]**—Under a local Act, comrs. were authorised to levy rates for paving & lighting the streets, etc., within the city of E., on the several owners & occupiers of all houses within the city. The comrs. were empowered to appoint two or more of the inhabitants of each parish in the city to be assessors of the rates, & the assessors were required to make the rates & the comrs. were to settle & sign the same. The comrs. were also to appoint the overseers of the respective parishes to collect the rates. The rates were made & collected in each parish by the assessors & collectors as required by the Act. T.

occupied a house in a parish in the city for one year, at a yearly rent above £10, & paid his share of the rates made under the local Act:—*Held*: these rates were public taxes of the parish within Poor Relief Act, 1691 (c. 11), s. 6, & T. had acquired a settlement in the parish.—*R. v. ST. THOMAS UNION* (1870), L. R. 5 Q. B. 371; 39 L. J. M. C. 83; 34 J. P. 711; *sub nom. EXETER UNION v. ST. THOMAS, DEVON UNION*, 22 L. T. 379; *sub nom. R. v. EXETER UNION*, 18 W. R. 997.

**C. Occupation.**

See Poor Law Act, 1927 (c. 14), s. 115.

903. **Whether occupation for whole year necessary.]**—Poor Removal Act, 1795 (c. 101), s. 4, does not prevent a person from acquiring a settlement by paying public parochial taxes in respect of a tenement above the yearly value of £10; although there is no residence for a whole year, as required by 59 Geo. 3, c. 50.—*R. v. ST. PANCRAS (INHABITANTS)* (1823), 2 B. & C. 122; 3 Dow. & Ry. K. B. 343; 2 Dow. & Ry. M. C. 28; 107 E. R. 329.

*Annotations*.—*Consd. R. v. Stoke Damerel* (1837), 6 Ad. & E. 308. *Reid. R. v. Lower Heyford* (1830), 1 B. & Ad. 75; *R. v. Penryn* (1832), 4 B. & Ad. 224; *R. v. Westbury on Trym* (1857), 7 E. & B. 444.

904. — **Tenement not property of party paying.]**—Poor Relief Act, 1691 (c. 11), s. 6, & Poor Relief (Settlement) Act, 1825 (c. 57), s. 2, a settlement cannot be gained by payment of parochial taxes for a tenement not being the property of the party paying, without an occupation of the tenement by him for a year.—*R. v. WESTBURY ON TRYM (INHABITANTS)* (1857), 7 E. & B. 444; 26 L. J. M. C. 76; 23 L. T. O. S. 369; 21 J. P. 613; 3 Jur. N. S. 690; 5 W. R. 374; 119 E. R. 1312.

905. — **—.]**—*GAINSBOROUGH UNION v. WORKSOP UNION* (1873), 37 J. P. Jo. 293.

906. **Extent of occupation—Part may be underlet.]**—*R. v. STOKE DAMEREL (INHABITANTS)*; No. 846, *ante*.

907. — **—.]**—Payment of rent amounting to £10.]—*R. v. BRIGHTHELMSTONE (INHABITANTS)*, No. 825, *ante*.

**D. Assessment.**

See Poor Law Act, 1927 (c. 14), s. 115.

908. **Necessity for assessment.]**—By Poor Relief Act, 1691 (c. 11), s. 6, a person to gain a settlement by payment of rates, must be "charged with & pay his share towards the public taxes or levies." Where grounds of appeal alleged that a pauper "had occupied a house, & resided therein, for upwards of seven months, & paid one or more of the parochial rates or taxes in respect of such house."—*Held*: insufficient, because it was not also stated that he was "charged with" such rates or taxes.—*R. v. ST. OLAVE'S, SOUTHWARK (INHABITANTS)* (1844), 5 Q. B. 912; 1 New Mag. Cas. 24; 1 New Sess. Cas. 188; 13 L. J. M. C. 161; 3 L. T. O. S. 81; 8 J. P. 759; 114 E. R. 1492.

909. — **Payment alone insufficient.]**—Paying gives no settlement if not rated.—*R. v. BOVINDON, HERTFORDSHIRE (INHABITANTS)* (1735), 2 Stra. 1025; 93 E. R. 1009; *sub nom. R. v. SARRATT (INHABITANTS)*, Burr. S. C. 78.

910. — **—.]**—Assessment & payment of a poor's rate by the tenant will gain a settlement, notwithstanding the landlord has privately agreed to pay them.—*R. v. OPENSHEAW (1764)*, 1 Wm. Bl. 462; Burr. S. C. 522; 96 E. R. 268.

*Annotations*.—*Dist. R. v. Edgbaston* (1796), 6 Term Rep. 540. *Reid. R. v. Walsall* (1777), Cald. Mag. Cas. 36; *Hughes v. Chatham Overseers* (1843), 5 Man. & G. 64.

911. ———.]—*R. v. STAPLETON* (1760), Burr. S. C. 649.

*Annotation*.—*Consd. R. v. Lower Heyford* (1830), 1 B. & Ad. 75.

912. ———.]—A person who has actually paid, but was not rated to the land tax, does not gain a settlement.—*R. v. ST. JOHN'S, SOUTHWARK (INHABITANTS)* (1779), 1 Doug. K. B. 225; *Cald. Mag. Cas.* 62; 99 E. R. 147.

913. What amounts to assessment—Statute apportioning liability between outgoing & incoming tenant.]—A local Act renders the incoming & the outgoing tenant of premises in the parish of St. Marylebone liable respectively to the payment of the rates of the parish in proportion to the times of their occupation respectively. A. occupied a house in St. Marylebone for the latter part of a year, in respect of which the outgoing tenant was rated; & A. paid the portion of the rate in respect of the time during which he occupied, but was not entered on the ratebook as occupier for any part of that time:—*Held*: he acquired a settlement under Poor Relief Act, 1691 (c. 11), s. 6.—*R. v. ST. MARYLEBONE (INHABITANTS)* (1850), 15 Q. B. 399; 4 New Sess. Cas. 199; 19 L. J. M. C. 201; 15 L. T. O. S. 224; 14 J. P. 559; 14 Jur. 833; 117 E. R. 510.

*Annotations*.—*Distd. Everton v. South Stoneham* (1860), 2 E. & E. 771; *It. v. St. Anne, Westminster* (1860), 2 E. & E. 485.

914. ——— Local Act making landlord liable.]—By a local Act the landlords of houses in the parish of G., instead of the occupiers, are to be rated to the relief of the poor if the assessable value of the house be assessed at less than £30 *per annum*. G. is within a borough. The occupier of a house in G., assessed at less than £30, claimed under Representation of the People Act, 1832 (c. 45), to be rated, & was rated, & paid the rates for three successive years; he did not during that period occupy the entire house:—*Held*: he had acquired a settlement, under Poor Relief Act, 1691 (c. 11), s. 6, by being charged with the rates & paying them.—*R. v. ST. GILES IN THE FIELDS (INHABITANTS)* (1857), 7 E. & B. 205; 26 L. J. M. C. 55; 28 L. T. O. S. 250; 21 J. P. 564; 3 Jur. N. S. 291; 5 W. R. 236; 119 E. R. 1223.

#### E. Payment.

See Poor Law Act, 1927 (c. 14), s. 115.

915. Necessity for payment—Assessment alone insufficient.]—Taxation only without payment makes no settlement.—*TALBORN (INHABITANTS) v. BOSTON (INHABITANTS)* (1695), 2 Salk. 523; *Sett. & Rem.* 181; 91 E. R. 445.

916. ———.]—Pauper occupied premises at a yearly rent, under an agreement by which the landlord was to pay all rates. The rent was higher on that account than it would otherwise have been. Pauper was assessed to the poor as the occupier; but the landlord always paid the rate:—*Held*: the pauper did not gain a settlement by being charged with or assessed to, & paying, the poor rate, under Poor Relief Act, 1691 (c. 11), s. 6, or Poor Law (Amendment) Act, 1834 (c. 76), s. 66.—*R. v. SOUTH KILVINGTON (INHABITANTS)* (1843), 5 Q. B. 216; 3 Gal. & Dav. 157; 13 L. J. M. C. 3; 2 L. T. O. S. 119; 8 J. P. 38; 7 Jur. 1108; 114 E. R. 1231.

*Annotation*.—*Refd. Wright v. Stockport Town Clerk* (1843), 5 Man. & G. 33.

917. ———.]—*R. v. ST. OLAVE'S, SOUTHWARK (INHABITANTS)*, No. 908, *ante*.

918. What amounts to payment—Payment by tenant—Rate reimbursed.]—*OAKHAMPTON PARISH*

*v. KENT PARISH* (1733), 2 Barn. K. B. 360; 94 E. R. 553.

919. ———.]—*R. v. OPENSHAW, No. 910, ante*.

920. ———.]—An attorney, having a cottage & land near his residence, allowed his clerk to occupy them, that he might the more conveniently attend to the business; & suffered him to hold them rent free, as an augmentation of his salary; the clerk was rated as occupier, but the attorney was sometimes called upon to pay, & did pay, the rates; & when the clerk paid them, the attorney reimbursed him:—*Held*: the clerk gained a settlement by paying the public parochial taxes.—*R. v. LOWER HEYFORD (INHABITANTS)* (1830), 1 B. & Ad. 75; 8 L. J. O. S. M. C. 117; *Pratt*, 185; 109 E. R. 715.

*Annotations*.—*Apld. R. v. Penryn* (1832), 1 Nev. & M. K. B. 74. *Refd. It. v. Bridgnorth Corpn.* (1839), 2 Per. & Dav. 317.

921. ——— Or money provided.]—A custom house officer who was rated for his salary towards the land tax, & in fact paid the rate himself, though the money was either given to him beforehand for the purpose, or allowed to him afterwards by the collector, gains a settlement in the parish in which he is so rated & pays.—*It. v. AXMOUTH (INHABITANTS)* (1807), 8 East, 383; 103 E. R. 390.

*Annotations*.—*Apld. It. v. Lower Heyford* (1830), 1 B. & Ad. 75. *Refd. St. George, Hanover Square v. Cambridge Union* (1867), L. R. 3 Q. B. 1; *Exeter Union v. St. Thomas, Devon Union* (1870), 22 L. T. 379.

922. ——— Pauper paying all rates—Except one made five days before end of year—Published four days afterwards.]—A pauper was rated to all rates during the year, & paid them, except the last, which was made five days before the end of the year, & published four days after:—*Held*: he gained a settlement by the payment of rates, & Poor Law (Amendment) Act, 1834 (c. 76), s. 66, which enacts that a person shall not gain a settlement "by occupying a tenement," unless he shall have been assessed to & paid the poor rate in respect thereof for a year did not apply; *semble*: when payment of rates for a whole year is material, non-publication of a rate made within the year is no excuse for non-payment of it.—*It. v. ST. MARY KALENDAR (INHABITANTS)* (1830), 9 Ad. & El. 420; 1 Per. & Dav. 497; 2 Will. Woll. & H. 103; 112 E. R. 1349; *sub nom. R. v. ST. MARY COLLENDER (INHABITANTS)*, 8 L. J. M. C. 54.

*Annotation*.—*Refd. Taunton Union v. St. Saviour's, Southwark Union* (1891), 55 J. P. 313.

923. ——— Payment by party unauthorised.]—No settlement is gained by the occupation of a tenement, by reason of payment of rates under Poor Relief Act, 1691 (c. 11), s. 6, if the payment be made by a party not authorised by the occupier to make the payment.—*R. v. BENJEWORTH (INHABITANTS)* (1854), 3 E. & B. 637; 118 E. R. 1281; *sub nom. R. v. BENJEWORTH (INHABITANTS)*, 2 C. L. R. 1540; 23 L. J. M. C. 124; 23 L. T. O. S. 77; 18 J. P. 471; 18 Jur. 402; 2 W. R. 420.

924. ——— Must be payment of whole rate charged—Payment of any one rate sufficient.]—*EVERTON OVERSEERS v. SOUTH STONEHAM (CHURCHWARDENS)*, No. 900, *ante*.

925. Payment by landlord—Knowledge of parish.]—Where the farm was rated & the landlord paid the rate, & was allowed it by the tenant, the tenant did not gain a settlement, it being stated that the overseer did not know that the tenant resided there.—*R. v. LLANGAMMARCH (INHABITANTS)* (1788), 2 Term Rep. 628; 100 E. R. 338.

*Annotation*.—*Consd. R. v. St. Anne, Westminster* (1860), 2 E. & E. 485.

*Sect. 8.—Settlement by renting and rating: Sub-sect. 2, F. Sect. 9: Sub-sect. 1, A.]*

*F. Evidence.*

**926. Name or description in rate book—Description as occupier.]—**A tenant who is rated to the land tax by the name of "The Occupier of Roscoes," gains a settlement by paying such rate.—*R. v. BRICKHILL (INHABITANTS)* (1722), 8 Mod. Rep. 38; 88 E. R. 28.

**927. — Landlord's name "or tenant."—***R. v. PAINSWICK (INHABITANTS)* (1758), Burr. S. C. 465. *Annotations:—*Consd. *R. v. Walsall* (1777), Cald. Mag. Cas. 35. *Distd. R. v. Liangammarch* (1788), 2 Term Rep. 628. *Refd. St. Anne, Westminster v. Birmingham Parish* (1860), 24 J. P. 485.

**928. — No entry of sum assessed.]—**When the title of the rate is, so much in the pound, & the pauper's name is inserted in the rate, & also his yearly rent, though nothing is written against his name in the column of sums assessed, this is a sufficient rating for the purpose of gaining a settlement.—*R. v. CORHAMPTON (INHABITANTS)* (1781), 2 Doug. K. B. 621; Cald. Mag. Cas. 108; 99 E. R. 393.

**929. — Presumption.]—**A tenant whose name has once been introduced upon the land tax rate, though it is taken off in the same year in consequence of his poverty & at his request, as the tax is a tenant's tax, is to be considered as rated by the parish, if they put no other upon the rate, & gains a settlement; though the landlord had previously been rated. Who is rated is a question of fact.—*R. v. ENDON, LONGSDON & STANLEY (INHABITANTS)* (1783), Cald. Mag. Cas. 374.

*Annotations:—*Apld. *R. v. St. Lawrence, Winchester* (1784), Cald. Mag. Cas. 379. *Consd. R. v. Folkestone* (1789), 3 Term Rep. 505.

**930. — ]—**With respect to the public, the land tax is to be considered as a tenant's tax, whatever may be the view of it as between landlord & tenant; consequently where both are named & neither expressly rated, but the tenant pays, the tenant acquires a settlement. Where the title of a rate is upon inhabitants, this word seems to import occupiers.—*R. v. MITCHAM (INHABITANTS)* (1783), 1 Doug. K. B. 226; Cald. Mag. Cas. 276; 99 E. R. 147.

*Annotations:—*Apld. *R. v. St. Lawrence, Winchester* (1784), Cald. Mag. Cas. 379. *Consd. R. v. Folkestone* (1789), 3 Term Rep. 505. *Mentd. Hals v. Freeman* (1819), 4 Moore, C. P. 21; *Goodchild v. St. John, Hackney Parish Trustees* (1858), E. B. & E. 1; *C. L. Ry. v. City of London Land Tax Comrs.*, [1911] 2 Ch. 467; *Piggott v. Cuckfield Union Assmt. Com.* (1921), 125 L. T. 402.

**931. — ]—***R. v. ST. LAWRENCE, WINCHESTER (INHABITANTS)* (1784), 4 Doug. K. B. 190; Cald. Mag. Cas. 379; 99 E. R. 834.

*Annotations:—*Distd. *R. v. St. James, Bury St. Edmunds* (1784), Cald. Mag. Cas. 385. *Consd. R. v. Folkestone* (1789), 3 Term Rep. 505. *Mentd. Goodchild v. St. John, Hackney Parish Trustees* (1858), E. B. & E. 1; *Piggott v. Cuckfield Union Assmt. Com.* (1921), 125 L. T. 402.

**932. — ]—**In a settlement case depending upon the pauper's being rated, the justices at the sessions must state, as a fact, whether the landlord or tenant were rated; & if they only state the evidence of that fact, this ct. will send the case down to be restated.

Where the occupier's name is upon the rate at all, they should take it that he was intended to be rated, unless the contrary expressly appear (*BULLER, J.*)—*R. v. RAINHAM (INHABITANTS)* (1793), 5 Term Rep. 240; Nolan, 222; 2 Bott, 767; 101 E. R. 135.

**933. — Before payment of rate.]—**The town & parish of B. is for the convenience of the overseers divided into twelve divisions under the superintendence of so many overseers respectively,

each of whom copies the name out of the general rate into a separate book of such of the inhabitants assessed as are within his district; & it is the custom of the parish for each overseer to add such names to his book as ought to be inserted in the general rate; such addition is not in fact made till the next year; but in the meanwhile the general rate is from time to time ordered to be collected with the additions:—*Held*: a person paying the rate whose name is afterwards added in the overseer's Book does not thereby gain a settlement; *aliter* if his name be so added before he paid the rate.—*R. v. EDGBASTON (INHABITANTS)* (1796), 6 Term Rep. 540; 101 E. R. 691.

**934. — Name of owner inserted—Name of occupier left blank.]—**Pauper occupied a tenement of more than £10 annual value for a year, & paid the rent & poor rate for a year. In the rate, the landlord's name was inserted under the head "name of owner"; but in the column headed "name of occupier" no name was entered:—*Held*: pauper gained a settlement, as being sufficiently "assessed" to satisfy Poor Law (Amendment) Act, 1834 (c. 76), s. 66.—*R. v. HULME (INHABITANTS)* (1843), 4 Q. B. 538; 2 Gal. & Dav. 682; 12 L. J. M. C. 100; 1 L. T. O. S. 78; 7 J. P. 370; 7 Jur. 464; 114 E. R. 1001.

*Annotations:—*Distd. *R. v. St. Anne, Westminster* (1860), 2 E. & E. 485. *Refd. Rogers v. Lewis* (1859), 7 C. B. N. S. 29. *Mentd. Moss v. St. Michael, Lichfield Overseers* (1844), Bar. & Arn. 330.

**935. — Discrepancy in different rates.]—**A separate & distinct dwelling-house & land in the parish of H. were let to W. A. & T. A., as joint tenants, the rent & value of the land, taken separately, being sufficient to confer a settlement on both. The farm was occupied by W., T. residing on another farm at a distance. T. paid the whole rent of the farm. The overseers of H. had always demanded & received payment of the rates in respect of the house & farm in question from T.: & in the rate books of H., "Atkinson, Mr." appeared as the name of the occupier of the farm in two rates, & "Atkinson, Thomas" in a third:—*Held*: the sessions were justified in finding that there was a sufficient occupation & payment of rent by W., & a sufficient assessment of him & payment of the rates by him, to give him a settlement in H. under Poor Law (Amendment) Act, 1834 (c. 76), & that he had been sufficiently charged with, & paid his share of, the public taxes of H. to gain a settlement under Poor Relief Act, 1691 (c. 11).—*R. v. HUSTHWAITE (INHABITANTS)* (1852), 18 Q. B. 447; 21 L. J. M. C. 189; 16 Jur. 1068; 118 E. R. 169; *sub nom. R. v. UTHWAITE (INHABITANTS)*, 19 L. T. O. S. 136; 16 J. P. 696.

*Annotation:—*Distd. *R. v. St. Anne, Westminster* (1860), 2 E. & E. 485.

**936. — Name continued after death.]—**If the name of a former occupier who to the knowledge of the parish officers is dead, is continued in the poor rate, but the present occupier pays, he shall gain a settlement.—*R. v. HECKMONDWICKE (INHABITANTS)* (1781), 2 Doug. K. B. 564; Cald. Mag. Cas. 103; 99 E. R. 356.

**937. Effect of parish having notice of person rated.]—***R. v. CHIDINGFOLD (INHABITANTS)* (1757), Burr. S. C. 415.

*Annotation:—*Refd. *Hughes v. Chatham Overseers* (Burton's vote), *Same v. Same* (Parker's vote), *Same v. Gillingham Overseers* (Brook's vote), *Same v. Chatham Overseers* (Smith's vote) (1843), 13 L. J. C. P. 44.

**938. — ]—***R. v. WALSALL (INHABITANTS)* (1777), Cald. Mag. Cas. 35.

*Annotations:—*Apld. *R. v. Heckmondwicke* (1781), Cald. Mag. Cas. 103. *Refd. R. v. St. Marylebone* (1850), 14 Jur. 833. *Mentd. Moss v. St. Michael, Lichfield Overseers* (1844), 8 Scott, N. R. 832.

939. —.]—A man & his wife had for some years lived apart, the wife living in the parish of M. In Nov. 1841, she became possessed of a house by devise in that parish, & occupied & was rated for it in her own married name; a few months after the man came & cohabited with his wife for about four months, & a rate which had been made before he came into the parish was paid by the wife while he was living with her. The man then left, & never returned, but was supported by his wife, who continued to be rated in her own name, & paid the rates, up to the time of his becoming lunatic & chargeable to another parish. The parish officers of M. had never dealt with or recognised the man as a ratepayer:—*Held*: on a case in which the ct. were to draw inferences of fact, the man had not obtained a settlement in M. under Poor Relief Act, 1691 (c. 11), s. 6, as there was no knowledge of him shown on the part of the parish officers.—*R. v. ST. ANNE, WKSTMINSTER (INHABITANTS)* (1860), 2 R. & E. 485; 29 L. J. M. C. 78; 1 L. T. 367; 6 Jur. N. S. 249; 8 W. R. 180; 121 E. R. 182.

940. *Receipt of collector.*—Where the receipt of the collector of the land tax expresses the sum paid to be so much assessed upon the landlord; it must be presumed that the landlord was rated, if not that the payment also was by him, & therefore that the tenant gained no settlement.—*R. v. ST. JAMES (INHABITANTS)* (1784), 4 Doug. K. B. 200; Cald. Mag. Cas. 385; 99 E. R. 840.

941. *Production of rate books—Evidence of renting occupation & payment.*—To prove, before removing justices, that the occupier of premises, in respect of which a settlement in the parish of P. was relied upon, had been assessed to the poor rate in 1840–1841, the removing parish called the vestry clerk of P. His examination was: J. M. “on his oath saith that he now produces the poor rate books of the said parish of P. for the years 1840 & 1841.” The other examinations proved the renting, occupation, & payment of the rates, for which receipts were exhibited, signed by the collector of P., but no further mention was made of the rate books or their contents, nor was any extract added:—*Held*: the examinations were sufficient, for it must be presumed that the removing justices inspected the rate book; & if there was any mode in which the material entries could have been annexed to the examinations, that addition was not necessary for the information of appts. the book itself being in their custody.—*R. v. ST. PANCRAS (INHABITANTS)* (1848), 12 Q. B. 4; 3 New Sess. Cas. 186; 17 L. J. M. C. 123; 11 L. T. O. S. 219; 12 J. P. 376; 12 Jur. 499; 116 E. R. 768.

—.]—*See EVIDENCE*, Vol. XXII., pp. 213, 245, 430, Nos. 1860, 2231, 4446, 4447.

## SECT. 9.—SETTLEMENT BY ESTOPPEL

### SUB-SECT. 1.—GRANT OF RELIEF AS EVIDENCE OF SETTLEMENT.

#### A. Within Parish.

*See Poor Law Act, 1927 (c. 14), s. 116.*

942. *General rule.*—Where a case from the sessions only stated the bare fact of a pauper's having received relief from resp.'s parish:—*Held*: this was not even *prima facie* evidence of a settlement there, since he might have been relieved as casual poor, which the overseers were bound to do if wanted, whether the pauper were settled there or not. Hearsay evidence of a fact is not to be received upon a question of settlement, though

the party who gave the information respecting her own settlement were dead.—*R. v. CHADDERTON (INHABITANTS)* (1801), 2 East, 27; 102 E. R. 278. *Annotations*:—*Foll.* *R. v. Chatham* (1807), 8 East, 498; *R. v. St. Giles-in-the-Fields* (1844), 5 Q. B. 872.

943. —.]—Giving parish relief to a pauper within the parish is no evidence of his settlement there. In the instance in question the relief was administered at one time for a fortnight, & at another time for a longer period in the parish workhouse.—*R. v. CHATHAM (INHABITANTS)* (1807), 8 East, 498; 103 E. R. 434.

*Annotations*:—*Foll.* *R. v. Coleorton* (1830), 1 B. & Ad. 25; *R. v. St. Giles-in-the-Fields* (1844), 5 Q. B. 872. *Reid*. *R. v. Trowbridge* (1827), 7 B. & C. 252; *Paynter v. Williams* (1833), 1 Cr. & M. 810.

944. —.]—The fact of a poor child being first found in a particular parish, is no evidence of his having been born there; & his being maintained by that parish for several years, & afterwards occasionally relieved by them for several weeks together, does not amount either to an admission, or to conclusive evidence, of his being settled there:—*Semble*: relief given to a pauper is no evidence of his being settled in the relieving parish.—*R. v. TROWBRIDGE (INHABITANTS)* (1827), 7 B. & C. 252; 1 Man. & Ry. K. B. 7; 1 Man. & Ry. M. O. 71; 6 L. J. O. S. M. C. 7; 108 E. R. 717.

*Annotations*:—*Reid*. *R. v. Coleorton* (1830), 8 L. J. O. S. M. C. 118; *R. v. Lydeard St. Lawrence* (1841), 10 L. J. M. C. 147.

945. —.]—The examinations upon which an order of removal from B. to W. was made, disclosed the following facts. The pauper was born a bastard in a third parish; but his mother, before her confinement, was told by the parish officers that they would not allow her to remain there unless she obtained a certificate from W. acknowledging that she was settled in that parish, & pregnant. She did remain; & at the time of her confinement the parish officers of W. paid £2 for the relief of herself & her child. She afterwards, in about two months, went abroad, leaving her child in the care of her mother, & for six years the parish officers of W. paid a weekly sum for the relief of the child, who during the whole time lived in the care of his grandmother in the third parish:—*Held*: this was evidence of an admission by the parish officers of W. of the existence of a certificate acknowledging the settlement of the pauper's mother in their parish at the time when she was pregnant; & it was unnecessary to give any evidence of search for the certificate itself.—*R. v. BASINGSTOKE (INHABITANTS)* (1850), 14 Q. B. 611; 4 New Mag. Cas. 37; 4 New Sess. Cas. 80; 19 L. J. M. C. 97; 14 L. T. O. S. 372; 14 J. P. 75; 14 Jur. 246; 117 E. R. 237.

946. — *In case of illness.*—A pauper, who cannot be removed by reason of sickness, shall not thereby gain a settlement.—*WALSEWORTH v. TEWING* (1676), 1 Freem. K. B. 433; 3 Keb. 673; 9 E. R. 323.

947. — *In joint poor-house.*—*R. v. ST. PETER & ST. PAUL, BATH (INHABITANTS)* (1782), Cald. Mag. Cas. 213; 1 Bott, 432.

*Annotation*:—*Foll.* *R. v. St. Giles-in-the-Fields* (1844), 5 Jur. 467.

948. — *Relief long continued—& one child apprenticed by parish.*—Relief given by a parish to a family resident in it, is no evidence of settlement, though the relief be continued for a long period, & though one of the family be put out apprentice by the parish.—*R. v. COLEORTON (INHABITANTS)* (1830), 1 B. & Ad. 25; 8 L. J. O. S. M. C. 118; 109 E. R. 697.

*Annotations*:—*Consol.* *R. v. St. George, Exeter* (1835), 3 Ad. & El. 373. *Reid*. *R. v. St. Giles-in-the-Fields* (1844), 5 Q. B. 872.

**Sect. 9.—Settlement by estoppel: Sub-sect. 1, A. & B.; sub-sect. 2, A. (a).]**

**949. Application of rule—Relief in house maintained outside parish—For relief of poor.]—Relief given by parish officers in a place out of their parish, but where they, by contract, have their paupers maintained, is the same in legal effect, as to settlement, as relief within the parish, & is therefore not *prima facie* evidence that the pauper is settled in the relieving parish. Although it do not appear that such place was parish property, or established according to any statute for building or providing parish houses.—R. v. ST. GILES IN THE FIELDS (INHABITANTS) (1844), 5 Q. B. 872; 1 Day. & Mer. 110; 1 New Mag. Cas. 6; 1 New Sess. Cas. 137; 13 L. J. M. C. 89; 3 L. T. O. S. 54; 8 J. P. 692; 8 Jur. 467; 114 E. R. 1477.**

#### B. Outside Parish.

**950. General rule.]—Relief given to a pauper while he is residing out of the relieving parish, is *prima facie* evidence of a settlement in that parish; & evidence of one instance in which relief was so given was held to be sufficient to warrant a finding by the sessions that the pauper was settled in the relieving parish, although upon a second application relief had been refused.—R. v. EDWINSTOWE (INHABITANTS) (1828), 8 B. & C. 671; 7 L. J. O. S. M. C. 30; Pratt, 305; 108 E. R. 1192.**  
*Annotation:—Reld. R. v. St. Giles-in-the-Fields* (1844), 1 New Sess. Cas. 137.

**951. —.]—Relief given to a pauper not residing in the relieving parish is *prima facie* evidence of his being settled there; but the sessions are not bound upon such evidence only to find that he is settled in the relieving parish; & therefore, where, upon the trial of an appeal, the pauper proved relief given to him by applt. parish while resident in another parish, the sessions having quashed the order of removal, this ct. refused to disturb the decision.—R. v. YARWELL (INHABITANTS) (1829), 9 B. & C. 894; 4 Man. & Ry. K. B. 684; 2 Man. & Ry. M. C. 394; 8 L. J. O. S. M. C. 8; 109 E. R. 332.**  
*Annotation:—Reld. R. v. Coleorton* (1830), 1 B. & Ad. 25.

**952. —.]—R. v. CARNARVONSHIRE JJ., No. 1539, post.**

**953. —.]—The examination of a pauper, a widow, purported to set up a settlement for her late husband by hiring & service in R., but the statement was defective. The examination also set out the fact that relief had been administered to the husband then residing in C., the removing parish, by the overseer of R., on the ground that he was a parishioner of R.:—*Held*: on the latter ground the order of removal was to be supported.—R. v. CAMROSE (INHABITANTS) (1843), 2 Q. B. 330; 1 L. T. O. S. 108; 7 J. P. 335; 114 E. R. 129.**

**954. —.]—Where an order of removal has been confirmed by the sessions, subject to a case reserved, & the original order is thereupon brought up by *certiorari*, the ct. will not notice defects on the face of the order not noticed in the case: although such defects were mentioned in moving for the *certiorari*. "While in the parish of N. I received monthly relief from H." parish, & "I was relieved in the workhouse" of N. "by the parish of H." These statements in the examination of a pauper were held sufficient evidence of acknowledgment by parochial relief to warrant an order of removal to H.—R. v. HARTFURY (INHABITANTS) (1847), 8 Q. B. 566; 2 New Mag. Cas. 185; 2 New Sess. Cas. 648; 16 L. J. M. C. 105; 9 L. T. O. S. 196; 11 J. P. 458; 11 Jur. 486; 115 E. R. 989.**

**955. —.]—R. v. ST. MARY, BUNGAY (INHABITANTS), No. 1286, post.**

**956. Whether conclusive.]—R. v. YARWELL (INHABITANTS), No. 951, ante.**

**957. Refusal of second application.]—R. v. EDWINSTOWE (INHABITANTS), No. 950, ante.**

**958. Application of rule—Son of person relieved—Residence with person relieved not proved.]—A pauper was removed to parish A. on examinations which showed that he had gained no settlement in his own right, & that when the pauper was twenty-seven years old his father had received relief from parish A., while resident elsewhere:—*Held*: sufficient, for that emancipation was not to be presumed. Although it was not stated that the pauper, at the time in question, was resident with his father or formed part of his family.—R. v. LILLESALL (INHABITANTS) (1845), 7 Q. B. 158; 1 New Sess. Cas. 576; 14 L. J. M. C. 97; 5 L. T. O. S. 71; 9 J. P. 439; 9 Jur. 407; 115 E. R. 448.**

**959. Authorisation of grant—Necessity for.]—Relief given by the relieving officer of a union, as on behalf of parish W., to paupers residing in parish M., both in the union, is no evidence of a settlement in W., without proof that such relief was authorised, or at least known & not objected to, by a guardian of the union acting for W., or by its overseer.—R. v. LITTLE MARLOW (INHABITANTS) (1847), 10 Q. B. 223; 2 New Mag. Cas. 81; 2 New Sess. Cas. 576; 16 L. J. M. C. 70; 8 L. T. O. S. 448; 11 J. P. 133; 11 Jur. 240; 116 E. R. 86.**

*Annotations:—Distd. R. v. Hartpury* (1847), 2 New Mag. Cas. 185; *Appld. R. v. Pott Shrigley* (1848), 12 Q. B. 143. *Reld. R. v. Crondall* (1847), 10 Q. B. 812.

**960. —What is sufficient evidence of authority.]—A statement by the relieving officer of a union, that he relieved a pauper out of the funds in his hands on account of a particular township in the union, is not sufficient to prove the pauper's chargeability to that township.—R. v. BRADFORD (INHABITANTS) (1846), 8 Q. B. 571, n.; 1 New Mag. Cas. 522; 2 New Sess. Cas. 330; 15 L. J. M. C. 117; 7 L. T. O. S. 158; 10 J. P. 375; 10 Jur. 753; 116 E. R. 990.**

*Annotations:—Reld. R. v. Watford* (1846), 9 Q. B. 626; *R. v. Hartpury* (1847), 2 New Mag. Cas. 185; *R. v. Little Marlow* (1847), 10 Q. B. 223.

**961. —.]—On application for an order of removal, the pauper was sworn before the justices; & her evidence was taken down in writing by the attorney for the parish applying for the order, who acted in that character only, & not as clerk to the justices; the writing was signed by the pauper; but no *jurat* was added to the writing; nor was it signed by the justices. At a subsequent hearing, the pauper was again examined, & her evidence taken down in writing; to this writing a *jurat* was added; & it was signed by the justices; & a copy was sent to the parish to which the removal was made:—*Held*: it was not necessary, under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, that a copy of the former writing should be also sent. Relief given to a pauper by order of the board of guardians of a union, on account of a particular parish therein, is evidence, on appeal by such parish against an order of removal, that the relief was given by its authority.—R. v. CRONDALL (INHABITANTS) (1847), 10 Q. B. 812; 2 New Mag. Cas. 192; 2 New Sess. Cas. 667; 16 L. J. M. C. 175; 9 L. T. O. S. 266; 11 J. P. 486; 11 Jur. 922; 116 E. R. 308.**

*Annotations:—Reld. R. v. Pott Shrigley* (1848), 13 Jur. 60; *R. v. Wigan* (1849), 14 Q. B. 287.



## SUB-SECT. 2.—REMOVAL ORDER.

## A. Order Not Appealed Against.

## (a) As to What Persons Conclusive.

See, now, Poor Law Act, 1927 (c. 14), s. 110.

**962.** How far conclusive—As to all the world.]—Order of two justices binds against all parishes, till repealed.—*KING'S NORTON (INHABITANTS) v. SWOLHILL (INHABITANTS)* (1098), 2 Salk. 481; 91 E. R. 414.

**963.** ———.]—(1) Parish, upon whom an original order is made, cannot remove till that be reversed.

(2) The order of two justices is a determination of the right against all persons, till it be reversed (*HOLT, C.J.*).—*CHALBURY (INHABITANTS) v. CHIPPING-FARRINGTON (INHABITANTS)* (1700), 2 Salk. 488; Sett. & Rem. 287; 11olt, K. B. 509; 91 E. R. 419; *sub nom. R. v. CHALBURY (INHABITANTS)*, 1 Com. 71.

*Annotations* :—As to (1) *Reid. Uxbridge Union v. Winchester Union* (1904), 91 L. T. 533. *Generally, Reid. R. v. Diddlebury* (1810), 12 East, 359.

**964.** ———.]—(1) Reversal on appeal is final only between the parties, but confirmation is conclusive against all the world.

(2) If one parish make an order for the removal of a poor person to another parish, & that order is confirmed upon an appeal, that parish is for ever concluded against all other parishes; so is an order made, & not appealed from final (*per CUR.*).—*MYNTON (INHABITANTS) v. STONY STRATFORD (INHABITANTS)* (1701), 2 Salk. 527; 3 Salk. 260; Sett. & Rem. 230; Holt, K. B. 577; 91 E. R. 448; *sub nom. R. v. MINTON PARISH*, 12 Mod. Rep. 668.

*Annotation* :—As to (2) *Reid. Nympsfield Parish v. Woodchester Parish* (1742), 2 Stra. 1172.

**965.** ———.]—(1) Order reversed is final only between the parties.

(2) Order confirmed, or not appealed from, is final as to all the world.—*SWANSCOMB PARISH v. SHENSFIELD PARISH* (1702), 2 Salk. 492; 91 E. R. 422.

**966.** ———.]—An order of removal not appealed against is conclusive.—*ANON.* (1712), 10 Mod. Rep. 84; 88 E. R. 637.

**967.** ———.]—Order not appealed against, absolute.—*OLD NEWTON PARISH v. STONHAM* (1714), 1 Sess. Cas. K. B. 90; 93 E. R. 20.

**968.** ———.]—*R. v. GLASTON, RUTLANDSHIRE (INHABITANTS)* (1728), 2 Sess. Cas. K. B. 110; 93 E. R. 158.

**969.** ———.]—The first order of removal not being appealed against, is conclusive.—*R. v. NORTH FEATHERTON (INHABITANTS)* (1731), 1 Sess. Cas. K. B. 170; 93 E. R. 50.

**970.** ———.]—An order of removal confirmed by the sessions upon the merits is conclusive against every body; & so it is also, if confirmed by them without appeal (*CHAPPLE, J.*).—*NYMPSFIELD PARISH v. WOODCHESTER PARISH, GLOUCESTERSHIRE* (1742), 2 Stra. 1172; 93 E. R. 1107; *sub nom. R. v. WOODCHESTER*, Burr. S. C. 191; 2 Bott, 710.

*Annotations* :—*Apld. R. v. St. Mary, Lambeth* (1796), 6 Term Rep. 615. *Consd. R. v. Wye* (1838), 7 Ad. & El. 761. *Reid. R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780.

**971.** ———.]—*R. v. SILCHESTER (INHABITANTS)* (1766), Burr. S. C. 551.

*Annotations* :—*Apld. R. v. Rudgeley* (1800), 8 Term Rep. 620; *R. v. Binegar* (1806), 7 East, 377. *Mentd. De Mora v. Concha* (1885), 29 Ch. D. 268.

**972.** ———.]—An order of removal unappealed from, to a certificated parish from a third parish, is conclusive against the certificated parish, on a removal to the certifying parish.—*R. v.*

*EALING (INHABITANTS)* (1784), 4 Doug. K. B. 12; Cald. Mag. Cas. 472; 90 E. R. 742.

**973.** ———.]—After an order of removal not appealed from, a new settlement can only be gained by some act or cause altogether subsequent to the removal. Therefore if a pauper in service at A. under a hiring for a year, be removed to B., & does not appeal, but returns in a few days to his master at A., is received by him, serves out the year, & is paid his full wages, yet he gains no settlement at A.—*R. v. KENILWORTH (INHABITANTS)* (1788), 2 Term Rep. 598; 2 Bott, 715; 100 E. R. 321.

*Annotations* :—*Consd. R. v. Willongley* (1788), 2 Term Rep. 709; *R. v. Willoughby* (1835), 4 Ad. & El. 143. *Reid. R. v. Alverley* (1803), 3 East, 563; *Uxbridge Union v. Winchester Union* (1904), 91 L. T. 533.

**974.** ———.]—An order of removal, executed & unappealed against, is conclusive as to the settlement of the pauper at the time of such order, even as between third parishes no parties to the former order.—*R. v. CORSHAM (INHABITANTS)* (1809), 11 East, 388; 2 Bott, 722; 103 E. R. 1054.

*Annotation* :—*Apld. Uxbridge Union v. Winchester Union* (1904), 91 L. T. 533.

**975.** ———.]—*R. v. ST. MARY, BUNGAY (INHABITANTS)*, No. 1286, *post*.

**976.** ———.]—Two pauper children were removed from L. to H. by an order of justices, which described them as the lawful children of W. & E. G. The order was not appealed against. Afterwards, E. G. was received into an asylum, being sent thither from L., as a pauper lunatic; & subsequently two justices, on inquiry, adjudicated that the settlement of E. G. was in H., & made an order of maintenance accordingly. H. having appealed, the order was confirmed by the sessions, subject to a case which stated the above facts, & which also found that the two children were, at the time of the first order, unemancipated, & were, by that order, adjudged to be settled in H. on the ground of W. G.'s settlement in H., which facts did not appear by the order, & also that in fact E. G. was not settled in H.:—*Held*: the first order, unappealed against, was conclusive proof that E. G. was settled in H.—*It. v. HARTINGTON MIDDLE QUARTER (INHABITANTS)* (1855), 4 E. & B. 780; 3 C. L. R. 554; 24 L. J. M. C. 98; 24 L. T. O. S. 327; 19 J. P. 150; 1 Jur. N. S. 586; 3 W. R. 285; 119 E. R. 288.

*Annotations* :—*Reid. It. v. Hutchings* (1881), 6 Q. B. D. 300. *Mentd. De Mora v. Concha* (1885), 29 Ch. D. 268; *Irish Land Comrs. v. Ryan*, [1900] 2 I. R. 565; *Wakofield Corp'n. v. Cooke*, [1903] 1 K. B. 417; *Hill v. Clifford*, *Clifford v. Timms*, *Clifford v. Phillips*, [1907] 2 Ch. 236; *Poulton v. Adjustable Cover & Boiler Block Co.*, [1908] 2 Ch. 430.

**977.** ———.]—Until new settlement gained.]—Two justices' order not appealed from binds the whole parish upon which it is made, till a new settlement is gained.—*THACKHAM (INHABITANTS) v. FINDON (INHABITANTS)* (1701), 2 Salk. 480; 91 E. R. 420.

*Annotations* :—*Consd. R. v. Kirkby Stephen* (1770), Burr. S. C. 664. *Reid. R. v. Abbots-Langley* (1729), 1 Barn. K. B. 148.

**978.** ———.]—*R. v. KIRKBY STEPHEN (INHABITANTS)* (1770), Burr. S. C. 664; 2 Bott, 712.

*Annotations* :—*Reid. R. v. Nantwich* (1812), 16 East, 298; *R. v. Bishop Wearmouth* (1834), 5 B. & Ad. 942; *R. v. Oldbury* (1835), 5 Nev. & M. K. B. 547.

**979.** ———.]—As to antecedent settlements.]—An order of removal is conclusive against every parish, as to all antecedent settlements.—*PETWORTH PARISH* (1711), 10 Mod. Rep. 25; 88 E. R. 609; *sub nom. PETWORTH (INHABITANTS) v. AINGMERE (INHABITANTS)*, 1 Sess. Cas. K. B. 27.

**980.** ———.]—Wrong order.]—*SPITALFIELDS*

*Sect. 9.—Settlement by estoppel: Sub-sect. 2, A. (a) & (b), & B.]*

*v. BROMLEY* (1713), 2 Bott, 700; 18 Vin. Abr. 468, pl. 5.

*Annotations:—*Consol. R. v. Kirkby Stephen (1770), Burr. S. C. 664; R. v. Nantwich (1812), 16 East, 228; R. v. Bishop Wearmouth (1834), 5 B. & Ad. 942. *Reid.* Astle v. Thomas (1823), 1 C. & P. 103.

981. ————]—Two justices made an order under 9 Geo. 4, c. 40, ss. 38, 41, for removing a lunatic pauper mentioned in the order as chargeable to the township of D., & thereby directed the overseers of D. to remove her to the county lunatic asylum; the charges of removal, maintenance, etc., to be paid by the county treasurer, as the pauper's settlement was unknown. Two other justices, by a subsequent order, under 9 Geo. 4, c. 40, s. 42, reciting the first order, & its execution, adjudged, after inquiry by them, that the pauper's settlement was in D., & directed the overseers of D. to reimburse the county treasurer, & to pay, at a certain rate, for the pauper's future maintenance, etc. On appeal against this order, it appeared that the first order was applied for by the assistant overseer of D., the nature of whose duties, however, was not proved; & that the overseers of D. removed the pauper in obedience to the first order. That order did not mention any person as the party applying for it:—*Held*: the overseers of D., not having appealed against the first order, were precluded from alleging, as a ground of appeal against the second, that the former order was made without legal proof of chargeability.—R. v. *HOLDSWORTH* (1841), 1 Q. B. 221; 1 Gal. & Dav. 442; 10 L. J. M. C. 57; 5 J. P. 226; 5 Jur. 768; 113 E. R. 1114.

982. ————]—Order not executed by actual removal.]—Where after an order of removal the parish of settlement acquiesces in it by relieving the pauper in the removing parish, the order, though not executed by actual removal, is, upon proof that it was unappealed against, a conclusive adjudication against all persons of the settlement of the pauper at the date of the order.—*CLIFTON UNION v. LIVERPOOL OVERSEERS* (1877), 2 Q. B. D. 540; 41 J. P. 599; *sub nom.* R. v. *CLIFTON UNION*, 46 L. J. M. C. 209.

983. ————]—As against component townships of parish—Effect of one township separating.]—A pauper was removed by order of justices to the parish of H., so named in the order, which consisted of several townships, maintaining their poor jointly. The order was acquiesced in. Afterwards one of the townships, O., separated itself from the parish, under Poor Relief Act, 1862 (c. 12), s. 21, & from thenceforth maintained its own poor. The pauper was subsequently removed to the township of O., so named in the order of removal, from the parish of W. On appeal against the order, resps. having put in the order of removal to H., O. offered evidence that the pauper was not settled in that particular township, before its separation from H. The sessions rejected the evidence:—*Held*: the former order upon H. was not conclusive against O. on appeal against an order directed to O. as a distinct township; & the case was sent back to be reheard.—R. v. *OLDBURY (INHABITANTS)* (1835), 4 Ad. & El. 167; 1 Har. & W. 554; 5 Nev. & M. K. B. 547; 3 Nev. & M. M. C. 375; 5 L. J. M. C. 98; 111 E. R. 750.

*Annotations:—*Consol. R. v. Tipton (1842), 3 Q. B. 215; Stourbridge Union v. Droitwich Union (1871), L. R. 6 Q. B. 769. *Reid.* R. v. Humington (1843), 5 Q. B. 373.

*(b) As to What Matters Conclusive.*

*See, now, Poor Law Act, 1927 (c. 14), s. 116.*

984. Order for removal of father—How far

conclusive as to settlement of children—Born subsequently.]—An order unappealed from to remove a man & his wife is conclusive as to after-born children.—*NYMPFIELD PARISH v. WOODCHESTER PARISH, GLOUCESTERSHIRE* (1742), 2 Stra. 1172; 93 E. R. 1107; *sub nom.* R. v. *WOODCHESTER*, Burr. S. C. 191; 2 Bott, 710.

*Annotations:—*Apld. R. v. St. Mary, Lambeth (1790), 6 Term Rep. 615. Consol. R. v. Wye (1838), 7 Ad. & El. 761. Apld. R. v. Hartington Middle Quarter (1855), 4 E. & B. 780.

985. ————]—Not named in order.]—An order unappealed from, removing a father, is no proof of the removal of a son who is neither mentioned in, nor removed by, it.—R. v. *SOUTHWORAM (INHABITANTS)* (1786), 1 Term Rep. 353; 2 Bott, 715; 99 E. R. 1135.

*Annotations:—*Reid. R. v. St. Mary, Lambeth (1796), 6 Term Rep. 615; Uxbridge Union v. Winchester Union (1904), 68 J. P. 535.

986. ————]—An order of removal was made on an examination which showed that the pauper never acquired a settlement for himself, but was emancipated in 1823; that his father was apprentice in L. in 1790, & was removed to L. under an order of removal in 1838, against which L. had not appealed, but had subsequently maintained the father; the examinations did not set forth the circumstances of the apprenticeship so as to prove that the father acquired a settlement in L. thereby, but they showed that the father never gained a settlement after the apprenticeship:—*Held*: the order, unappealed against, for the removal of the father, was conclusive evidence of the settlement of the son.—R. v. *BRIGHTHELMSTON (INHABITANTS)* (1845), 7 Q. B. 549; 1 New Mag. Cas. 349; 2 New Sess. Cas. 7; 14 L. J. M. C. 137; 5 L. T. O. S. 194; 9 J. P. 599; 9 Jur. 775; 115 E. R. 596.

987. Order for removal of wife—Whether conclusive as to settlement of husband.]—An order removing a woman as the wife of A., is, if unappealed from, conclusive against the parish as to the settlement of A.; for by calling her his wife it imports that the removal was to his settlement.—R. v. *HINXWORTH (INHABITANTS)* (1778), 2 Bott, 713; Cald. Mag. Cas. 42; *sub nom.* R. v. *HINXWORTH (INHABITANTS)*, 1 Doug. K. B. 46, n.; 99 E. R. 33.

*Annotations:—*Apld. R. v. Leigh (1778), 1 Doug. K. B. 46. *Reid.* R. v. St. Andrews, Holborn (1796), 6 Term Rep. 613; R. v. Rudgeley (1800), 8 Term Rep. 620; R. v. Henfield (1843), 8 J. P. 21.

988. ————]—If a wife is removed, & the order unappealed from, such removal is conclusive as to the husband's settlement, although it is not stated in the order that she was his wife.—R. v. *TOWCESTER (INHABITANTS)* (1785), 4 Doug. K. B. 240; Cald. Mag. Cas. 497; 99 E. R. 860.

*Annotation:—*Reid. R. v. Rudgeley (1800), 8 Term Rep. 620.

989. ————]—If a *feme covert* be removed by an order of two justices from A. to B., describing her as "widow," it is conclusive not only as to her settlement but as to that of her husband also.—R. v. *RUDGELEY (INHABITANTS)* (1800), 8 Term Rep. 620; 101 E. R. 1580.

*Annotations:—*Apld. R. v. Catterall Township (1817), 6 M. & S. 83; R. v. Hartington Middle Quarter (1855), 4 E. & B. 780. *Reid.* R. v. Watford (1846), 2 New Mag. Cas. 13.

990. Order for removal of husband & wife—Conclusive as to all derivative settlements.]—An order of removal unappealed against is conclusive not only on the parties removed, but also as to all derivative settlements under them.

If A. & B. be removed as man & wife from X. to Y., & there be no appeal against the order, it is conclusive, not only as to A. & B. though they be



not married, but also as to their children, though illegitimate.—*R. v. ST. MARY, LAMBETH (INHABITANTS)* (1796), 6 Term Rep. 615; 2 Bott, 717; 101 E. R. 733.

*Annotations*.—*Apld.* *R. v. Catterall Township* (1817), 6 M. & S. 83; *R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780. *Refd.* *R. v. Rudgeley* (1800), 8 Term Rep. 630; *R. v. Wye* (1838), 7 Ad. & El. 761.

**991.** — **Conclusive as to marriage & settlement.**—An order of removal of J. S. & B. his wife, made upon the examination of the wife, adjudging that they lately came into the parish of K. & are likely to become chargeable to it, & were last legally settled in M., is good upon the face of it, & conclusive upon the parish of M. as to the marriage & settlement of the husband & wife; so that upon a subsequent removal of the wife, describing her as B. S., single woman, from M. to B., M. cannot show in evidence that the marriage was null & void.—*R. v. BINEGAR (INHABITANTS)* (1806), 7 East, 377; 2 Bott, 721; 3 Smith, K. B. 353; 103 E. R. 146.

*Annotations*.—*Consd.* *R. v. Rotherham* (1842), 3 Q. B. 776. *Refd.* *R. v. Willatts* (1845), 14 L. J. M. C. 157; *R. v. St. Paul, Covent Garden* (1846), 16 L. J. M. C. 11.

**992.** **Order for removal of brother — Whether conclusive as to settlement of sister—Father's settlement only arising collaterally.**—Upon the trial of an appeal at quarter sessions, resp. parish proved relief granted to the father of the pauper by applt. parish before the year 1815. Applt. parish then tendered an order of sessions made in the year 1815, quashing an order of justices for the removal of the brother of the pauper to applt. parish. They tendered parol evidence to show that the ground of the decision of the ct. of quarter sessions was, that the father of the pauper had not at that time any settlement in applt. parish, & consequently, that the son had not any derivative settlement there:—*Held*: even if parol evidence was admissible to prove the ground of the decision of the sessions, still that the order of sessions was not evidence that the father of the pauper was not settled in applt. parish in 1815, because the father's settlement was a matter that arose collaterally on the trial of the first appeal.—*R. v. KNAPTOTT (INHABITANTS)* (1824), 2 B. & C. 883; 4 Dow. & Ry. K. B. 469; 2 Dow. & Ry. M. C. 347; 2 Bott, 794; 107 E. R. 610.

*Annotations*.—*Consd.* *R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780. *Refd.* *R. v. Yeoveley* (1838), 8 Ad. & El. 806.

**993.** — — — — — (1) On appeal against an order removing Frederick B. from the parish of M. to that of S., resps., alleging a derivative settlement from the father of Frederick, put in a former order, removing the family of Samuel B., the brother of Frederick, from M. to S., in the usual form, & the examination of Samuel B., the elder, father of Frederick & Samuel, on which the last mentioned order was granted, showing that he, Samuel, the elder, was settled in S.:—*Held*: the last mentioned order was not of itself evidence to prove the settlement of Frederick B. in S.; & the examinations could not be received as showing the ground on which that order was granted.

(2) Resps. proved that, when the former order was made, the overseer of M. delivered it, with the examinations, to the overseer of S.; that the paupers were removed under it; & that S. never appealed:—*Held*: this was evidence of an admission by S. that the settlement of Samuel, the father, was correctly stated in the examinations; & therefore, the examinations, as part of such evidence, were admissible on the appeal against the removal of Frederick.—*R. v. SOW (INHABITANTS)* (1843), 4 Q. B. 93; 2 Gal. & Dav. 537;

12 L. J. M. C. 38; 7 J. P. 272; 7 Jur. 270; 114 E. R. 832.

*Annotation*.—*Generally.* *Refd.* *R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780.

**994.** **Order for removal of mother & child — Whether conclusive as to legitimacy of child.**—On a case from sessions, upon appeal against the removal of R. from T. to C. in 1856, it was stated that in 1837 a woman named S. W., “& Ann, aged six weeks, her daughter,” were removed by order from P. to C., & that in fact C. was then the place of settlement of both S. W. & Ann: that this order was not appealed against: & that Ann was born in P., & was the same person as R.: that C., applt. parish, on the trial of the appeal, offered proof of the illegitimacy of R., & that the sessions held that C. was precluded, by the order of 1837, from giving such proof, & affirmed the order of 1856. This ct. quashed the order of sessions, holding that C. was not estopped from giving proof of the illegitimacy, inasmuch as, assuming the order of 1837 to assert the fact of legitimacy, that fact was immaterial to the removal of S. W. & Ann, & therefore was not admitted by not appealing against such removal.—*R. v. CAERWYS (INHABITANTS)* (1858), 8 E. & B. 720; 30 L. T. O. S. 256; 22 J. P. Jo. 52; 120 E. R. 267.

#### *B. Order Appealed against and Confirmed.*

*See, now, Poor Law Act, 1927 (c. 14), s. 110.*

**995.** **How far conclusive—As to all the world.**—

(1) An order of removal discharged on appeal is only conclusive as against applt. parish.

(2) An order of removal affirmed is conclusive as against all parishes with respect to settlements gained anterior to the order of removal.

(3) The person had a freehold at H., which descended to him; now if this man may go & live there forty days . . . he shall not be disturbed (*HOLT, C.J.*).—*RICELIP PARISH v. HENDEN PARISH* (1698), 5 Mod. Rep. 416; 87 E. R. 739; *sub nom.* *HARROW (INHABITANTS) v. RYSLIP (INHABITANTS)*, 2 Salk. 524; *Sett. & Rem.* 226; *sub nom.* *RYSLIP PARISH v. HENDON PARISH*, *Holt, K. B.* 572; *sub nom.* *R. v. RICELIP PARISH*, 3 Salk. 261; *sub nom.* *R. v. RISLIP, HENDON & HARROW (INHABITANTS)*, 1 Ld. Raym. 394, 425; *sub nom.* *RISLIP, HENDON, & HARROW CASE*, *Fortes. Rep.* 311.

*Annotations*.—*As to (1)* *Apld.* *Kingsbury, Warwick v. Coleshill, Warwick* (1827), 5 L. J. O. S. M. C. 130. *Refd.* *R. v. Knappott* (1824), 2 B. & C. 883. *As to (2)* *Refd.* *Nympsfield Parish v. Woodchester Parish* (1742), 2 Stra. 1172; *R. v. Knappott* (1824), 2 B. & C. 883. *As to (3)* *Consd.* *R. v. Houghton le Spring* (1801), 1 East, 247. *Refd.* *Moresley v. Granborough* (1719), *Fortes. Rep.* 302. *Generally, Mentd.* *Garland v. Burton* (1738), *Andr.* 291; *Holsham v. Blackwood* (1851), 11 C. B. 111.

**996.** — — — — — *MYNTON (INHABITANTS) v. STONY STRATFORD (INHABITANTS)*, No. 964, *ante*.

**997.** — — — — — Order of justices confirmed on appeal is final to applt.

If an order of justices for the removal of a poor person be confirmed on appeal, applt. are ever concluded from discharging themselves of that poor person, as to all places (*per CUR.*).—*ANON.* (1701), 12 Mod. Rep. 548; 88 E. R. 1510.

**998.** — — — — — *SWANSCOMB PARISH v. SHENSFIELD PARISH*, No. 965, *ante*.

**999.** — — — — — (1) An order of reversal is final only between the two parishes (*per CUR.*).

(2) If it be confirmed, it is final as to all the world; & therefore no new settlement appearing, the order of removal from B. must be quashed (*per CUR.*).—*LITTLE BITHAM PARISH v. SOMERBY PARISH* (1719), 1 Stra. 232; 93 E. R. 491.

**Sect. 9.—Settlement by estoppel: Sub-sect. 2, B. & C. (a), (b) & (c).]**

**1000.** ———.]—After a settlement proved at the sessions by appts. in a third parish, a rated inhabitant of such third parish is not a competent witness for resps. to disprove that settlement; being directly interested in the judgment of the sessions on that question; inasmuch as the order, if confirmed, would be conclusive evidence of the settlement being at that time in appts. parish, upon a subsequent order of removal from thence to such third parish.—*R. v. TERRINGTON (INHABITANTS)* (1812), 15 East, 471; 104 E. R. 921.

**1001.** ———.]—Notwithstanding evidence subsequently discovered—Which might have affected result.]—*NORTHPELTERTON PARISH v. HORSINGTON PARISH* (1733), Kel. W. 241; 2 Barn. K. B. 148; 25 E. R. 591.

**1002.** ———.]—As against subsequent order.]—*R. v. GLASTON, RUTLANDSHIRE (INHABITANTS)* (1728), 2 Sess. Cas. K. B. 110; 93 E. R. 158.

**1003.** As to what matters conclusive—Removal of father—Whether conclusive of settlement of son.]—Order of removal of father confirmed is conclusive as to the settlement of son, although the son be not named in the order, & be emancipated at the time of making it, if he hath not acquired any settlement in his own right.—*R. v. CATTERALL TOWNSHIP* (1817), 6 M. & S. 83; 2 Bott, 724; 105 E. R. 1174.

*Annotations:—Reid. R. v. Wye* (1838), 7 Ad. & El. 761; *R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780; *Uxbridge Union v. Winchester Union* (1904), 91 L. T. 533. *Mentd. Russell v. Russell*, [1924] A. C. 687.

**1004.** ———.]—Settlement of pauper born of void marriage—Marriage declared void after confirmation of removal order.]—D. & E. were removed, by an order describing them as man & wife, with their six children, named in the order of removal, to W. The order was appealed against. Pending the appeal, the parish officers of W. instituted a suit in the Spiritual Ct. to dissolve the marriage as incestuous. After this, the order was confirmed; & subsequently, the Spiritual Ct. decreed the marriage incestuous, & void from the beginning to all intents & purposes. Pauper was born of the supposed marriage, before the order, but he was not named in it, & he was unemancipated, & had gained no settlement, when the order was made:—*Held*: the confirmation of the order, under these circumstances, was not conclusive proof of a derivative settlement of the pauper in W., on appeal against an order removing the pauper to W. after the decree of the Spiritual Ct., but, on such appeal, W. might show, by the decree, that, since the first order, the marriage had become void *ab initio* & the pauper illegitimate.—*R. v. WYE (INHABITANTS)* (1838), 7 Ad. & El. 761; 3 Nev. & P. K. B. 6; 1 Will. Woll. & H. 128; 7 L. J. M. C. 18; 2 Jur. 298; 112 E. R. 656.

*Annotations:—Distd. Barton Regis Union v. Liverpool (Churchwardens, etc.)* (1878), 47 L. J. M. C. 62. *Reid. R. v. Son* (1843), 4 Q. B. 83; *Heston Overseers, etc. v. St. Bride Overseers, etc.* (1853), 22 L. J. M. C. 65; *R. v. Hartington Middle Quarter* (1855), 4 E. & B. 780. *Mentd. De Mora v. Concha* (1885), 29 Ch. D. 268; *Russell v. Russell*, [1924] A. C. 687.

**1005.** Whether decision need be on merits.]—On appeal against a removal from H. to M., the ground of appeal stated was a subsequent settlement in a third township, E., by renting a tenement; but, the notice of grounds stating no residence in E., the sessions confirmed the order. Afterwards, the pauper was removed from M. to E., on the same ground of settlement properly stated. E. appealed, stating, as a ground, the confirmation of the former order:—*Held*: this was conclusive against M.; & the sessions having

confirmed the order of removal to E., considering the former decision not to have been on the merits, this Ct. quashed such order of confirmation, holding the former decision to have been on the merits.—*R. v. EVENWOOD & BARONY (INHABITANTS)* (1843), 3 Q. B. 370; 3 Gal. & Dav. 145; 12 L. J. M. C. 101; 7 J. P. 626; 7 Jur. 697; 114 E. R. 548.

*Annotations:—Folld. R. v. Charlbury* (1843), 3 Q. B. 378. *Reid. Ex v. Ackworth Overseers* (1843), 3 Q. B. 397; *R. v. Ellel* (1843), 7 J. P. 721; *R. v. Perranzabuloe* (1844), 8 J. P. 516; *R. v. Conningsby* (1848), 11 L. T. O. S. 103. *Mentd. De Mora v. Concha* (1885), 29 Ch. D. 268.

**1006.** ———.]—On appeal against an order of removal before actual removal, the sessions refused to hear appts. because they had not sent their grounds of appeal fourteen days before the sessions; & the order was confirmed, with the special entry, "Order confirmed, not on the merits, no due notice having been given":—*Held*: (1) the right to appeal against the actual removal was not lost by lodging the previous appeal against the order; (2) appts. were not estopped by the special entry; as, although it showed that the order was confirmed, it also showed that appts. had no right to be heard, & were, in fact, unheard, not from a failure of proof after the matter of inquiry had been entered on, but on account of a preliminary objection.—*R. v. MACCLESFIELD (INHABITANTS)* (1849), 13 Q. B. 881; 3 New Mag. Cas. 199; 4 New Sess. Cas. 56; 19 L. J. M. C. 38; 14 L. T. O. S. 4; 13 J. P. 635; 13 Jur. 1048; 116 E. R. 1500.

*Annotations:—Reid. R. v. Over* (1849), 14 L. T. O. S. 269; *Uxbridge Union v. Winchester Union* (1904), 91 L. T. 533. *Mentd. R. v. Broadthampton* (1858), 1 E. & E. 154.

**1007.** ———.]—An order adjudicating on the settlement of a pauper is conclusive as a judgment *in rem* as to the settlement of such pauper, & is none the less conclusive because an abortive appeal has been made against such order, which appeal failed because the notice of appeal was out of time, & so was not heard on its merits.—*UXBRIDGE UNION v. WINCHESTER UNION* (1904), 91 L. T. 533; 68 J. P. 525; 2 L. G. R. 969, D. C.

**C. Order Appealed against and Quashed.**

**(a) In General.**

*See, now, Poor Law Act, 1927 (c. 14), s. 116.*

**1008.** How far conclusive—Whether against all parishes.]—*RICELIP PARISH v. HENDEN PARISH*, No. 995, *ante*.

**1009.** ———.]—*MYNTON (INHABITANTS) v. STONY STRATFORD (INHABITANTS)*, No. 964, *ante*.

**1010.** ———.]—*ST. MICHAEL, BEDENHAM (INHABITANTS) v. KINGSTON-BOWSEY (INHABITANTS)*, No. 1025, *post*.

**1011.** ———.]—*SWANSCOMB PARISH v. SHENSFIELD PARISH*, No. 965, *ante*.

**1012.** ———.]—*LITTLE BITHAM PARISH v. SOMERBY PARISH*, No. 999, *ante*.

**1013.** ———.]—An order reversed is final to the parties.—*SOMERBY PARISH v. STRETTON PARISH* (1719), 11 Mod. Rep. 309; 88 E. R. 1058.

**1014.** ———.]—An order of quarter sessions quashing an order of removal & unappealed against is conclusive between the parties.—*R. v. LEIGH (INHABITANTS)* (1778), Cald. Mag. Cas. 59; 1 Doug. K. B. 46; 99 E. R. 33.

**1015.** ———.]—Reversal on special grounds—Pauper not chargeable—Subsequently becoming chargeable.]—*OSGATHORPE PARISH v. DISEWORTH PARISH* (1746), 2 Stra. 1256; 93 E. R. 1165; *sub nom. R. v. OSGATHORPE (INHABITANTS)*, Burr. S. C. 261.

*Annotations:—Appl. R. v. Wick St. Lawrence* (1833), 5 B. & Ad. 526. *Distd. R. v. Charlbury & Walcott* (1843), 13 L. J. M. C. 19.

**1016.** — Question for sessions.—On consideration of grounds.]—On appeal against an order of removal from C. to B., the ground of appeal was, that a former order of removal from C. to B. had been quashed on appeal. On trial of the present appeal, it was shown that the first order had been quashed because the examination did not give the date of the birth of the pauper's husband. On the present appeal, the sessions quashed the second order, subject to a case, which stated that the first order was quashed because the sessions, on the first appeal, thought the omission material. This ct. confirmed the second order of sessions, no ground being shown on which their finding, as to the view taken by the sessions on the first appeal, could be treated as incorrect.—*R. v. CHARLBURY & WALCOTT (INHABITANTS)* (1843), 3 Q. B. 378; 3 Gal. & Dav. 177; 13 L. J. M. C. 19; 8 J. P. 57; 7 Jur. 1083; 114 E. R. 551; *sub nom.* *R. v. CHORLBURY & WALCOTT*, 2 L. T. O. S. 147.

*Annotations* :—*Consd. R. v. Perranzabuloe* (1841), 3 Q. B. 400. *Distd. R. v. Flintshire JJ.* (1844), 13 L. J. M. C. 163; *R. v. Conningsby* (1848), 11 L. T. O. S. 103. *Refd. Ex p. Aokworth Overseers* (1843), 3 Q. B. 397; *R. v. Landkey* (1847), 11 J. P. 440.

**1017.** — — — — —.]—When on appeal against an order adjudging the settlement of a pauper, a case has been reserved by the sessions for the opinion of the Ct. of Q. B., the judgment of that ct. thereon, & the reasons for it, are adopted by the sessions; and if, therefore, the order is quashed generally, it is competent to the sessions to inquire on a future occasion whether the judgment turned on the question of settlement.—*R. v. St. PETER'S, DROITWICH (INHABITANTS)* (1847), 9 Q. B. 886; 2 New Mag. Cas. 68; 2 New Sess. Cas. 531; 16 L. J. M. C. 38; 8 L. T. O. S. 363; 11 J. P. 212; 11 Jur. 225; 115 E. R. 1514.

*Annotations* :—*Expld. Heston Overseers v. St. Bride's Overseers* (1853), 1 E. & B. 583. *Refd. R. v. Widecombe in the Moor* (1847), 9 Q. B. 894.

**1018.** — — — — —.]—Applts., at sessions, relied upon the quashing of a former order of removal, relating to the same paupers, on the trial of an appeal between the same parishes. The entry made by the ct. as to that order was, that it was quashed by consent of parties, for the "informality & insufficiency of the examinations." The sessions having, on the subsequent appeal, decided, subject to the opinion of this ct., that the order was quashed on grounds which did not make the quashing conclusive:—*Held*: the sessions had a right to decide this on consideration of the circumstances before them, & this ct. ought not to interfere with their finding.—*R. v. DUKINFIELD (INHABITANTS)* (1848), 11 Q. B. 678; 2 New Mag. Cas. 393; 3 New Sess. Cas. 126; 17 L. J. M. C. 113; 10 L. T. O. S. 522; 12 J. P. 230; 12 Jur. 674; 116 E. R. 627.

**1019.** Effect of conclusiveness.—New settlement must be shown.]—After an order of removal is quashed, the party cannot be removed a second time without stating a new settlement.—*FOSTON PARISH v. CARLTON PARISH* (1723), 1 Stra. 567; 93 E. R. 704.

**1020.** — — — — —.]—A judgment of the ct. of quarter sessions quashing an order for the removal of a pauper, with the consent of resp. parish, is conclusive evidence to relieve applt. parish on any subsequent dispute between these parishes as to the settlement of the same pauper at that time; & if not *prima facie* evidence that the settlement is in the unsuccessful parish, is, at least, sufficient to call upon that parish to show a settlement somewhere.—*KINGSBURY (INHABITANTS) v.*

*COLESHILL (INHABITANTS)* (1827), 5 L. J. O. S. M. C. 130.

**1021.** — Pending order not affected by subsequent statute.]—An order for the removal of a pauper to the place of his birth settlement confirmed by sessions subject to a case, was quashed on the ground that the facts showed a settlement which the pauper derived from his grandfather. Between the order at sessions & the decision upon the case, Divided Parish & Poor Law (Amendment) Act, 1876 (c. 61), abolishing a derivative settlement, such as that above mentioned, became law, & a fresh order for the removal of the pauper to the place of his birth settlement was made:—*Held*: such order must be quashed, for the quashing of the first order was a conclusive adjudication of a settlement of the pauper, inasmuch as the facts upon which it proceeded were unaltered, & its validity could not be affected by a subsequent change in the law, & further, because it must be taken to be an order "pending" at the date of the Act, & therefore under sect. 36 excluded from its operation.—*BARTON REGIS UNION v. LIVERPOOL OVERSEERS* (1878), 3 Q. B. D. 295; 47 L. J. M. C. 62; 37 L. T. 713; 42 J. P. 341; 20 W. R. 282, D. C.

(b) Quashing for Informality.

*See, now, Poor Law Act, 1927 (c. 14), s. 116.*

**1022.** Whether conclusive.—As between contending parties.]—An order of removal quashed for informality, is not conclusive of the settlement between the two contending parishes.—*R. v. PENGE (INHABITANTS)* (1793), Nolan, 176.

**1023.** — — — — —.]—An order of removal quashed for form is not conclusive on the parties.—*R. v. St. ANDREW, HOLBORN (INHABITANTS)* (1796), 6 Term Rep. 618; 101 E. R. 732.

*Annotation* :—*Appld. R. v. Wick St. Lawrence* (1833), 2 Nov. & M. K. B. 289.

**1024.** — — — — —.]—Where the examinations do not disclose any evidence of chargeability, & the order of removal is on that ground quashed generally by order of sessions, such order of sessions cannot be treated as conclusive of the settlement of the pauper; & at a subsequent sessions the ground on which the former order was quashed may be shown.—*R. v. PERRANZABULOE (INHABITANTS)* (1844), 3 Q. B. 400; 3 Gal. & Dav. 315; 1 New Sess. Cas. 16; 13 L. J. M. C. 47; 8 J. P. 516; 8 Jur. 59; 114 E. R. 560; *sub nom.* *R. v. PERANZAMBULOE*, 2 L. T. O. S. 326.

*Annotation* :—*Refd. R. v. Landkey* (1847), 11 J. P. 440.

(c) Quashing "On the Merits."

*See, now, Poor Law Act, 1927 (c. 14), s. 116.*

**1025.** Whether conclusive.—As against parish obtaining order.]—The reversal of an order of removal upon the merits precludes the parish who obtained such order from insisting at any future period that the pauper was settled in the parish to which he was removed.—*St. MICHAEL, BEDENHAM (INHABITANTS) v. KINGSTON-BOWSEY (INHABITANTS)* (1699), 2 Salk. 486; 91 E. R. 418; *sub nom.* *KINGSTON BOWSEY (INHABITANTS) v. BEDDINGHAM, SUSSEX (INHABITANTS)*, 1 Ld. Raym. 513; *sub nom.* *BEDDINGHAM PARISH v. KINGSTON BOWSEY PARISH*, Carth. 516.

*Annotation* :—*Refd. Nympsfield Parish v. Woodchester Parish* (1742), 2 Stra. 1172.

**1026.** — As to contending parties.]—Pauper was removed from B. to C. on an examination of himself, stating a settlement by occupying a tenement from June, 1827, to June, 1828. This was denied by the notice of objections; & on appeal, the occupation appeared to be from June, 1828,

**Sect. 9.—Settlement by estoppel: Sub-sect. 2, C. (c) & (d), D. & E.]**

to Aug. 1829; whereupon the sessions quashed the order. Afterwards, the same pauper was removed from B. to C. on a fresh examination of himself, stating the settlement as before, but with the right dates. The order was objected to, on the ground that the former order was conclusive between B. & C.:—*Held*: it was so: &, the sessions having affirmed the order, this ct. quashed the order of sessions.—*R. v. CLINT (INHABITANTS)* (1841), 11 Ad. & El. 624, n.; 1 Gal. & Dav. 245; 10 L. J. M. C. 151; 5 J. P. 783; 113 E. R. 551.

**1027. ———.]**—The sessions, on appeal, quashed an order of removal from P. to L., founded on examinations which stated a settlement by renting & occupying a house in L. for one year at £22 a year, & being assessed to the poor rate in L., which the party had paid as the occupier of the said house, during his occupation. The ground of appeal was that the examination was defective as not stating in what year or years the party rented & occupied; or that the house was rented by him in L., or occupied, under a yearly hiring & the rent to the amount of £10 actually paid for one whole year at the least, or that such house was actually occupied under a yearly hiring by him & the rent, etc., paid by him for the same, or that he had been assessed to the poor rate & paid the same in respect of such house for one year. The order of sessions stated the order of removal to be quashed on the ground of the "examination" "disclosing no settlement on the face thereof, & appts. having given notice thereof in their grounds of appeal." The pauper being removed again from P. to L., it was stated, & relied upon, as a ground of appeal, that the examinations did not show any settlement acquired since the above order of sessions; & in fact no new settlement appeared. The sessions, however, confirmed the new order of removal, subject to a case, stating all the circumstances of the former decision, & submitting, as the question for this ct., whether or not the former order of sessions was conclusive:—*Held*: this ct., being enabled by the case stated to see that the former order of sessions had disposed of the substantial question, might pronounce that order conclusive, though the sessions, by their last order, had decided the contrary, & the latter order was quashed.—*R. v. ST. MARY, LAMBETH (INHABITANTS)* (1845), 7 Q. B. 587; 1 New Mag. Cas. 359; 2 New Sess. Cas. 36; 14 L. J. M. C. 126; 5 L. T. O. S. 196; 9 J. P. 552; 9 Jur. 758; 115 E. R. 610.

*Annotation*:—*Apld. R. v. Ellal* (1845), 9 Jur. 758.

**1028. ———.]**—Appls. against an order of removal objected, in their grounds of appeal, that the examination did not properly show the residence necessary to the acquiring settlement, & that other specified facts were insufficiently alleged; they also denied the settlement. At the sessions this order was "on motion of said resps., set aside for insufficiency of examination." Afterwards resps. again removed the paupers to applt. township on an examination disclosing substantially the same grounds of settlement as before:—*Held*: the first order of sessions was conclusive between the parties on the point of settlement.—*R. v. ELLAL (INHABITANTS)* (1845), 7 Q. B. 593; 2 New Sess. Cas. 39; 14 L. J. M. C. 127, n.; 9 J. P. 744; 9 Jur. 758; 115 E. R. 613.

*Annotation*:—*Reid. R. v. Conningsby* (1848), 11 L. T. O. S. 103.

**1029. ———.]**—*BARTON REGIS UNION v. LIVERPOOL OVERSEERS*, No. 1021, *ante*.

**1030. What is "on merits"—Respondents declining to go into case.]**—On appeal against an order of removal grounded on a settlement by hiring & service, resps., discovering that the examination served by them on appls. did not state a residence in applt. parish, moved, at the sessions, to discharge their own order, & it was quashed, generally, with the consent of appls., no reason, however, being stated either to appls. or to the justices. Resps. afterwards removed the pauper again to the same parish, no change of circumstances having intervened; &, on appeal, contended that the discharge of the former order was not conclusive, the merits not having been in question:—*Held*: the order was conclusive.

Where an order was quashed merely because resps. decline going into their case, that is a decision on the merits (*COLERIDGE, J.*).—*R. v. CHURCH KNOWLE (INHABITANTS)* (1837), 7 Ad. & El. 471; 2 Nev. & P. K. B. 359; Nev. & P. M. C. 353; Will. Woll. & Dav. 627; 7 L. J. M. C. 4; 1 J. P. 248; 1 Jur. 841; 112 E. R. 547.

*Annotations*:—*Reid. R. v. Landkey* (1847), 9 Q. B. 905; *R. v. St. Peters, Droitwich* (1847), 2 New Sess. Cas. 531.

**1031. ——— Examinations insufficient.]**—Examinations transmitted with an order of removal from S. to A., set out a former order of removal, unappealed against, also from S. to A. The order appeared to have been suspended, &, on appeal against the present order, it was objected, on the hearing, that the examinations did not show that the suspension had been regularly taken off, or the order of removal executed. The sessions held the objections fatal; but, to give an opportunity of removing again, they entered on their records that the order was discharged "not on the merits"; appls.' counsel objecting, & insisting on their right to have the appeal fully tried, so as finally to dispose on the ground of removal. On motion for a *mandamus* to the sessions to erase the words "not on the merits," or to enter continuances & hear the appeal:—*Held*: the entry was wrong, for the decisions was a conclusive one upon the point of settlement.—*Ex p. ACKWORTH OVERSEERS* (1843), 3 Q. B. 397; 1 Dow. & L. 718; 13 L. J. M. C. 38; 8 J. P. 261; 114 E. R. 558; *sub nom. R. v. WEST RIDING OF YORKSHIRE JJ., Ex p. ACKWORTH OVERSEERS*, 8 Jur. 291.

*Annotations*:—*Consd. R. v. St. Anne's, Westminster* (1847), 9 Q. B. 878; *R. v. Middlesex JJ.* (1877), 2 Q. B. D. 516. *Reid. Ex p. Pontefract Overseers* (1843), 3 Q. B. 391. *Mentd. R. v. Paynter* (1845), 9 Jur. 897.

**1032. Presumption that quashing "on merits".]**—Pauper's father was born in the parish of S.; & pauper's mother & her family, after the father's death, were relieved by S., while resident in another parish, down to 1817, when pauper was apprenticed, but not so as to gain a settlement. In 1824, the mother was removed, by order describing her as the widow of pauper's father, to S.; but the order was quashed on appeal. Pauper was then twenty-six years old; he was not named in the order of 1824; nor did it appear where he had resided since 1817, except as above mentioned:—*Held*: (1) on appeal against a subsequent order of justices removing pauper to S., the discharge of the order made in 1824 was material evidence for S.; (2) in the absence of proof to the contrary, it must be presumed that the order of 1824 was discharged on the merits as to settlement, & it could not be presumed, in the absence of proof, that the pauper was at that time emancipated.—*R. v. YEOVELEY (INHABITANTS)* (1838), 8 Ad. & El. 806; 1 Per. & Dav. 60; 1 Will. Woll. & H. 614; 8 L. J. M. C. 9; 3 J. P. 418; 112 E. R. 1048.

*Annotation*:—*Generally, Mentd. Police Comr. for the Metropolis v. Donovan* (1903), 83 L. T. 555.

## (d) Quashing "Generally."

See, now, Poor Law Act, 1927 (c. 14), s. 116.

**1033. Admissibility of evidence—Of grounds for quashing.]**—Where an order of removal is appealed against, & is quashed generally by the sessions, applt. on the trial of another appeal may show by evidence the distinct ground upon which the former order was quashed.—*R. v. WHEELOCK, CHESTER (INHABITANTS)* (1826), 5 B. & C. 511; 2 Bott. 797; 108 E. R. 190.

*Annotations:—*Consd. *R. v. Wick St. Lawrence* (1833), 5 B. & Ad. 526. *Reid. R. v. Yeovely* (1838), 8 Ad. & El. 806; *R. v. Charlbury & Walcott* (1843), 3 Q. B. 378; *R. v. Evenwood & Barony* (1843), 7 Jur. 687; *R. v. Lancashire JJ.* (1843), 3 Q. B. 367; *R. v. Great Bolton* (1845), 7 Q. B. 387.

**1034. ———.]**—An order of sessions, quashing an order of removal generally, is conclusive evidence between the parties to the appeal, that when the order of removal was made, applt. parish was not bound to receive the pauper, but it is only *prima facie* evidence that the pauper was not settled in that parish; & therefore, upon the trial of an appeal between the same parishes against a second order of removal of the same party, the removing parish may show by parol evidence that the first order of removal was quashed on the ground that the pauper resided on a tenement of his own, which made him irremovable, though it did not confer a settlement; & that he afterwards sold the tenement, & thereby became removable.—*R. v. WICK ST. LAWRENCE (INHABITANTS)* (1833), 5 B. & Ad. 526; 2 Nev. & M. K. B. 289; 1 Nev. & M. M. C. 391; 3 L. J. M. C. 12; 110 E. R. 885.

*Annotations:—*Consd. *R. v. Church Knowle* (1837), 2 Nev. & P. K. B. 359; *R. v. Great Bolton* (1845), 7 Q. B. 387; *It. v. St. Anne's, Westminster* (1847), 9 Q. B. 878. *Apud. Heston, Overseers v. St. Bride's Overseers* (1853), 1 E. & B. 583. *Reid. R. v. Cottingham* (1834), 2 Ad. & El. 250; *R. v. Charlbury & Woolcot* (1843), 8 J. P. 57; *R. v. Ellal* (1843), 2 L. T. O. S. 120; *Russell v. Russell* [1924] A. C. 687.

**1035. ———.]**—Where upon a case sent up to the Ct. of Q. B. containing questions as to points of substance as well as form relating to its order of the removal of a pauper, the decision is given upon the formal objections alone, but the order is quashed generally, evidence is admissible upon a subsequent appeal, to show that the formal objections alone were decided, & its settlement therefore not finally determined.—*It. v. ST. PETER'S, DROITWICH (INHABITANTS)* (1847), 9 Q. B. 886; 2 New Mag. Cas. 68; 2 New Sess. Cas. 531; 16 L. J. M. C. 38; 8 L. T. O. S. 363; 11 J. P. 212; 11 Jur. 225; 115 E. R. 1514.

*Annotations:—*Consd. *Heston Overseers v. St. Bride's Overseers* (1853), 1 E. & B. 583. *Reid. It. v. Widecombe in the Moor*, (1847), 9 Q. B. 894.

## D. Abandoned Order.

See, now, Poor Law Act, 1927 (c. 14), s. 116.

**1036. Whether conclusive.]**—*R. v. LLANRHYDD (INHABITANTS)* (1770), Burr. S. C. 658; 2 Bott. 711.

*Annotations:—*Reid. *R. v. Diddlebury* (1810), 12 East, 559; *R. v. Norfolk JJ.* (1822), 5 B. & Ald. 484; *R. v. Townstal, It. v. Stayley* (1843), 3 Q. B. 367.

**1037. ———.]**—The parish in whose favour an order of removal is made may by consent abandon it, without waiting to appeal to the sessions & having it quashed there; & after such order cancelled by the removing magistrates, with the consent of both parishes before the time of appeal, another order made by them, removing the pauper to a different parish, was held good.—*R. v. DIDDLEBURY (INHABITANTS)* (1810), 12 East, 359; 104 E. R. 141.

*Annotations:—*Reid. *R. v. Norfolk JJ.* (1822), 5 B. & Ald. 484; *R. v. West Riding JJ.* (1842), 2 Q. B. 705.

**1038. ———.]**—Though abandonment leads to quashing.]—Where applts. against an order of removal have delivered grounds of appeal containing objections of form, & resps., having given notice of abandonment, apply to have their own order quashed, such quashing is not conclusive, though there be, in the grounds of appeal, other objections going to the merits, & though the notice does not specify the grounds of abandonment. Therefore, where, under such circumstances, the sessions had quashed the order, with an entry, Order quashed, without any special entry, as the ct. have no evidence before them to enable them to make such entry:—*Held: a subsequent ct. of quarter sessions, on appeal against a new order bringing the same settlement into question, might properly decide that the quashing was not conclusive.*—*R. v. LANDKEY (INHABITANTS)* (1847), 9 Q. B. 905; 2 New Mag. Cas. 173; 2 New Sess. Cas. 623; 16 L. J. M. C. 81; 9 L. T. O. S. 75; 11 J. P. 440; 11 Jur. 308; 115 E. R. 1522.

As to abandoned orders generally, see Part VI., Sect. 3, sub-sect. 1, O., *post*.

## E. Void Order.

**1039. Whether conclusive—General rule.]**—*It. v. CORSHAM & WESTBURY (INHABITANTS)* (1701), Fortes. Rep. 315; 92 E. R. 868.

**1040. ———.]**—Order not appealed against—Made without jurisdiction.]—*R. v. CHILVERSCOTON (INHABITANTS)*, No. 1232, *post*.

**1041. ———.]**—Removal to place not maintaining its own poor.]—A legal order of removal is conclusive if appealed from; but an order of removal to a place which does not maintain its own poor separately is a mere nullity.—*R. v. SWALCLIFFE* (1783), Cald. Mag. Cas. 248; 2 Const. pp. 633, 690.

*Annotation:—*Reid. *It. v. Bingley* (1833), 2 Nev. & M. K. B. 103.

**1042. Exception to rule—Order acted upon—Nullity cannot be set up.]**—By an order of removal under the hands & seals of two justices, a pauper was removed from the township of K., to the "parish, township, or place of B.," & on the removal the officer of K. received from a person, to whom he delivered the pauper in B., the previously incurred costs of maintenance; it proved that B. was a place in the township of O., which was a township maintaining its own poor, which did not maintain its own poor, & the person to whom the pauper was delivered was an overseer of O.; the order was duly filed with the clerk of the peace, but it was appealed against by persons calling themselves "inhabitants of B.," & the grounds of appeal recited that they were persons who conceived themselves to be aggrieved by the order; the order was also appealed against by the township of O.; at the sessions both appeals were heard, & in each appeal the order was quashed with costs:—*Held: the appeal by the inhabitants of B. was a valid appeal, & the order of sessions was rightly made, for that the township of K. was estopped from saying that the order of removal, being directed to a place not maintaining its own poor, was a nullity.*—*R. v. WESTMORLAND JJ.* (1843), 1 Dow. & L. 178; 12 L. J. M. C. 113; 7 J. P. 658; 7 Jur. 898.

*Annotations:—*Mentd. *R. v. Eardisland* (1854), 18 J. P. 649; *R. v. St. Mary, Lambeth Highways Surveyor* (1854), 24 L. T. O. S. 144.

**1043. ———.]**—Where, in 1833, an order of removal from parish B. to H. was obtained, & the pauper removed, but the copy of order then delivered was defective and bad, yet the order of removal never was appealed against:—*Held: the*

*Sect. 9.—Settlement by estoppel: Sub-sect. 2, E.; sub-sect. 3. Sects. 10 & 11. Part VI. Sect. 1: Sub-sects. 1, 2 & 3. Sect. 2: Sub-sect. 1, A. & B.]*

objection that the copy was a nullity could not now be set up.—*R. v. WITNEY UNION* (1864), 28 J. P. 661.

#### SUB-SECT. 3.—MAINTENANCE ORDER.

**1044. Whether settlement determined—Maintenance order in bastardy.]—**Order for maintenance does not determine the settlement of a bastard.—*BUDWORTH PARISH v. DUMPLY TOWNSHIP* (1707), 1 Salk. 123; *Sett. & Rem.* 159; 91 E. R. 116.

**1045. — Maintenance order of lunatic.]—**On appeal against an order of maintenance of a lunatic pauper under 8 & 9 Vict. c. 126, s. 62, upon an adjudication of settlement under 8 & 9 Vict. c. 126, s. 58, a prior order of sessions adjudi-

cating on the settlement, upon an appeal, between the same parties, against an ordinary order of removal, is conclusive as to the settlement at the time of such prior order; there being no difference, as to this rule of evidence, between orders of maintenance of lunatics on adjudication of the settlement & ordinary orders of removal.—*HESTON OVERSEERS v. ST. BRIDE'S OVERSEERS* (1853), 1 E. & B. 583; 22 L. J. M. C. 65; 17 Jur. 757; 118 E. R. 556; *sub nom. R. v. HESTON (CHURCHWARDENS)*, 20 L. T. O. S. 235; 17 J. P. 408; 1 W. R. 148.

#### SECT. 10.—SETTLEMENT BY MARRIAGE

*See Sect. 3, sub-sect. 3, ante.*

#### SECT. 11.—SETTLEMENT BY PARENTAGE.

*See Sect. 3, sub-sect. 4, ante.*

## Part VI.—Removal.

### SECT. 1.—WHEN ORDER MAY BE MADE.

#### 'SUB-SECT. 1.—IN GENERAL.

*See Poor Law Act, 1927 (c. 14), ss. 121, 122.*

**1046. Pauper must have become chargeable.]—**Certificate man is not removable till actually chargeable.—*LITTLE-KIRE PARISH v. WOOLFALL PARISH* (1703), 2 Salk. 530; 91 E. R. 451.

**1047. —.]—**A person is not to be removed, until he becomes chargeable to the parish, in which he resided under a certificate.—*R. v. KINGSWOOD (INHABITANTS)* (1756), *Say.* 283; 96 E. R. 881.

**1048. —.]—**(1) A certificate person cannot be removed under Poor Removal Act, 1896 (c. 30), till he is actually chargeable. Therefore a probability that one of the certificated persons residing together in one family, will become chargeable, as if a female be pregnant with a bastard, is no cause for removing them, & where relief was given to a son & grandson living in a separate house from the father, it was no ground to remove him & his other children, living with him. But that part of the family only which was chargeable was removable.

(2) A certificate promising to receive the paupers when requested, means only when they shall be legally requested, namely, being requested by two justices when the paupers become chargeable. If it meant to receive them before they became chargeable, it would be void under Poor Removal Act, 1896 (c. 30), for a certificate is only binding when it is conformable to that statute.—*R. v. ST. MARY WESTPORT (INHABITANTS)* (1789), 3 Term Rep. 44; 100 E. R. 446.

*Annotations:—As to (1) Held. R. v. Darlington* (1792), 4 Term Rep. 797; *R. v. Tibbenham* (1808), 9 East, 388.

**1049. —.]—**A hired a house for £10 a year, & put into it his furniture, worth above £15, & lived in it above a year. Having applied for relief, the parish officers were compelled by a magistrate's order to grant it. After the relief was granted, the landlord demanded his rent, but allowed A. a fortnight's time to pay it. Before that time expired, & before the rent was paid, the pauper was removed to another parish by an order of two justices. After he had been removed, he sold his furniture, & paid the year's rent:—*Held:* the parish officers having been compelled to grant relief, A. had thereby become actually

chargeable, & was therefore removable by Poor Removal Act, 1795 (c. 101), although he had resided above forty days on the tenement.

It is said that although he had in fact received relief from that parish, yet as he possessed property, he was not actually chargeable. But I think that, as the parish did not act fraudulently, & as they were compelled to grant him relief by an order of justices, the pauper is to be deemed as actually chargeable (*BAYLEY, J.*).

Poor Removal Act, 1795 (c. 101), take away the power of removing . . . persons likely to become chargeable, but gives the power to remove persons actually chargeable, at any time after they have become so & before they have actually gained a settlement in the removing parish (*BAYLEY, J.*).—*R. v. AMPHILL PARISH* (1824), 2 B. & C. 847; 4 Dow. & Ry. K. B. 447; 2 Dow. & Ry. M. C. 297; 107 E. R. 596.

*Annotation:—Held. R. v. Willoughby* (1835), 4 Ad. & El. 143.

**1050. —.]—**(1) On motion for an attachment for disobeying a Crown Office subpoena to give evidence at petty sessions, on an application to be made for an order of removal, the affidavits stated that application had been made to the justices "on behalf of the overseers" to examine & inquire into the legal settlement" of the pauper: writ refused, because the affidavits did not properly state any complaint of chargeability, & therefore did not show jurisdiction in the justices to entertain the application. Affidavits in support of a like motion stated that the party subpoenaed came to the petty sessions, held before "two justices of the peace," not stating them to be of the quorum; that another witness was first examined, & that the justices then required the subpoenaed party to be sworn, but that he refused, not objecting to the jurisdiction, but denying that he was bound to give evidence against his own parish:—*Held:* the quorum authority might be presumed, from the acting of the justices, & because the party subpoenaed, though he took an objection before them, did not dispute their jurisdiction.

(2) It is no answer to such motion for attachment that the subpoena was issued & served before any complaint of chargeability had been made.



(3) Since 3 & 4 Vict. c. 26, rated inhabitants & parish officers are compellable to give evidence on an application for an order of removal.—*R. v. VICKERY* (1848), 12 Q. B. 478; 3 New Mag. Cas. 23; 3 New Sess. Cas. 193; 17 L. J. M. C. 129; 11 L. T. O. S. 221; 12 J. P. 487; 12 Jur. 581; 116 E. R. 946.

1051. —.]—Two children under the age of sixteen resided with their father, who was a sailor in the Royal Navy, in the Medway union continuously from 1903 to 1913. Previously to 1903 the father was legally settled in the Doncaster union. The father never became chargeable in the Medway union. The children having become chargeable in the Woolwich union, an order was made adjudging that their last legal settlement was in the Doncaster union, & ordering their removal to that union:—*Held*: (1) the father, by reason of his being a sailor, never acquired a status of irremovability in the Medway union & was always removable from the union, although under Poor Removal Act, 1795 (c. 101), s. 1, he could not in fact have been removed until he had become chargeable; (2) the father being removable, the children were also removable; (3) the children, therefore, did not obtain a settlement in the Medway union by residence under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34, & (4) the children's last legal settlement was in the Doncaster union.—*DONCASTER UNION v. WOOLWICH UNION*, [1915] 1 K. B. 563; 84 L. J. K. B. 494; 112 L. T. 870; 79 J. P. 213; 13 L. G. R. 451, D. C.

1052. — & inhabiting.]—In order to give justices jurisdiction to remove a pauper to the place of his legal settlement, he must be inhabiting in & chargeable to the parish from which he is removed. The chargeability & inhabiting must be concurrent:—*Held*: therefore, an order of removal, made before the passing of Poor Law (Amendment) Act, 1844 (c. 101), s. 56, could not be supported upon an examination which only proved that the pauper was receiving relief from the removing parish in an union workhouse not stated to be situate in that parish.—*R. v. SILCHESTER* (INHABITANTS) (1849), 12 L. T. O. S. 374; 13 J. P. 51.

#### SUB-SECT. 2.—WHAT CONSTITUTES CHARGEABILITY.

See Poor Law Act, 1927 (c. 14), ss. 42, 121, 128.

1053. Question of law.]—It is not sufficient evidence to ground the removal of a pauper, if the pauper, or other witnesses, state in the examinations that the pauper is "chargeable" to the removing parish; chargeability being a conclusion of law, to be inferred by the justices from evidence of the pauper's having received relief from the parish.—*R. v. HIGH BICKINGTON* (INHABITANTS) (1844), 3 Q. B. 790; 1 Dav. & Mer. 103; 1 New Mag. Cas. 1; 1 New Sess. Cas. 121; 13 L. J. M. C. 74; 3 L. T. O. S. 52; 8 J. P. 490; 8 Jur. 377; 114 E. R. 710; *subsequent proceedings* (1846), 8 Q. B. 889.

*Annotations*:—*Consd.* *R. v. Manchester* (1845), 14 L. J. M. C. 126. *Held.* *R. v. Great Bolton* (1845), 14 L. J. M. C. 122; *R. v. Keighley* (1846), 8 Q. B. 877.

1054. Actual relief given—Though pauper possessed of means—Relief ordered by magistrates.]—*R. v. AMPHILL PARISH*, No. 1049, *ante*.

1055. Relief to children—Living in separate house.]—*R. v. ST. MARY WESTPORT* (INHABITANTS), No. 1048, *ante*.

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#### SUB-SECT. 3.—PROOF OF CHARGEABILITY.

1056. Statement that pauper "chargeable".]—*R. v. HIGH BICKINGTON* (INHABITANTS), No. 1053, *ante*.

1057. —.]—There must be legal evidence of the fact of the chargeability of a pauper to the removing parish in the examinations sent with an order of removal. A statement in the examinations, that a pauper is chargeable to the parish though coupled with a similar statement in the heading of the examinations, was held insufficient.—*R. v. LIDFORD* (INHABITANTS) (1844), 1 Dav. & Mer. 105; 1 New Mag. Cas. 50; 1 New Sess. Cas. 244; 8 J. P. 674.

1058. — & resident in workhouse.]—A statement that the pauper is residing in the workhouse in P., & is chargeable to the township of P., is sufficient evidence of chargeability.—*R. v. MANCHESTER* (INHABITANTS) (1845), 8 Q. B. 573; New Mag. Cas. 346; 2 New Sess. Cas. 15; 14 L. J. M. C. 126; 5 L. T. O. S. 172; 9 J. P. 599; 115 E. R. 991.

1059. Statement that pauper relieved—By relieving officer.]—Relief by a relieving officer of a union being no proof against any particular parish, there is no evidence to support chargeability where the relieving officer states that, pursuant to orders from the guardians, he relieved the pauper from the parochial funds, which orders were entered in a book not produced.—*R. v. SHITLINGTON* (INHABITANTS) (1845), 1 New Mag. Cas. 432; 6 L. T. O. S. 147; 9 J. P. Jo. 758.

1060. —.]—*R. v. POTT SHRIGLEY* (INHABITANTS), No. 1394, *post*.

#### SECT 2.—IRREMOVABILITY.

##### SUB-SECT. 1.—WHAT PERSONS ARE IRREMOVABLE.

###### A. Holders of Estates.

See Poor Law Act, 1927 (c. 14), s. 108 (7).

1061. Freeholder.]—A pauper cannot be removed from his freehold.—*ANON.* (1703), 6 Mod. Rep. 88; 87 B. R. 847.

1062. Leaseholder.]—A house in the parish of W. was let to A. & B., his wife, for their joint lives, & the life of the survivor. A. & B. were ejected wrongfully from the house, but their furniture, & a person who had lodged with them, remained in the house. Afterwards A. assisted the lessor to destroy the lease:—*Held*: after these transactions A. & B. continued irremovable from W., though they had become actually chargeable.—*R. v. MATLOCK* (INHABITANTS) (1834), 1 Ad. & El. 124; 3 L. J. M. C. 94; 110 E. R. 1155.

*Wife.*]—See Sub-sect. 3, A., *post*.

###### B. Persons Temporarily Sick.

See Poor Law Act, 1927 (c. 14), s. 121 (a).

1063. Pauper treated for accident.]—*R. v. ST. JAMES, BURY ST. EDMUNDS* (INHABITANTS) (1808), 10 East, 25; 2 Bott, 584; 103 E. R. 685.

*Annotations*:—*Appl.* *R. v. St. Lawrence, Ludlow* (1821), 4 B. & Ald. 660. *Consd.* *R. v. St. Paul, Covent Garden* (1846), 7 Q. B. 533; *R. v. Cuckfield* (1855), 5 E. & B. 523. *Held.* *R. v. Birmingham* (1811), 14 East, 251; *Tomlinson v. Bentall* (1826), 5 B. & C. 738; *R. v. Woolpit* (1835), 4 Ad. & El. 205; *R. v. Oldland* (1836), 4 Ad. & El. 929.

1064. —.]—Where a pauper legally settled in the parish of A., having met with a severe accident in the parish of B., was carried into an adjacent parish to be cured, & remained there for a long period of time:—*Held*: he was to be considered as casual poor in the parish of C., & was irremovable; & an order of removal to A., suspended, under the powers of Poor Removal Act,

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1795 (c. 101), & a subsequent order on the overseers of A. to pay the intermediate charges incurred by the parish of C., were invalid.—*R. v. ST. LAWRENCE, LUDLOW (INHABITANTS)* (1821), 4 B. & Ald. 680; 2 Bott, 598; 106 E. R. 1078.

*Annotations:—Conn. R. v. Woolpit* (1835), 4 Ad. & El. 205; *R. v. Cuckfield* (1855), 5 E. & B. 523.

**1065.** —[*J.*—A pauper met with an accident in the parish of A., & was wrongfully removed, but with her own consent, to the parish of B. to which she belonged:—*Held*: being casual poor in A., the overseers of that parish were liable, without an express promise, to pay the expense of her cure in the parish of B.—*TOMLINSON v. BENTALL* (1826), 5 B. & C. 738; 8 Dow. & Ry. K. B. 403; 4 Dow. & Ry. M. C. 159; 5 L. J. O. S. M. C. 7; 108 E. R. 274.

*Annotations:—Reid. Paynter v. Williams* (1833), 3 Tyr. 894; *R. v. Oldland* (1836), 4 Ad. & El. 929; *R. v. Radnorshire JJ.* (1846), 15 L. J. M. C. 151.

**1066.** —*Residence continued after recovery—Subsequent disablement by sickness.*—[Pauper, having met with an accident in the parish of C. which rendered him helpless, was taken into the workhouse of the union of which C. was a part, & there remained for seven years, the effect of the accident having in the interval, it did not appear at what precise time, ceased sufficiently to make him capable of removal, & he having since become permanently disabled by chronic rheumatism, aggravated by the accident:—*Held*: he was removable to the parish of his settlement, as being chargeable to C., it made no difference that, at the time of the accident, he was virtually resident in a third parish & irremovable thence under Poor Removal Act, 1846 (c. 66).—*R. v. CUCKFIELD (INHABITANTS)* (1855), 5 E. & B. 523; 25 L. J. M. C. 4; 26 L. T. O. S. 58; 20 J. P. 196; 1 Jur. N. S. 1047; 4 W. R. 11; 119 E. R. 575.

**1067.** *What amounts to "sickness"—Blindness.*—[Two justices made an order for the removal of a pauper, & in the warrant stated that the pauper had not "become chargeable" to the removing parish "in respect of relief made necessary by sickness or accident." On appeal, the sessions confirmed the order, subject to a case stating, amongst other things, that the pauper was afflicted with incurable blindness, which was the original & continuing cause of his chargeability:—*Held*: blindness was sickness within Poor Relief Act, 1846 (c. 66), s. 4; & the justices not having stated in the warrant that they were satisfied that the sickness would produce permanent disability, the warrant was bad.—*R. v. BUCKNELL (INHABITANTS)* (1854), 3 E. & B. 587; 2 C. L. R. 1534; 23 L. J. M. C. 129; 23 L. T. O. S. 142; 18 J. P. 503; 18 Jur. 533; 2 W. R. 427; 118 E. R. 1201.

*Annotation:—Reid. Burton v. Eyden* (1873), 28 L. T. 408.

**1068.** —*Pregnancy.*—[On appeal against an order of removal, the sessions stated for the opinion of the ct. a case: by which it appeared that the pauper was an able-bodied single woman, who, while in service, became pregnant, & was dismissed from the service; & by reason of her advanced state of pregnancy, was unable to take a situation & maintain herself. The removing justices had not found that she was chargeable in respect of relief made necessary by sickness, but only that she "has become & now is actually chargeable":—*Held*: it was not to be inferred that she had become chargeable in respect of any sickness; & the order of removal was not therefore objectionable under Poor Removal Act, 1846 (c. 66), s. 4, pregnancy not being necessarily sickness within

Poor Removal Act, 1846 (c. 66), s. 4.—*R. v. HUDDERSFIELD (INHABITANTS)* (1857), 7 E. & B. 794; 26 L. J. M. C. 169; 29 L. T. O. S. 179; 22 J. P. 160; 3 Jur. N. S. 718; 5 W. R. 629; 110 E. R. 1441.

*Annotation:—Reid. R. v. Walker* (1859), 1 F. & F. 534.

**1069.** —*Mental deficiency.*—[A pauper of weak intellect, whose place of settlement was in the W. union, & who had acquired a status of irremovability in the D. union, was found wandering in the B. union, where he became chargeable. At the time of his leaving the D. union he had not formed any intention of abandoning his residence in that union, & owing to his mental incapacity he was incapable of exercising any independent choice as to his place of residence, but his mental condition was not such as would justify his detention in a lunatic asylum:—*Held*: he was not a casual pauper in the B. union, & was removable therefrom under Poor Relief Act, 1862 (c. 12), to the W. union, notwithstanding the status of irremovability acquired in the D. union.—*R. v. WAKEFIELD UNION* (1883), 48 J. P. 326.

**1070.** *Sickness must be personal—Sickness of husband not sufficient.*—[*R. v. ST. GEORGE, MIDDLESEX (INHABITANTS)*, No. 1325, *post*.

**C. Persons having acquired Status of Irremovability.**

*See Sub-sect. 2, post.*

**SUB-SECT. 2.—ACQUISITION OF STATUS BY RESIDENCE.**

**A. In General.**

*See Poor Law Act, 1927 (c. 14), s. 108 (2).*

**1071.** *Residence completed after removal order made—Before actual removal.*—[*R. v. GLOSSOP (INHABITANTS)*, No. 1170, *post*.

**1072.** *Residence in different parishes—In same city.*—[By a local Act, the governor, deputy governor & guardians of the poor of the City of Norwich were incorporated; & the corp. were to have the care & provide for the maintenance of all the poor of the several parishes within the city, & to exercise all the powers of churchwardens & overseers in the management & removal of the poor, & to institute & defend any appeal against any order relating to the poor; & all orders of removal were to be made on the complaint of the corp. The corp. was to apportion the sums to be raised for the relief of the poor among the several parishes, to be paid to the treasurer of the corp., & in fixing the proportion to be raised by the several parishes, were to calculate the same upon the whole annual value of the property liable in the city. Appeals against orders of removal from any parish within the city were to be made on notice to the corp. The corp., in 1846, obtained an order to remove a pauper from the parish of St. S. within the city to a parish out of the city. The pauper had resided in St. S. two years next before the application for the order, & in another parish of the same city twenty years immediately preceding the two years:—*Held*: Norwich was a "city" "maintaining its own poor," & therefore a "parish" within Poor Law (Amendment) Act, 1834 (c. 76), s. 109, & Poor Removal Act, 1846 (c. 66), s. 1, which Act, by sect. 8, is to be read as one Act with the former Act; & the pauper having resided five years in the city, though in different parishes, was irremovable.—*R. v. FORNCETT ST. MARY (INHABITANTS)* (1849), 12 Q. B. 100; 3 New Sess. Cas. 477; 18



L. J. M. C. 125; 13 L. T. O. S. 44; 13 J. P. 505; 13 Jur. 729; 116 E. R. 827.

*Annotations*.—*Appl. R. v. Holy Trinity, Exeter* (1851), 4 New Sess. Cas. 438. *Refd. R. v. Bristol Governor, etc., of the Poor* (1840), 18 L. J. M. C. 132.

**1073.** ———.]—The several parishes of the city & county of a city of E. are incorporated for the purpose of maintaining their poor out of a common fund; but in the case of appeals & orders of removal, the persons to set the law in motion, are the churchwardens & overseers of the individual parish, & not the corp. :—*Held*: the city of E. was a parish within Poor Removal Act, 1846 (c. 66), as explained by sect. 109, the interpretation clause, of 5 & 6 Will. 4, c. 76, & a pauper who for five years next before the application for a warrant of removal has resided within such, was irremovable under Poor Removal Act, 1846 (c. 66), s. 1.—*HOLY TRINITY, EXETER v. IDE (CHURCHWARDENS)* (1851), 16 L. T. O. S. 363; 15 J. P. 273; *sub nom. R. v. HOLY TRINITY, EXETER (CHURCHWARDENS)*, 4 New Sess. Cas. 438.

**1074.** ———.]—*In same union.*—Poor Removal Act, 1861 (c. 55), passed on Aug. 1, 1861, by sect. 1 enacts, that “after March 25 next the period of three years shall be substituted for that of five years specified in sect. 1 of Poor Removal Act, 1846 (c. 66), “& the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said sect. as a residence in any parish” :—*Held*: a pauper, who, on Mar. 14, 1862, when an order of removal was made, had resided three years in a union, of which eighteen months next before the application for the order were in the township of B., & more than three years prior to those eighteen months were in the township of L., could not be removed under it after the Act passed.—*PRESTON OVERSEERS v. BLACKBURN OVERSEERS* (1863), 3 B. & S. 793; 2 New Rep. 161; 32 L. J. M. C. 180; 8 L. T. 274; 9 Jur. N. S. 1039; 122 E. R. 297.

*Annotation*.—*Refd. R. v. Hendon Overseers* (1863), 32 L. J. M. C. 202.

**1075.** ———.]—Poor Removal Act, 1846 (c. 66), s. 1, enacts that no person shall be removed from any parish in which he shall have resided for the five preceding years. By Poor Removal Act, 1861, s. 1, “the period of three years shall be substituted for that of five years in” the former Act, “& the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said sect. as a residence in any parish” :—*Held*: a pauper who, having resided three years in a parish, removed to another parish in the same union, & after residing there for some months became chargeable, was removable to the parish of his settlement.—*R. v. GREAT SALKELD (INHABITANTS)* (1864), 5 B. & S. 377; 33 L. J. M. C. 185; 10 L. T. 521; 28 J. P. 662; 10 Jur. N. S. 1101; 12 W. R. 875; 122 E. R. 871; *sub nom. GREAT SALKELD CHURCHWARDENS & OVERSEERS v. PLUMPTON WALL OVERSEERS*, 4 New Rep. 237.

*Annotation*.—*Refd. R. v. Bolton-le-Sands Township* (1865), 35 L. J. M. C. 54.

**1076.** ———.]—The effect of Poor Removal Act, 1864 (c. 105), s. 1, in connection with Poor Removal Act, 1846 (c. 66), s. 1, & Poor Removal Act, 1861 (c. 55), s. 1, is to render a pauper irremovable from his parish of residence within a union to his parish of settlement in the same union, although his term of three years’ residence is computed by the time during which he lived in two or more parishes of the union, neither of which is his parish of settlement.—*R. v. BOLTON-LE-SANDS (INHABITANTS)* (1865), 35 L. J. M. C. 54; 13 L. T. 523; 30 J. P. 54; 12 Jur. N. S. 37; 14 W. R. 177.

**1077.** ———.]—By Poor Removal Act, 1846 (c. 66), s. 1, no person shall be removed from any parish in which he shall have resided for five years. By Poor Removal Act, 1861 (c. 55), s. 1, & Union Chargeability Act, 1865 (c. 79), s. 8, residence in any part of a union is to have the same effect as a residence in a parish, & the period of residence is reduced to one year. By Poor Removal Act, 1861 (c. 55), s. 12, the words used in that Act are to be construed as in Poor Law (Amendment) Act, 1834 (c. 76); & by sect. 109 of the latter Act “union” is to include amongst others, “any number of parishes incorporated for the relief or maintenance of the poor under any local Act.” By a local Act certain townships each separately maintaining its own poor, & several parishes were incorporated into a united district for the purpose of maintaining a house of industry for the poor of the whole district, under a board of directors. Each parish or township had the separate care of, & paid for the maintenance of, its own poor in the house, under the management of the directors; but each contributed according to a fixed proportion to the general costs of the maintenance of the house. The outdoor relief was left in the hands of the parish officers :—*Held*: the united district was a union within Poor Removal Act, 1861 (c. 55), s. 1, & Poor Law (Amendment) Act, 1834 (c. 76), s. 109; & an aggregate residence of one year in two of the townships rendered a pauper irremovable.—*MACHYNLETH v. POOL* (1869), L. R. 4 Q. B. 592; 10 B. & S. 653; 38 L. J. M. C. 148; 20 L. T. 951; 34 J. P. 197; 17 W. R. 1016.

**1078.** *Residence in extra-parochial place.*—A residence of five years in an extra-parochial place, part of which residence was before the coming into operation of Extra-Parochial Places Act, 1857 (c. 19), does not confer the status of irremovability; that Act having no retrospective operation.—*R. v. ST. SEPULCHRE, NORTHAMPTON (INHABITANTS)* (1859), 1 E. & E. 813; 28 L. J. M. C. 187; 33 L. T. O. S. 120; 5 Jur. N. S. 867; 7 W. R. 447; 120 E. R. 1115.

**1079.** *Previous residence of pauper’s wife.*—*WEST HAM UNION v. CARDIFF UNION*, No. 485, *ante*.

*What constitutes residence.*—See Part V., Sect. 5, *ante*.

## B. What amounts to Break in Residence.

### (a) In General.

**1080.** *Removal procured by fraud.*—(1) A pauper entitled to irremovability from M. by reason of a five years’ residence within Poor Removal Act, 1846 (c. 66), s. 1, & as widow within Poor Removal Act, 1846 (c. 66), s. 2, went after the death of her husband to the relieving officer for M. & demanded relief; he told her that B. was the place of her settlement, & that if she went thither she would be relieved; & he gave her 10s. to pay her fare to B., & sent her to the B. railway station in company with two persons who saw her off. The pauper went to B., & stayed with her mother that night; the next morning she applied for relief, & was relieved for two or three weeks in the house. She then left the house & went to her mother’s, where she remained three weeks without relief. She then applied for & received parish relief at her mother’s for three months. She then returned to M., became chargeable, & an order for her removal was made. The sessions did not find as a fact that the officer of M. had induced & assisted the pauper to go to B., “with intent to cause” her “to become chargeable to a parish in which she was not then

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chargeable":—*Held*: the facts would have justified the sessions in so finding; if they had so found the going to B. would not have been a break of residence, & the case must be remitted to the sessions, as this ct. will not draw an inference of fraud or illegality, when a ct. of quarter sessions has not found it.

(2) *Semble*: a break of residence within the twelve months next after the death of a husband destroys the irremovability of his widow under Poor Removal Act, 1846 (c. 66), s. 2.—*R. v. ST. MARYLBONE (INHABITANTS)* (1851), 16 Q. B. 299; 4 New Sess. Cas. 444; 20 L. J. M. C. 173; 15 J. P. 258; 117 E. R. 893; *sub nom. R. v. ST. MARYLBONE (INHABITANTS)*, *Re LAWRENCE*, 15 Jur. 289.

1081. —[Two unemancipated children & their mother, a widow, became chargeable to the P. union in Nov. 1901, the mother being then irremovable from P. by reason of one year's residence without interruption or relief. In the same month the mother ceased to have relief except on account of the children, who remained in the P. union schools & are still there, the mother went to her own home in P. In Feb. 1902, the mother removed to W. H. union leaving her children still chargeable to P. union:—*Held*: (1) the mother lost her status of irremovability from P. when she went to W. H., notwithstanding that the relief, through her children was uninterrupted; (2) an order for the removal of the children to W. H. was good, because the mother's irremovability from P. having gone, the children were removable to the parish of their last legal settlement; (3) a statement by the relieving officer of the P. union made to the mother to the effect that her removal to W. H. from P. would not make any difference to her children was not sufficient to prevent the irremovability from lapsing on the ground of fraud.—*WEST HAM UNION v. POPLAR UNION* (1902), 66 J. P. 504.

1082. *Involuntary removal—To workhouse.*—*R. v. WEST WARD UNION*, No. 1139, *post*.

—*Nurse sent to branch hospital.*—*See Sub-sect. 2, B. (c), post*.

1083. *Absence at school.*—H. was the illegitimate son (born in 1847 at R.) of a single woman, who married in 1858, & he lived with his mother & her husband, & was maintained by them. They had lived for more than a year in the parish of L. on Aug. 5, 1862, when H. was elected a pupil at "the School for the Indigent Blind," in another union, being then about fifteen years & six months old. The school was a charitable institution supported by voluntary contributions; the pupils were lodged, & clothed, & fed, as well as taught, out of the funds of the institution. The pupils were discharged by the committee when they were sufficiently instructed, or when they attained twenty-one years, or for misconduct. H. remained & continually resided at the school as a pupil until July 19, 1868, when he was discharged, being more than twenty-one years old. During his residence at the school he was wholly maintained, clothed, lodged, & fed out of the school funds, & neither his mother nor her husband contributed to his support; but he went to them at L., & lodged with them for five weeks in the summer of each of the years 1863, 1864, & 1865, & for six weeks in the summers of 1866 & 1867, & during those periods he was maintained by his mother & her husband. On his discharge from the school in July, 1868, H. returned to his mother & her husband at L., & was maintained

by them till Mar. 1869, when he became chargeable to L. He had no other settlement than his birth settlement. On appeal against an order for the removal of H. to his place of settlement, quarter sessions drew the inference from the above facts that there was an *animus revertendi* in H.; & they held that he had constructively resided with his mother & her husband in L. for more than a year, & was therefore irremovable:—*Held*: the sessions were justified in deciding that the pauper had continued to reside with the parents, & was irremovable.—*R. v. ABINGDON UNION* (1870), L. R. 5 Q. B. 406; 39 L. J. M. C. 153; 22 L. T. 603; 18 W. R. 981; *sub nom. HENLEY UNION v. ABINGDON UNION*, 35 J. P. 138.

*Annotations*:—*Dirda, R.* (on the prosecution of Tadcaster Union) *v. Leeds Union* (1879), 27 W. R. 708; *Holborn Union v. Chertsey Union* (1884), 14 Q. B. D. 239.

1084. *Unintentional removal—Absence for one night.*—The pauper resided in a parish in resp. union for fifteen years continuously, when he became unable to work, & became chargeable to resp. union. He continued to reside in the parish & to receive relief for two years & a half more, when having received notice to quit the premises which he occupied, he arranged to take a house in a parish within another union, & removed into the house with his family & slept there one night, not knowing that he was removing into another union. On the next day he was told that his residence in resp. union had been broken, & at once returned to a house in a parish within that union:—*Held*: his removal under the above circumstances, was such a break in his residence as to destroy his status of irremovability.—*NEWARK UNION v. GLANFORD BRIGG UNION* (1877), 2 Q. B. D. 522; 46 L. J. M. C. 285; 36 L. T. 793; 41 J. P. 679; 26 W. R. 42.

1085. *Onus of proof—On party alleging break.*—*R. v. WHITBY UNION*, No. 1140, *post*.

*Receipt of parochial relief.*—*See Sub-sect. 2, C. (a), post*.

*Imprisonment.*—*See Sub-sect. 2, C. (b), post*.

*Absence in hospital.*—*See Sub-sect. 2, C. (c), post*.

*Absence on naval & military service.*—*See Sub-sect. 2, C. (d), post*.

*Confinement as lunatic.*—*See Sub-sect. 2, C. (e), post*.

(b) *Prior Removal Order.*

1086. *Removal under order.*—Pauper, having resided twenty years in parish S., went from S. in consequence of an order of removal to parish C., unappealed against. She intended to return to S. if the parish of C. would allow her to do so, & relieve her at S. She lived for a week in C. at her sister's in law, & then, by direction of the parish officers of C., returned to S., where she was relieved by C., & continued to reside till the order next mentioned. Within five years of her going to parish C. another order of removal to C. was made:—*Held*: Poor Removal Act, 1846 (c. 66), s. 1, did not make her irremovable from S., the residence having been discontinued by her going to parish C. within the five years preceding the second order. Though her child & furniture remained throughout at the house in S., & the pauper continued her tenancy there & paid rent for the whole period.—*R. v. SEEND (INHABITANTS)* (1848), 12 Q. B. 133; 3 New Sess. Cas. 276; 3 New Mag. Cas. 59; 18 L. J. M. C. 12; 13 J. P. 232; 12 Jur. 939; 116 E. R. 817.

*Annotations*:—*Fold, R. v. Barnsley* (1849), 12 Q. B. 193, *Ald. R. v. Caldecote* (1851), 17 Q. B. 52. *Bell, Hartfield v. Rotherfield* (1853), 17 Q. B. 746; *R. v. Hendon* (1863), 11 W. R. 639.

1087. —]—(1) If an order of removal states that it was made by justices "in & for" the proper district, it need not also state the particular place where it was made within that district.

(2) It is not necessary that an order of removal, since Poor Removal Act, 1846 (c. 66), should negative that a pauper has become chargeable in consequence of sickness or accident.

(3) A pauper is not irremovable from a parish on the ground of residence, under Poor Removal Act, 1846 (c. 66), s. 1, if, at any time during the five years next before application for an order to remove him, he has been removed from the parish under a prior order; for such removal is a break in the residence. It makes no difference that the pauper so removed leaves behind furniture in a house rented & occupied by him at the time of his removal & retains the key of the house, & that he has always the *animus revertendi*, & actually returns & resumes occupation of his house after an absence of a few days.—*R. v. HALIFAX (INHABITANTS)* (1848), 12 Q. B. 111; 3 New Mag. Cas. 6; 3 New Sess. Cas. 208; 17 L. J. M. C. 158; 11 L. T. O. S. 452; 12 J. P. 613; 12 Jur. 789; 116 E. R. 808.

*Annotations*.—As to (2) *Fold. R. v. Goole* (1849), 12 Q. B. 172. *Apd. R. v. Llanddogrot* (1849), 3 New Sess. Cas. 517. As to (3) *Fold. R. v. Barnsley* (1849), 12 Q. B. 193. *Apd. R. v. Caldecote* (1851), 17 Q. B. 52. *Refd. Hartfield v. Rotherfield* (1852), 17 Q. B. 746; *R. v. Stapleton* (1853), 1 E. & B. 766; *R. v. Hendon* (1863), 11 W. R. 639.

1088. —]—Under 8 & 9 Vict. c. 126, s. 48, it is not necessary that a lunatic, chargeable to a parish, should be sent to an asylum or licensed house. The justice before whom he is brought is to decide whether he is a proper person to be confined or not; & if not confined, he may be removed to his parish as an ordinary pauper. An idiot, aged thirty-three, living with his parents in parish B., became chargeable; & thereupon he & they were removed by order of justices to parish T., their place of settlement. The order was never appealed against. The father retained his house in B., in the care of two of his children, who were emancipated; & when removed, he intended to return as soon as he could. After four days, the paupers did return to the house in B., with the consent of the overseers of T., who promised to send weekly relief to the parents for the son; but the son again became chargeable to B.; & another order was made, finding the son & parents chargeable, & ordering their removal to T. The family had resided in B. for five years next before the making of this order, excepting only the four days above mentioned:—*Held*: the five years' residence was broken by the removal to parish T., & the paupers were not irremovable from B. under Poor Removal Act, 1846 (c. 66), s. 1.—*R. v. BARNSELY (INHABITANTS)* (1849), 12 Q. B. 193; 3 New Mag. Cas. 148; 3 New Sess. Cas. 542; 18 L. J. M. C. 170; 13 L. T. O. S. 160; 13 J. P. Jo. 329; 116 E. R. 840; *sub nom. R. v. WEST RIDING OF YORKSHIRE JJ., TAMWORTH v. BARNSELY*, 13 Jur. 511.

*Annotations*.—*Refd. Hartfield v. Rotherfield* (1852), 17 Q. B. 746; *R. v. St. Mary, Islington* (1862), 3 B. & S. 46.

1089. —]—Paupers, who had resided in parish S. ever since 1835, were removed in 1845, under an order of justices, unappealed against, to parish C. They were delivered to the overseer of C. at his house in C., remained there a few hours, & then returned to S. the same day, & slept there the same night; an agreement having been made between the officers of the two parishes, that the paupers should continue to reside at S., & be relieved at the cost of C. They continued to reside at S. under this arrangement up to the passing of

Poor Removal Act, 1846 (c. 66); after which an order of justices was made for their removal from S. to C.:—*Held*: the paupers were not irremovable by reason of a five years' unbroken residence in S.—*R. v. CALDECOTE (INHABITANTS)* (1851), 17 Q. B. 52; 4 New Sess. Cas. 687; 20 L. J. M. C. 187; 17 L. T. O. S. 93; 15 J. P. 517; 15 Jur. 537; 117 E. R. 1201.

*Annotations*.—*Distd. R. v. Hendon* (1863), 11 W. R. 639. *Refd. R. v. St. Mary, Warwick* (1863), 17 J. P. 552.

1090. Removal of lunatic to asylum.]—A pauper lunatic may be sent to an asylum by order of a justice, under 8 & 9 Vict. c. 126, s. 48, though he has resided, for five years next before the application for such order, in a parish different from that in which the asylum is situate, the case of such removal being an exception to the general enactment of Poor Removal Act, 1846 (c. 66), s. 1. Justices may afterwards make orders under 8 & 9 Vict. c. 126, ss. 58, 62, adjudging such pauper to be settled in a parish other than that in which he has so resided, and requiring such other parish to pay for maintenance, etc. *Qu.*: whether, if such pauper recovered, & returned to the parish whence he was taken, the order under 8 & 9 Vict. c. 126, s. 58, or the actual removal, would be deemed to cause a break of residence in such parish, disentitling him to the benefit of the five years formerly completed there.—*R. v. LEADEN ROTHING (INHABITANTS)* (1849), 12 Q. B. 181; 3 New Sess. Cas. 525; 18 L. J. M. C. 187; 13 L. T. O. S. 137; 13 J. P. 794; 13 Jur. 534; 116 E. R. 835.

1091. Order not carried out.]—On Aug. 11, 1855, an order was made for the removal of a pauper from the parish of L. to the parish of H. At this time the pauper had resided more than three, but less than five years, in L. The pauper was not actually removed, but continued to reside in the parish of L. at the request of the parish from H. from whom she received relief up to June, 1862. By Poor Removal Act, 1861 (c. 55), s. 1, three years is, after Mar. 25, 1862, to be substituted for five years, in Poor Removal Act, 1846 (c. 66), s. 1, so as to render all persons irremovable from any parish where they have resided for three years next before the application for the warrant:—*Held*: the pauper was irremovable from the parish of L., & an order made on Aug. 18, 1862, for her removal to H. must be quashed.—*R. v. HENDON (INHABITANTS)* (1863), 2 New Rep. 114; 32 L. J. M. C. 202; 8 L. T. 276; 27 J. P. 677; 9 Jur. N. S. 1197; 11 W. R. 639.

#### (c) Temporary Absence.

1092. Where *animus revertendi*—General rule—No break.]—Whether a pauper had the *animus revertendi* is a question of fact; & the sessions ought to determine it.

In 1841, pauper, who had resided five years with his wife & family in parish St. M., in rooms hired by the quarter, went to T., the parish of his settlement, to obtain work or relief, & was there employed & paid by one of the overseers for about six weeks, during which time he lodged in the poor-house. He then returned to his wife & family, who, during his absence, continued to reside in the same rooms, & were maintained by him; & he resided there with them up to Dec. 1846, when an order for his removal from St. M. to T. was applied for. For the four years next before the passing of Poor Removal Act, 1846 (c. 66), he received relief from the parish of his settlement:—*Held*: the pauper's absence from St. M. was no break in his residence, as there was clear evidence of his *animus revertendi*: & he had become

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irremovable within Poor Removal Act, 1846 (c. 66), s. 1.—*R. v. TACOLNESTONE (INHABITANTS)* (1849), 12 Q. B. 157; 3 New Sess. Cas. 353; 3 New Mag. Cas. 78; 18 L. J. M. C. 44; 12 L. T. O. S. 372; 13 J. P. 268; 13 Jur. 80; 116 E. R. 825.

*Annotations*.—*Distd. R. v. Llanelly* (1851), 17 Q. B. 40; *R. v. Stapleton* (1853), 1 E. & B. 766. *Reld. R. v. Barnsley* (1849), 18 L. J. M. C. 170.

1093. ————*J*.—(1) A married pauper & her children were removed by an order of justices from the parish where she had resided, as a married woman, for ten years continuously. Two years before the order of removal, her husband had left her & gone to America. She had received letters from him since his departure, & was daily expecting, at the time of the hearing of the appeal, to receive a letter from him containing money to enable her & her children to join him. The sessions having quashed the order, & stated the above facts in a case for this *ct.*:—*Held*: there was a disruption of the husband's residence, & such disruption rendered the wife & children removable, notwithstanding their unbroken personal residence in resp. parish.

(2) When the husband is absent, so as to cause a *prima facie* disruption of the residence, the onus is upon those who dispute that fact to show an *animus revertendi* (*LORD CAMPBELL, C.J.*).—*R. v. LLANELLY (INHABITANTS)* (1851), 17 Q. B. 40; 4 New Sess. Cas. 699; 20 L. J. M. C. 179; 17 L. T. O. S. 90; 15 J. P. 534; 15 Jur. 510; 117 E. R. 1190.

*Annotations*.—*As to* (1) *Appld. R. v. Manchester Overseers* (1857), 29 L. T. O. S. 247. *Consd. West Ham Union v. St. Matthew, Bethnal Green Union*, [1894] A. C. 230. *Reld. R. v. Cudham* (1859), 5 Jur. N. S. 269. *As to* (2) *Appld. R. v. Manchester Overseers* (1851), 8 Q. B. D. 50.

1094. ————*J*.—*F.* was resident in the parish of *S.* with his wife & family, in a house rented by himself. He was then hired; & the terms of his hiring required him to dwell in the parish of *C.* He went to *C.*, & slept there every night whilst his hiring continued, which was for four years & four months: but he left his wife & family residing in the house in *S.*, for which he continued to pay the rent. He was then discharged from his hiring, & returned to his house in *S.*, where he continued to reside till removed to a third parish by an order made within five years of his return to *S.* His wife & family had never quitted the house in *S.* On appeal against the order, the sessions decided that he had resided in *S.* for five years next preceding the order, but subject to a case, in which the above facts were stated: & the sessions found that, whilst he dwelt at *C.*, he intended to return to *S.* whenever he should leave his situation, but did not wish to leave it, & did not do so willingly:—*Held*: the question, whether on those facts *F.* resided in *S.* whilst dwelling at *C.*, was not concluded by the finding of the sessions; & his absence at *C.*, under a hiring which made it his duty not to return to *S.*, though he intended ultimately to return to *S.*, was not a mere temporary absence consistent with residence in *S.*, but a permanent residence in *C.*; & consequently, Poor Removal Act, 1846 (c. 66), s. 1, did not prevent his removal from *S.*.—*R. v. STAPLETON (INHABITANTS)* (1853), 1 E. & B. 766; 1 C. L. R. 84; 22 L. J. M. C. 102; 21 L. T. O. S. 78; 17 J. P. 472; 17 Jur. 549; 1 W. R. 304; 118 E. R. 623.

*Annotations*.—*Distd. R. v. Brighton Directors of the Poor* (1854), 4 E. & B. 236; *R. v. East Stonehouse* (1855), 4 E. & B. 901. *Consd. Wellington Overseers v. Whitchurch Overseers* (1863), 4 B. & S. 100. *Distd. Manchester*

*Overseers v. Ormskirk Union* (1886), 16 Q. B. D. 723. *Reld. R. v. St. Leonard, Shoreditch* (1865), 14 W. R. 55; *R. v. Stourbridge Union* (1865), 6 New Rep. 225; *Totnes Union v. Cardiff Union* (1866), 51 J. P. 133; *Webster v. Minister of Health* (1926), 43 T. L. R. 36.

1095. ————*J*.—A pauper resided with his wife & children in resp. parish for about seven years prior to May, 1859, when he went to Cuba, in pursuance of an agreement which he had entered into with a mining co. to work for them there for three years: it being part of the agreement that during his absence the co. should pay his wife & children £5 per month out of his salary. It was always his intention to return to England to his wife & children at the end of the three years. In Nov. 1861, he returned to England in consequence of illness, & found his wife & children in the same house in which he had left them, & in which they had resided continuously in the interval:—*Held*: his absence in Cuba constituted a break of residence, which rendered him removable.—*WELLINGTON OVERSEERS v. WHITCHURCH OVERSEERS* (1863), 4 B. & S. 100; 2 New Rep. 276; 32 L. J. M. C. 189; 8 L. T. 456; 27 J. P. 644; 10 Jur. N. S. 37; 11 W. R. 828; 122 E. R. 397.

*Annotation*.—*Consd. Totnes Union v. Cardiff Union* (1886), 51 J. P. 133.

1096. ————*Absence under contract of service—Period of employment indefinite.*—*R. v. STAPLETON (INHABITANTS)*, No. 1004, *ante*.

1097. ————*J*.—A single woman, aged thirty-two, in Jan. 1861, had resided in the township of *G.* for more than three years; she was then residing with her widowed mother, & continued with her until Sept., when she went to live out of *G.* as a domestic servant, on the terms of remaining a month upon trial, & if she remained longer, on the usual terms of a month's warning. At the time she left she intended to return to her mother's house if she received notice to leave within the month; her mistress gave her notice, & she returned to her mother's house in *G.* at the end of the month, where she remained till Feb. 1864:—*Held*: she had not become irremovable from *G.*, as her absence for a month was a break of residence, her intention to return being immaterial as she had no residence of her own to return to.—*R. v. GLOSSOP UNION* (1866), L. R. 1 Q. B. 227; 35 L. J. M. C. 148; 13 L. T. 672; 30 J. P. 215; 14 W. R. 329.

*Annotations*.—*Distd. R. v. Abingdon* (1870), L. R. 5 Q. B. 406. *Expld. Guildford Union v. St. Olave's Union* (1872), 25 L. T. 803; *R. v. St. Ives* (1872), L. R. 7 Q. B. 467. *Consd. Holborn Union v. Chertsey Union* (1884), 14 Q. B. D. 289; *Cambridge Union v. Edmonton Union*, [1900] 2 Q. B. 111. *Reld. Knaresborough Union v. Pateley Bridge Union* (1871), 25 L. T. 590; *R. v. Stepney Union* (1884), 54 L. J. M. C. 12.

1098. ————*J*.—The pauper, a journeyman tailor, having resided in the parish of *B.* for forty-five years, was admitted into the workhouse, & worked there at his trade under the superintendence of the master tailor. *R.*, a tailor, residing in the neighbouring parish of *S.*, being in want of a hand, the master tailor told the pauper that he might go to *R.*; & if *R.* & he did not agree, he might come back. The pauper went to *R.* in the parish of *S.*, & worked for him at 3s. a week, with board & lodging for ten weeks, when *R.* & the pauper not agreeing, the pauper came back to the workhouse. If they had agreed, the pauper might have continued working for *R.*, & *R.* told the pauper that he might stay as long as he thought proper:—*Held*: the pauper had not become irremovable from *B.*, as his absence for ten weeks, under the circumstances, was a break of residence.—*R. v. WORCESTER UNION* (1874), L. R. 9 Q. B. 340; 43 L. J. M. C. 102; 30 L. T. 357; *sub nom.*

WORCESTER UNION v. BIRMINGHAM PARISH, 38 J. P. 407; *sub nom.* R. v. BIRMINGHAM UNION, 22 W. R. 572.

*Annotations*:—*Consd.* Manchester Overseers v. Ormskirk Union (1888), 16 Q. B. D. 723. *Reid.* Cambridge Union v. Edmonton Union (1900), 69 L. J. Q. B. 584.

1099. ——— Temporary employment as nurse.]—Pauper rented a lodging in parish B., furnished by herself, & resided there for five years next before the order of removal after-mentioned, exclusive of an absence under the following circumstances. During the five years, she contracted to attend a lady for her confinement, as monthly nurse, & attended her accordingly for six weeks in the parish of E. She retained her lodging in B. throughout, paying the rent, keeping her furniture there, & always intending to return to it. At the end of the six weeks she did so return. An order having been afterwards made for removing her from B. to her place of settlement, & appealed against:—*Held*: there had been no disruption of the residence in B., within Poor Removal Act, 1846 (c. 66), s. 1.—R. v. BRIGHTON DIRECTORS OF THE POOR (1854), 4 E. & B. 236; 3 C. L. R. 25; 24 L. J. M. C. 41; 24 L. T. O. S. 92; 19 J. P. 132; 1 Jur. N. S. 138; 3 W. R. 58; 119 E. R. 91.

*Annotations*:—*Distd.* Wellington Overseers v. Whitchurch Overseers (1863), 10 Jur. N. S. 37. *Reid.* It. v. East Stonehouse (1855), 4 E. & B. 901; It. v. St. Leonard, Shoreditch (1865), 6 R. & S. 784; R. v. Whitby Union (1870), 39 L. J. M. C. 97; R. v. Birmingham Union (1874), 22 W. R. 572.

1100. ——— Employment abroad.]—WELLINGTON OVERSEERS v. WHITCHURCH OVERSEERS, No. 1095, *ante*.

1101. ——— Absence by night.]—R. v. ST. LEONARD, SHOREDITCH (INHABITANTS), No. 469, *ante*.

1102. ——— No residence to which legal right to return.]—To render the absence of a party from his parish not a break of residence, it is essential that he should have a residence in such parish to which he has a right to return.

A. left his parish, where he had a lodging, which he gave up to seek elsewhere for work, intending to return when work was better, & the occupier of the house would have permitted him to have the same lodgings again on his return, & they were not, in fact, occupied in his absence:—*Held*: a break of residence.—R. v. WORCESTER J.J., *Re* WINCHCOMBE UNION & STOURBRIDGE UNION (1865), 12 L. T. 542; 13 W. R. 836; *sub nom.* R. v. STOURBRIDGE UNION, 6 New Rep. 225; 34 L. J. M. C. 179; 29 J. P. 502; 11 Jur. N. S. 799.

*Annotations*:—*Expld.* R. v. St. Leonard, Shoreditch (1865), 6 R. & S. 784. *Consd.* R. v. St. Ives Union (1872), L. R. 7 Q. B. 487. *Reid.* Knaresborough Union v. Pateley Bridge Union (1871), 25 L. T. 590.

1103. ———.]—R. v. GLOSSOP UNION, No. 1097, *ante*.

1104. ———.]—In June, 1868, a pauper sold off some of her furniture, & removed the rest to a spare room in the house of her brother-in-law, with whom she stayed off & on until Jan. 1869. She then went away, & stayed with other relations & at an infirmary in other unions until after Sept. of that year, when she returned to the house of her brother-in-law as before. In May, 1870, she took a cottage in the same union as that of the house in which she was staying, & put her furniture into it. In the following month she became chargeable to the union. Quarter sessions found that the pauper had no legal right to return to the house of her brother-in-law after her departure in Jan. 1869; & therefore held that she had not acquired a status of irremovability in that union. The ct. sent the case back, in order that the jus-

tices might find as a fact whether or not her brother in law intended, when she went away, to receive her again as before; & intimated that their judgment would depend upon that fact.—KNARESBOROUGH UNION v. PATELEY BRIDGE UNION (1871), 25 L. T. 590.

1105. ——— Domestic servant—Absence on holiday.]—The pauper, an old woman of seventy, had lived twenty-eight years in the parish from which she was ordered to be removed; during the last four years she was at intervals in the workhouse, & had no other place of residence. Upon leaving the workhouse in 1870, she was for six weeks in domestic service in the parish; after which, finding herself too old for such service she left, saying that she wished at any rate first to have a holiday. She stayed six days out of the parish with a son & a friend, both of whom were too poor to continue to entertain her. She then returned to the workhouse of the parish, from which she was afterwards removed to her place of legal settlement:—*Held*: this was not such a breach of residence as to destroy the pauper's status of irremovability in the removing parish, although she had no place of residence in that parish to which she could return, during her absence.—R. v. ST. IVES (1872), L. R. 7 Q. B. 467; 41 L. J. M. C. 94; 26 L. T. 393; 36 J. P. 645; 20 W. R. 657.

*Annotations*:—*Consd.* Cambridge Union v. Edmonton Union, [1900] 2 Q. B. 111. *Reid.* It. v. Worcester Union (1874), 39 L. T. 357.

1106. ——— Becoming lunatic.]—The pauper, lunatic, who had been deserted by her parents, was sent by the Great Yarmouth Union to a home for feeble minded girls at Ipswich. She afterwards went into service at Weeley in applt. union & required a status of irremovability in that union. Her malady becoming more pronounced, she desired to return to the home. Her mistress had determined to get rid of her, but did not communicate this decision to the servant. The servant, on leaving Weeley, expressed a desire to return there to the service of her former mistress after being cured at the home. On arrival at the home, she became incurably insane & incapable of exercising any choice as to her residence:—*Held*: there was such a break of residence as to destroy her status of irremovability in the Tendingr Union.—J. TENDRING UNION v. IPSWICH UNION (1903), 67 J. P. 304; 1 L. G. R. 574, D. C.

——— Absence in hospital.]—*See* Sub-sect. 2, c. C. (c), *post*.

1107. What amounts to *animus revertendi*—Question of fact.]—R. v. TACOLNESTONE (INHABITANTS), No. 1092, *ante*.

1108. Onus of proof of *animus revertendi*—On party alleging residence.]—R. v. LLANELLY (INHABITANTS), No. 1093, *ante*.

1109. ———.]—After a husband & wife had, by residence in a union, acquired irremovability under the Poor Removal Act, 1846 (c. 66), s. 1, as amended by later Acts, the husband went to reside elsewhere, & the irremovability was lost. He died. The widow shortly afterwards became chargeable to the union in which they had resided. An order was thereafter made for her removal:—*Held*: (1) by reason of the break of her husband's residence, her residence during his life was not residence within Poor Removal Act, 1846 (c. 66), & consequently, her residence as widow not having alone sufficed to render her irremovable, she was removable; (2) burden of proof that the husband had an *animus revertendi* was on applts.—R. v. MANCHESTER OVERSEERS (1881), 8 Q. B. D. 50;

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51 L. J. M. C. 6; 45 L. T. 679; 46 J. P. 261; *sub nom.* MANCHESTER OVERSEERS v. PRESTWICH UNION, 30 W. R. 247, D. C.

**1110. Absence on duty—Nurse sent to branch hospital.]—**A pauper, by virtue of her employment as a nurse by the trustees of the Manchester Royal Infirmary, resided for five years, with the exception of two periods of absence of three & five months' duration respectively, when she was sent to a branch establishment, in applt. township. By the terms of her engagement as nurse she was required to undertake whatever duties she was ordered, whether as a hospital or a private nurse. On the occasions of her absence at the branch establishment, which, though a separate building in a different parish, was entirely under the management of the Royal Infirmary, the pauper left behind her at the Royal Infirmary the greater part of her property & effects, & she went there from time to time for her wages & for change of clothing as she required it:—*Held*: the two periods of absence of the pauper did not constitute a break of residence, & she had gained a legal settlement in applt. township by three years' residence within Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34.—MANCHESTER OVERSEERS v. ORMSKIRK UNION (1886), 16 Q. B. D. 723; 54 L. T. 573; 50 J. P. 518; 34 W. R. 533; 2 T. L. R. 475, D. C.

**1111. Absence abroad—In search of work.]—**B., father of paupers, had resided more than three years in S. parish, & then left his wife & children at S. for the Cape of Good Hope, in search of work. He sent his family £1 a week all the time he was abroad, & returned after a year to S., where the family still lived, but he deserted them, & the children being under sixteen were sought to be removed on the ground that B.'s settlement in S. was lost by breach of residence:—*Held*: the justices were right in holding that the absence for a year was a break of B.'s residence in S.—TOTNES UNION v. CARDIFF UNION (1880), 51 J. P. 133; 2 T. L. R. 370, D. C.; *affd.*, 3 T. L. R. 45, C. A.

**1112. Temporary absence of lunatic on trial.]—**A person who had acquired exemption from removal by residence in a certain union became insane, & was sent to a pauper lunatic asylum. Some months afterwards she was released on trial, & resided for about seven weeks with her relations in another union, when she got worse, & was again received into the asylum. At the time of her release her mental capacity was such that she was incapable of exercising any independent choice as to her residence. A magistrate's order was obtained *ex parte* under Lunacy Act, 1890 (c. 5), ss. 287, 294, directing payment by the union in which the lunatic had acquired exemption from removal of the expenses of her removal to the asylum, & her maintenance there after she had been received into the asylum the second time. On a rule for a *certiorari* to quash the order:—*Held*: the temporary absence of the lunatic from the union where she had acquired exemption from removal, when she was incapable of exercising any choice as to her residence, did not constitute such a break of residence as to put an end to her status of irremovability.—R. v. BRUCE & BRAMLEY UNION, [1892] 2 Q. B. 136; 67 L. T. 314; 50 J. P. 567; 40 W. R. 680; 36 Sol. Jo. 542, D. C.

*Annotations*:—*Conrad*, R. v. London JJ., *Ex p.* Edmonton Union (1896), 60 J. P. 456. *Refd.* Suffolk County Lunatic Asylum Visiting Committee v. Nottingham Union (1906), 68 J. P. 120.

**1113. Absence with intention to break residence.]**

—A pauper whose original settlement was in the C. union had by residence become irremovable in the E. union, & was sent to the E. workhouse. She desired to be sent to the C. workhouse, in which her son was, & she therefore obtained her discharge from the E. workhouse & went to reside for a week with a relative in another union in order to break her status of irremovability in the E. union. She then returned to the E. workhouse for the purpose of being sent to the C. union:—*Held*: an order for her removal from the E. union to the C. union was rightly made.—CAMBRIDGE UNION v. EDMONTON UNION, [1900] 2 Q. B. 111; 69 L. J. Q. B. 584; 82 L. T. 495; 64 J. P. 533; 48 W. R. 559, D. C.

*Annotation*:—*Refd.* West Ham Union v. Poplar Union (1905), 69 J. P. 232.

**Absence in hospital.]—**See Sub-sect. 2, C. (c), *post*.

**Absence on naval or military service.]—**See Sub-sect. 2, C. (d), *post*.

**Absence during lunacy.]—**See Sub-sect. 2, C. (c), *post*.

**C. What Time must be Excluded.**

**(a) Period in Receipt of Parochial Relief.**

See Poor Law Act, 1927 (c. 14), s. 108 (2) (f), (g).

**1114. General rule—Period excluded.]—**(1) Under Poor Removal Act, 1846 (c. 66), s. 1, a pauper cannot be removed under an order of justices, if he has resided in the parish five years next before the application for a warrant of removal, whether such residence or any part of it was after or before the passing of the Act.

(2) Assuming the first proviso in Poor Removal Act, 1846 (c. 66), s. 1, which excludes from the computation of the five years any time during which the party shall have been in prison or receiving parochial relief, etc., to be retrospective, a residence down to the time of the application makes the party irremovable, though he may have received parochial relief within five years of the application, provided the residence amounted in the whole to five years exclusive of the period of such relief.—R. v. HARROW ON THE HILL (INHABITANTS) (1848), 12 Q. B. 103; 3 New Sess. Cas. 232; 3 New Mag. Cas. 9; 17 L. J. M. C. 148; 11 L. T. O. S. 290; 12 J. P. 584; 12 Jur. 518; 116 E. R. 805.

*Annotations*:—*Appld.* R. v. Croydon (1848), 3 New Mag. Cas. 60. *Generally*, *Refd.* R. v. Salford (1848), 12 J. P. 676; R. v. Hendon Overseers (1863), 32 L. J. M. C. 202.

**1115. ———.]—**(1) By Poor Removal Act, 1846 (c. 66), s. 1, a pauper, in order to acquire the privilege of irremovability, must be resident in the parish for five years previous to the making of the order of removal.

(2) If the pauper has been imprisoned or relieved, etc., for a period in the parish, that period is to be excluded in the computation of the required time.

(3) If, however, the period of imprisonment, etc., was passed out of the parish the pauper is removable; for, in such a case, as the enacting clause of the sect. does not apply, so neither does the excepting clause.

(4) *Semble*: the removal after the statute of a person rendered irremovable thereby is a good ground of appeal against a valid order of removal made before the statute.—R. v. SALFORD (INHABITANTS) (1848), 12 Q. B. 106; 3 New Mag. Cas. 5; 3 New Sess. Cas. 286; 17 L. J. M. C. 170; 11 L. T. O. S. 452; 12 J. P. 676; 12 Jur. 790; 116 E. R. 806.

*Annotations*:—*As to* (3) *Appld.* R. v. Pott Shrigley (1848), 12 Q. B. 143. *Disld.* R. v. Holbeck Overseers (1851), 16 Q. B. 404. *Disld.* R. v. Hartfield Overseers (1852), 21



*L. J. M. C. 65. Rehd. R. v. Potterhanworth (1858), 1 E. & E. 262. Generally, Rehd. R. v. Leaden Roothing (1849), 12 Q. B. 181; St. Olave's, Rotherhithe, Union v. Canterbury Union (1897), 66 L. J. Q. B. 471.*

**1116.** ———.]—The receipt of relief in the course of the five years preceding the application for the order, does not affect the continuity of residence, so as to prevent the person from becoming irremovable by virtue of Poor Removal Act, 1846 (c. 66), if after excluding the period or periods during which relief has been received, there remains a five years' residence.—*R. v. CROYDON (1848), 3 New Mag. Cas. 60; 12 L. T. O. S. 147.*

**1117.** ———.]—The husband of the pauper had resided in resp. union continuously for upwards of three years. During part of this time the pauper was in lunatic asylums, where she was maintained as a pauper lunatic, but in lucid intervals, the aggregate of which amounted to more than a year, she lived with her husband in resp. union. The husband did not during his residence receive parish relief otherwise than in respect of the maintenance of his wife as a pauper lunatic:—*Held*: the husband was irremovable, for the periods during which he did not receive parish relief could be put together in order to constitute a year's residence by him under Poor Removal Act, 1846 (c. 66), s. 1, & Union Chargeability Act, 1805 (c. 70), s. 8, & the pauper took her husband's status of irremovability.—*IPSWICH UNION v. WEST HAM UNION (1887), 20 Q. B. D. 407; 58 L. T. 419; 52 J. P. 469; 36 W. R. 473, D. C.*

**1118. What amounts to receipt of relief—Relief to parent on account of children.**—Relief to a parent on account of his children is relief to the children within Poor Removal Act, 1846 (c. 66), s. 1.

Where, therefore, the paupers had resided in a parish for eight years, during the first five of which their mother, a widow, resided with them, & received parochial relief for her & their support, they being at the time under the age of sixteen years & unemancipated:—*Held*: the children were removable from the parish.—*R. v. SHAVINGTON CUM GREYSTY (INHABITANTS) (1851), 17 Q. B. 48; 4 New Sess. Cas. 676; 20 L. J. M. C. 194; 17 L. T. O. S. 90; 15 J. P. 499; 15 Jur. 560; 117 E. R. 1200.*

*Annotation.*—*Consd. R. v. St. Mary, Islington (1862), 3 B. & S. 46.*

**1119.** ——— **Relief to child—Pauper lunatic over sixteen.**—(1) The expense of the maintenance, etc., of a pauper lunatic above the age of sixteen in a lunatic asylum, under 16 & 17 Vict. c. 97, is not relief given to its parent, so as to prevent the parent acquiring, under Poor Removal Act, 1846 (c. 66), a status of irremovability by residence in a parish during that time.

(2) *Qu.*: if the child were under the age of sixteen.—*R. v. ST. MARY, ISLINGTON, MIDDLESEX (1862), 3 B. & S. 46; 31 L. J. M. C. 233; 6 L. T. 606; 26 J. P. 661; 122 E. R. 19.*

*Annotations.*—*Generally, Rehd. R. v. Newchurch (1862), 3 B. & S. 107; A.-G. v. Morthyr Tydd Union, [1900] 1 Ch. 516; Re Benson, Knaresborough Union v. Benson (1918), 82 J. P. 260.*

**1120.** ———.]—A woman & her husband resided in the W. H. union from Sept. 12, 1894, to Feb. 1901, & acquired a settlement in such union, & two children were born there during such residence. In Feb. 1901, the family went to reside in the P. union, & remained there till June, 1902, when the woman's husband died. The woman continued to reside in the P. union till June 8, 1904. She had, previously to the death of her husband, acquired a status of irremovability from such union. On the last-mentioned

date the woman left the P. union for the purpose of looking for employment, & went with a third child to reside in the W. H. union. During her residence in the P. union the woman had been since the death of her husband constantly in receipt of outdoor relief, & her other two children had been taken into the parochial schools & boarded & educated at the expense of the guardians, where they remained up to the date of an order of removal which was obtained as to these two children when the mother ceased to live in the P. union as aforesaid:—*Held*: by Poor Law (Amendment) Act, 1834 (c. 76), s. 56, the woman, owing to the relief given to her children, must be deemed to have been herself in receipt of relief from the P. union, & could not break her residence in the P. union, & must be deemed to be irremovable from that union, & the order of removal was, therefore, wrongly made.—*WEST HAM UNION v. POPLAR UNION (1906), 94 L. T. 709; 70 J. P. 255; sub nom. POPLAR UNION v. WEST HAM UNION, 4 L. G. R. 512, D. C.*

**1121.** ——— **Maintenance of lunatic wife.**—In 1835, the pauper's father & mother went to reside at E., & they both continued to reside there till July, 1847. The pauper was born there in Jan. 1844. In July, 1847, the mother became chargeable to E., as a lunatic, & was removed to an asylum at B. In Sept. 1849, an order was made by justices, adjudging the mother's settlement to be in S. After remaining in the asylum, at the charge of S., for several years, she was removed to the workhouse in S., & was maintained there by S., as a lunatic, till her death in Oct. 1858. The pauper continued to reside with her father, in E., from her birth till his death, in Dec. 1857; & after his death, she remained there till Feb. 1858, when she became chargeable to E. In Dec. 1858, an order was made for her removal to S., which was quashed, on appeal, by an order of sessions:—*Held*: the pauper was, by Poor Removal Act, 1846 (c. 66), irremovable from E.; for that the relief afforded to her father by the maintenance of her mother did not deprive him of the status of irremovability from E. which he had previously acquired; that status was communicated to the pauper, & she retained it at the date of the order of removal.—*R. v. ELVERT (INHABITANTS) (1859), 2 B. & E. 266; 29 L. J. M. C. 17; 33 L. T. O. S. 202; 23 J. P. 807; 5 Jur. N. S. 1350; 7 W. R. 586; 121 E. R. 101.*

*Annotations.*—*Consd. St. Giles in the Fields Overseers v. Strand Union (1861), 7 Jur. N. S. 161. Distd. R. v. St. Mary Arches, Exeter Overseers, etc. (1862), 1 B. & S. 890. Apprvd. Reigate Union v. Croydon Union, Highworth & Swindon Union v. Westbury on Severn Union, Medway Union v. Bedminster Union (1889), 14 App. Cas. 465. Consd. West Ham Union v. St. Matthew, Bethnal Green Union, [1894] A. C. 230; St. Olave's Union v. Canterbury Union (1897), 61 J. P. 231. Apprvd. West Ham Union v. Holbeach Union, [1905] A. C. 450. Rehd. Woolwich Union v. Fulham Union, [1906] 2 K. B. 240; Kingston-upon-Hull Incorporation of the Poor v. Hackney Union, [1911] 1 K. B. 748.*

**1122.** ———.]—The expense of the maintenance of a wife in a lunatic asylum, etc., she having been, on the application of her husband, received into the workhouse as chargeable to the parish, & removed to the asylum under an order obtained in pursuance of stat. 16 & 17 Vict. c. 97, is relief given to the husband, so as to prevent his acquiring, under Poor Removal Act, 1846 (c. 66), a status of irremovability by residence in the parish during that time.—*R. v. ST. GEORGE, BLOOMSBURY OVERSEERS (1863), 4 B. & S. 108; 2 New Rep. 322; 32 L. J. M. C. 217; 27 J. P. 662; 11 W. R. 801; 122 E. R. 400.*

**1123.** ———.]—*IPSWICH UNION v. WEST HAM UNION, No. 1117, ante.*

**Sect. 2.—Irremovability: Sub-sect. 2, C. (a), (b), (c), (d) & (e).]**

**1124. — Maintenance in home—Supported by general charitable subscriptions.]—**A pauper had for upwards of three years been maintained in a penitentiary or home, which was supported by offertories collected in various churches, & by charitable subscriptions from all parts of England:—**Held:** the circumstances of the pauper's residence were not such as to bring her within the proviso to Poor Removal Act, 1846 (c. 66), s. 1, & having become irremovable under that Act, Poor Relief Act, 1814 (c. 170), s. 8, did not apply so as to prevent her gaining a settlement under Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 34.—**FULHAM UNION v. ISLE OF THANET UNION** (1881), 7 Q. B. D. 539; 50 L. J. M. C. 101; 44 L. T. 678; 45 J. P. 552; 29 W. R. 723, C. A.

**Annotation:—***Apld.* Ormskirk Union v. Lancaster Union (1912), 10 L. G. R. 1041.

**1125. Effect of change of residence—While in receipt of relief.]—****WEST HAM UNION v. POPLAR UNION**, No. 1081, *ante*.

(b) *Period in Prison.*

See Poor Law Act, 1927 (c. 14), s. 108 (2) (h), (i), (j).

**1126. General rule—Period excluded.]—**Under Poor Removal Act, 1846 (c. 66), s. 1, an imprisonment, out of the parish, in default of paying a fine, upon a summary conviction, does not break the residence in the parish; & if there be on the whole a five years' residence, without reckoning the time of imprisonment, & the residence be continuous with the exception of that time, the resident is irremovable.—**R. v. HOLBECK OVERSEERS** (1851), 16 Q. B. 404; 20 L. J. M. C. 107; 16 L. T. O. S. 503; 15 J. P. 227; 117 E. R. 933; *sub nom.* **HOLBECK OVERSEERS v. LEEDS OVERSEERS**, 15 Jur. 271; *sub nom.* **R. v. HOLPECH OVERSEERS**, 4 New Sess. Cas. 501.

**Annotations:—***Foll.* Hartfield v. Rotherfield (1852), 17 Q. B. 746. *Refd.* Clarendon v. St. James, Westminster Overseers, etc. (1851), 15 Jur. 492; **R. v. WORCESTERSHIRE J.J.**, Winchcombe Union v. Stourbridge Union (1865), 13 W. R. 836.

**1127. —**—**]**—The first provision in Poor Removal Act, 1846 (c. 66), s. 1, that the several periods of time there specified shall, for all purposes, be excluded in the computation of the five years' residence necessary to confer irremovability, has the effect of excluding those specified periods in computing whether the pauper has resided altogether five years in the parish, & also whether he has resided there for five years next before the application for the warrant; & such periods of time are neither to tell in making up the five years nor to operate as a break in the residence, if altogether it has continued for five years. The expression in the proviso, "the time during which such person shall be a prisoner in a prison," includes all lawful imprisonments in any prison, whether in or out of the parish of residence, without distinction of felony, misdemeanour or debt.

An order for the removal of the wife & children of J. was obtained on Mar. 21, 1851. Down to Jan. 8, 1851 J. had continuously resided in resp. parish for more than ten years. On that day he was apprehended on a charge of felony & committed to the county gaol, situate out of resp. parish, where he remained till Mar. 13, following, when he was tried & convicted of felony, & sentenced to two years' imprisonment in a house of correction out of resp. parish, where he remained when the order of removal was made:—**Held:** the period of his imprisonment was to be excluded

from the computation of his residence in resp. parish, & the wife & children were not removable therefrom.—**HARTFIELD v. ROTHERFIELD** (1852), 17 Q. B. 746; 117 E. R. 1467; *sub nom.* **R. v. HARTFIELD OVERSEERS**, 21 L. J. M. C. 65; 18 L. T. O. S. 237; 16 J. P. 181; 16 Jur. 244.

**Annotations:—***Foll.* **R. v. St. Andrew, Holborn** (1852), 21 L. J. M. C. 69; **R. v. Potterhanworth** (1858), 1 E. & E. 262. *Apld.* Guildford Union v. St. Olave's Union (1872), 36 J. P. 804; Ipswich Union v. West Ham Union (1887), 58 L. T. 419. *Dist.* Newark Union v. Maldstone Union (1905), 93 L. T. 602. *Apld.* West Ham Union v. Poplar Union (1906), 94 L. T. 769. *Refd.* **R. v. East Stonehouse** (1855), 24 L. J. M. C. 121; **R. v. St. Leonard, Shoreditch** (1865), L. R. 1 Q. B. 21; **St. Olave's Union v. Canterbury Union**, [1897] 1 Q. B. 682.

**1128. —**—**]**—A pauper had resided in resp. parish for upwards of five years next before the application for a warrant for his removal excluding a period during which he was an inmate of the workhouse in the said parish, & excluding also two periods of three weeks & two weeks during which he was imprisoned in a house of correction, situate out of resp. parish, under committals for misbehaviour in the workhouse:—**Held:** these periods were to be excluded from the computation for all purposes, & the pauper was consequently irremovable by reason of residence for five years in resp. parish, within Poor Removal Act, 1846 (c. 66), s. 1.—**R. v. St. Andrew, Holborn (INHABITANTS)** (1852), 17 Q. B. 746, 764; 21 L. J. M. C. 69; 18 L. T. O. S. 238; 16 J. P. 182; 16 Jur. 246; 117 E. R. 1467, 1474.

**Annotation:—***Dist.* Newark Union v. Maldstone Union (1905), 93 L. T. 602.

**1129. —**—**]**—**R. v. POTTERHANWORTH (INHABITANTS)**, No. 1141, *post*.

(c) *Period in Hospital.*

See Poor Law Act, 1927 (c. 14), s. 108 (2) (d).

**1130. General rule—Period in hospital excluded.]—**A female pauper lived a year & upwards on sufferance with relatives, & left the parish for some weeks, intending to return, her relatives being willing to receive her on her return:—**Held:** her residence was not broken, & she retained her status of irremovability, though having no house or lodging to which she had a right to return in the parish.—**R. v. KNARESBOROUGH UNION** (1872), 36 J. P. 501.

**1131. —**—**]**—A pauper lived in resp.'s union before Mar. 25, 1867 long enough to obtain a status of irremovability. On that day he was admitted into resp.'s workhouse, & he remained there until Aug. 27, 1868, when he voluntarily took his discharge, & on the same day became an inmate of a hospital in another union. On Dec. 31, 1868 he was discharged from the hospital, & took a lodging in resp.'s union, where he remained until Jan. 20, 1869, when he was again admitted into resp.'s workhouse:—**Held:** independently of the exception by Poor Removal Act, 1846 (c. 66), s. 1, of time spent in a hospital, the pauper had a constructive residence in resp.'s union during his temporary absence, although he had no specific lodging or house to return to, & therefore his status of irremovability was not destroyed, & an order for his removal to the place of his last legal settlement was bad.—**GUILDFORD UNION v. ST. OLAVE'S UNION** (1872), 25 L. T. 803; 36 J. P. 804.

**Annotation:—***Refd.* **R. v. St. Ives** (1872), L. R. 7 Q. B. 467.

**1132. —**—**]**—**ST. OLAVE'S UNION v. CANTERBURY UNION**, No. 487, *ante*.

**1133. What constitutes "hospital"—Home for epileptics—Partially supported by payments from inmates.]—**An institution partially endowed by a private person & founded with the object of



providing a home & medical treatment, together with suitable employment & recreation, for persons suffering from epilepsy, the main part of the expenses being defrayed by payments of the inmates, is a "hospital" within proviso to Poor Removal Act, 1846 (c. 66), s. 1.—*ORMSKIRK UNION v. CHORLTON UNION*, [1903] 2 K. B. 498; 72 L. J. K. B. 721; 89 L. T. 256; 68 J. P. 42; 19 T. L. R. 622; 47 Sol. Jo. 690; 1 L. C. R. 692, C. A.

*Annotations*.—*Consd.* *Tendring Union v. Woolwich Union*, [1923] 1 K. B. 121. *Refd.* *Ormskirk Union v. Lancaster Union* (1912), 107 L. T. 620. *Mentd.* *Rotunda Hospital, Dublin v. Coman* (1920), 7 Tax Cas. 517.

**1134. — Convalescent home.] — CHRISTCHURCH UNION v. ST. MARY, ISLINGTON UNION**, No. 500, *ante*.

**1135. — Home for poor & afflicted persons — Where medical attendance not provided.] —**A woman who became a pauper lunatic in 1911, had resided from 1905 till May, 1911, in the Nazareth House, Lancaster, in the Lancaster Union. The Nazareth Houses are established in various parts of England for the relief of the poor & afflicted persons, & for the education & training for service of orphan Roman Catholic children, imbeciles & epileptics, & persons requiring skilled nursing, or constant medical attendance, are not admitted. There are no trained nurses, nor is there a resident medical attendant. The house has an endowment fund, which depends greatly on voluntary subscriptions. The woman, being of weak intellect & quarrelsome nature, never obtained a situation outside the house. She was a voluntary & ordinary inmate doing domestic duties & receiving no special medical attention:—*Held*: she was not confined as a patient in a hospital within Poor Removal Act, 1846 (c. 66), s. 1, & was irremovable from the Lancaster Union.—*ORMSKIRK UNION v. LANCASTER* (1912), 107 L. T. 620; 77 J. P. 45; 10 G. R. 1041, D. C.

*Annotation*.—*Fold.* *Tendring Union v. Woolwich Union*, [1923] 1 K. B. 121.

**— Home for incurables.] —**St. Michael's Home, Clacton, was a home for crippled girls suffering from tubercular disease of the spine or joints, but not for those suffering from tuberculosis of lungs & therefore requiring medical treatment, & who, having been treated in hospital, had been discharged therefrom as incurable. No special medical treatment was provided, but only medical treatment for usual children's ailments. There was no limit to the time during which the girls might remain as inmates, & most of them stayed a number of years, or until some circumstance arose which necessitated their going elsewhere.

M., then a girl aged sixteen, was admitted as an inmate of the Home in 1911, suffering from tubercular disease of the spine, having been discharged from a hospital as incurable. She remained until 1918, when the Board of Education took over the home & limited the age of the inmates to sixteen years. She afterwards became chargeable to resps.' union, & upon their application, on evidence of the above facts, a Metropolitan police magistrate made an order adjudging her last settlement to be in the parish of Clacton in appls.' union. By consent of the parties a case was stated under Quarter Sessions Act, 1849 (c. 45), s. 11, for the opinion of the ct.:—*Held*: during her stay at the home, M. was not a "patient confined in a hospital," & had therefore acquired a legal settlement there within the Poor Removal Act, 1846 (c. 66), s. 1.—*TENDRING UNION v. WOOLWICH UNION*, [1923] 1 K. B. 121; 92 L. J. K. B. 33; 127 L. T. 551; 86 J. P. 163; 20 L. G. R. 519, D. C.

(d) *Period in Naval, Military or Air Service.*

*See Poor Law Act, 1927 (c. 14), s. 108 (2) (a).*

**1137. General rule.] —**A man was born & lived with his parents in a parish in the W. union, thereby acquiring a settlement in that union. In Apr. 1912, he went to reside in a parish in the L. union where he lived till Sept. 7, 1914, thereby becoming irremovable from that parish. On Sept. 7, 1914, he enlisted in the Army & served as a soldier until Aug. 25, 1918, when he was killed. On Nov. 22, 1914, he married. His wife, after her marriage, went back to live with her parents in a parish in the W. Union, where she continued to reside till she became insane. On Sept. 27, 1916, she was sent to an asylum as a pauper lunatic:—*Held*: (1) the husband by virtue of Poor Removal Act, 1846 (c. 66), s. 1, retained his status of irremovability in the L. union as long as he was serving as a soldier; (2) his wife by virtue of the Poor Removal Act, 1848 (c. 111), had the same status of irremovability in the L. union as her husband had, & when she became insane & was sent to an asylum the incidental expenses & the expense of her maintenance in the asylum were, under Lunacy Act, 1890 (c. 5), s. 294, payable by the guardians of the L. union, notwithstanding the fact that at the time of her removal to the asylum she was not resident in the parish from which her husband was irremovable.—*LEWISHAM UNION v. WANDSWORTH UNION*, [1919] 2 K. B. 463; 89 L. J. K. B. 33; 121 L. T. 333; 83 J. P. 178; 17 L. G. R. 465, D. C.

**1138. What service includes—Service in militia.] —**The proviso in Poor Removal Act, 1846 (c. 66), s. 1, that the time during which any person shall be serving Her Majesty as a soldier, marine or sailor shall be excluded from the computation of the time a residence for which creates irremovability, applies to the time during which a person is serving as a militia man.—*HORTON OVERSEERS v. LEEDS OVERSEERS* (1855), 5 E. & B. 595; 25 L. J. M. C. 38; 20 J. P. 198; 1 Jur. N. S. 1162; 119 E. R. 602; *sub nom.* *Re HORTON PARISH OFFICERS & LEEDS PARISH OFFICERS*, 26 L. T. O. S. 73.

*Annotation*.—*Mentd.* *R. v. JENNUP* (1856), Dears. C. C. 619.

**In respect of wife of soldier.] —***See* Sub-sect. 3, A., *post*.

(e) *Period of Confinement as Lunatic.*

*See Poor Law Act, 1927 (c. 14), s. 108 (2) (c), (e).*

**1139. General rule—Period excluded.] —**(1) Pauper having resided five years in A., a parish in an union, was removed without an order to the workhouse of the union, where he remained twelve months. A. paid the union a small sum; afterwards M., another parish in the union, paid the union for the maintenance, by consent of the guardian for M. at the board of the union, on the supposition that pauper was settled in M. Pauper became lunatic, & was removed to an asylum by an order describing him to be from A.; it did not appear that either A. or M. interfered in this removal. Afterwards Poor Removal Act, 1846 (c. 66), passed. M. paid for pauper's maintenance in the asylum for many years after his removal thither, & after the passing of that statute, & of 16 & 17 Vict., c. 97:—*Held*: under stat. 16 & 17 Vict., c. 97, s. 102, the union was properly chargeable for the expenses in the lunatic asylum, as the pauper, at the time of his removal thither, would, but for such removal, have been exempt from removal from A. under Poor Removal Act, 1846, (c. 66), inasmuch as neither the removal to the workhouse without an order, nor the removal to the

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lunatic asylum, interrupted the residence in A., by Poor Law (Amendment) Act, 1849 (c. 103), s. 4, though the time spent in the workhouse & lunatic asylum was excluded from the computation of time of residence.

(2) Poor Law (Amendment) Act, 1844 (c. 101), passed before the removal to the workhouse:—**Held:** so far as regarded irremovability under Poor Removal Act, 1846 (c. 66) Poor Law (Amendment) Act, 1844 (c. 101), s. 56, did not, though it made the workhouse part of the parish of settlement, & though M. had made payments on the supposition of the settlement being in M., break the residence in A.; the payment by M., if evidence of settlement there, was such evidence as might be rebutted.—*R. v. WEST WARD UNION* (1850), 7 E. & B. 21; 26 L. J. M. C. 20; 28 L. T. O. S. 157; 21 J. P. 212; 3 Jur. N. S. 185; 5 W. R. 87; 119 E. R. 1155.

**1140.** ———.—(1) Where the status of irremovability by virtue of a year's residence is shown to have existed, it is for the party alleging that it has ceased to exist to prove that to be the case.

(2) The leaving of a residence which has conferred the status of irremovability must be the voluntary act of the party.

Where, therefore, a pauper lunatic who had acquired the status of irremovability by residence in the union of K. as a domestic servant, whilst continuing in that same union became insane, whereupon her mother took her away into the union S. where an order was made for her maintenance upon her union of settlement at W.:—**Held:** the order was bad, for she had not lost her status of irremovability in the union of R.—*R. v. WHITBY UNION* (1870), L. R. 5 Q. B. 325; 39 L. J. M. C. 97; 34 J. P. 725; 18 W. R. 785; *sub nom. R. v. WHITBY UNION, YORKSHIRE, Re MARSHALL*, 22 L. T. 336.

**Annotations:**—As to (2) *Distd. Hendon Union v. Hampstead Union* (1893), 62 L. J. M. C. 170. **Refd.** *Guildford Union v. St. Olave's Union* (1872), 36 J. P. 804; *Newark Union v. Glanford Brigg* (1877), 2 Q. B. D. 522.

**SUB-SECT. 3.—STATUS OF WIVES AND CHILDREN.**

**A. In General.**

*See* Poor Law Act, 1927 (c. 14), s. 108 (3)–(7).

**1141. General rule.]**—(1) Under Poor Removal Act, 1846 (c. 66), s. 1, imprisonment in England under a sentence of penal servitude is not an interruption of the residence necessary to confer irremovability. An order for the removal of the wife & children of T. was obtained on Nov. 6, 1857. Previously to 1849, T. had gained a settlement in applt.'s parish. In 1849 T. & his family went to reside in resps.' parish. In 1851 he was convicted & sent to prison out of the parish for three months & then returned. In June, 1854, he was sentenced to two years' imprisonment, & on that occasion was absent from the parish two years, & one month, when he again returned to resps.' parish. On Oct. 24, 1856, he was again apprehended, & on Jan. 8, 1857, sentenced to six years' penal servitude, Between Lady-day, 1849 & Oct. 24, 1856, when out of prison, he resided in resps.' parish, & his wife & family resided there up to the time of the granting of the order of removal. The wife had seen T. in Millbank prison about the time of the granting the order. T. had further a settlement by estate between 1849 & Oct. 1856, in resps.' parish:—**Held:** he was a prisoner in prison within the

meaning of the proviso, & the wife & family were therefore not removable.

(2) Where a man having resided with his wife & children for more than five years in a parish, is sentenced to six years' penal servitude, the wife & children, continuing to reside in the same parish, are irremovable whilst he remains in prison in England in consequence of the sentence.—*R. v. POTTERHANWORTH (INHABITANTS)* (1858), 1 E. & E. 262; 28 L. J. M. C. 56; 32 L. T. O. S. 158; 23 J. P. 564; 4 Jur. N. S. 1277; 7 W. R. 106; 120 E. R. 907.

**1142.** ———.—*IPSWICH UNION v. WEST HAM UNION*, No. 1117, *ante*.

**1143.** ———.—(1) Notwithstanding Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35 a child over sixteen, who is residing with its parent as part of the family, & who has no other settlement than the settlement derived from the parent at the time when it attained sixteen, is not removable to its place of settlement if the parent is not removable. A child, after living in applt. union with its father, who had acquired a settlement by residence there, removed with him into resp. union, & while residing there with him as part of his family attained the age of sixteen & became chargeable. An order was made for the removal of the child to applt. union. At the date of this order the father had resided for more than a year in resp. union, & had thereby become irremovable:—**Held:** notwithstanding Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 35, Poor Removal Act, 1848 (c. 111), s. 1 applied, & the father not being removable, the child was not removable.

(2) What then is the right construction of the proviso in Poor Removal Act, 1848 (c. 111), s. 1? . . . I think that the proviso was a benevolent & humane enactment, & that its object was to prevent in these cases of misfortune the separation of families, so long as the family continued to be one family living together. If the family were living together as one under the superintendence of its head, & the misfortune of requiring parish relief should happen either to the parents or to the children, they were not to be separated from each other. Remembering the object with which the proviso was passed, I cannot doubt that it applies to the case of a person who has a wife or children living with him as part of his family. When you consider the object of the Legislature, it is a necessary implication that you should read the proviso thus: "Whenever any person shall have a wife or children *living with him as part of his family*," the words in italics being understood. That being so, the next point to be considered is, what is the meaning of the following words: "Having no other settlement than his or her own." In order to construe those words, we must look at the different persons to whom they are applied. Who are they? "Wife or children," & no other—wife or children still being part of the father's or mother's family. That being so, I have no hesitation in saying that the meaning of the words, "Having no other settlement than his or her own" is, "having no other settlement than the settlement derived from him or her." The proviso is to apply so long as that state of things lasts. It does not, therefore, apply when the wife or child has another settlement than that derived from the husband or father or mother, but, so long as the only settlement of the wife or the child or children is that derived from the husband or the father or the mother—that is, the wife from her husband, or the child from its father or mother—they are not to be separated (LORD ESHER, M.R.).—

**MITFORD & LAUNDITCH UNION v. WAYLAND UNION** (1890), 25 Q. B. D. 164; 59 L. J. M. C. 86; 38 W. R. 632; 6 T. L. R. 307, C. A.

*Annotations*:—*As to* (2) *Consd.* West Ham Union v. St. Matthew, Bethnal Green, [1892] 2 Q. B. 676. *Dttd.* Paddington Union v. Westminster Union, [1915] 2 K. B. 644. *Refd.* Kingston-upon-Hull Corp. for the Poor v. Hackney Union, [1911] 1 K. B. 748.

**1144.** — *J.*—**LEWISHAM UNION v. WANDSWORTH UNION**, No. 1137, *ante*.

**1145. Whether wife separated from husband.**—Order to remove a married woman is good unless it appears she is sent from her husband.—*ST. MICHAEL, BATH PARISH v. NUNNY, SOMERSET PARISH* (1723), 1 Stra 544; 93 E. R. 680.

*Annotations*:—*Consd.* R. v. Carleton (1775), Burr. S. C. 813. *Foll.* R. v. Stockton (1833), 5 B. & Ad. 546.

**1146. Husband in prison—Wife residing in same parish.**—Where debtor is imprisoned in the county gaol in execution under a Court of Requests Act, which authorises such imprisonment for a limited time & his wife resides in the parish where the gaol is situate, & has occasional access to him under the prison regulations, she cannot, if chargeable, be removed from the parish; for the principle, that husband & wife shall not be separated by an order of removal, applies, notwithstanding such imprisonment of the husband.—*R. v. STOGUMBER (INHABITANTS)* (1839), 9 Ad. & El. 622; 1 Per. & Dav. 409; 2 Will. Woll. & II. 95; 8 L. J. M. C. 20; 3 J. P. 303; 112 E. R. 1347.

*Annotation*:—*Consd.* R. v. Preston Union (1883), 11 Q. B. D. 113.

**1147. Consent of wife—Husband having no settlement.**—(1) Assuming that a wife may be removed to her maiden settlement without her husband by consent of both, such consent is not to be inferred from examinations of the husband & wife taken at the same time before the removing justices, in which the husband states his consent, & the wife says nothing on the subject.

(2) The first examination purported, by the heading, to be taken by the justices touching the settlement of J. M., the husband: other material ones purported to be taken “at the time, place, & in manner, aforesaid”: but one of these related entirely to the wife’s maiden settlement, & the order removed her & her children, & not the husband:—*Held*: the examinations were not on that account objectionable, on appeal against the order.

(3) The examinations stated that the husband & a parish officer had diligently inquired in all likely places for the husband’s settlement, but had not found any, & believed he had none:—*Held*: the search was sufficiently stated, & the examinations were not defective for omitting to show with more certainty that the husband had not a settlement in Scotland, Ireland, the Isle of Man, etc., to which he & his family might have been removed under Poor Relief Act, 1819 (c. 12), s. 33.—*R. v. LEEDS (INHABITANTS)* (1814), 5 Q. B. 916; Dav. & Mer. 304; 1 New Mag. Cas. 52; 1 New Sess. Cas. 257; 13 L. J. M. C. 107; 3 L. T. O. S. 179; 8 J. P. 517; 8 Jur. 534; 114 E. R. 1493.

*Annotations*:—*As to* (1) *Refd.* Poor Law Comrs. for Ireland v. Liverpool Vestry (1869), 39 L. J. M. C. 25. *Generally*, *Refd.* R. v. Yelvertoft (1845), 6 Q. B. 801.

**1148. Consent of husband—Lunatic wife.**—A wife having become insane & chargeable to the union in which her husband dwelt, was taken from his house to the workhouse of the union, & the medical officer thereof certified, under 25 & 26 Vict. c. 111, s. 20, that the lunatic was a proper person to be kept in a workhouse. An order was then made by justices for her removal alone to another union containing her husband’s last place of settlement. The husband consented to the

removal order; the wife was mentally incapable of consent:—*Held*: the order of removal made under these circumstances did not contravene the policy of the law with regard to the separation of husband & wife, & was good.—*R. v. PRESTON UNION* (1883), 11 Q. B. D. 113; 49 L. T. 104; *sub nom.* R. v. GARSTANG POOR LAW UNION, 52 L. J. M. C. 97; 48 J. P. 69, D. C.

**1149. Separation of husband & wife—No presumption that separation effected.**—Two justices ordered F., the wife of R., a Scotsman, having no settlement in England, & a lunatic, to be removed from parish A., where she had become chargeable, to parish B., which was adjudged to be her lawful settlement. The order did not state where the husband was when it was made:—*Held*: the order was not void on the ground that it would effect the separation of husband & wife, because it was not to be presumed that when it was made, the husband was residing in parish A., or was not residing in parish B.—*R. v. STOCKTON (INHABITANTS)* (1833), 5 B. & Ad. 546; 2 Nev. & M. K. B. 353; 1 Nev. & M. M. C. 411; 3 L. J. M. C. 48; 110 E. R. 892.

**1150. Husband having an estate.**—A wife, who on being left by her husband, goes & resides on his estate for forty days by herself does not thereby gain a settlement for a husband, & therefore, not for herself or children.—*R. v. AYTHORP ROODING (INHABITANTS)* (1756), Burr. S. C. 412; 2 Bott. 496.

*Annotations*:—*Consd.* R. v. Brington (1827), 7 B. & C. 546. *Refd.* R. v. Houghton Jo Spring (1801), 1 East, 247; R. v. Martley (1804), 5 East, 40.

**1151. Though residing elsewhere.**—Wife cannot be removed from a tenement of £10 in the occupation of the husband, though he resides elsewhere, on the ground that she could not be removed from his estate, he having a subsisting lease at the time of her removal.—*LEEDS v. BLACKFORDBY* (1764), 1 Wm. Bl. 466; 96 E. R. 270; *sub nom.* R. v. LEEDS (INHABITANTS), Burr. S. C. 524; 2 Bott. 163.

*Annotation*:—*Consd.* R. v. St. George the Martyr, Southwark (1798), 7 Term Rep. 466.

**1152. ———**—(1) The wife of a person who was legally settled in A. but was a transported convict, went to B., & resided there upon an estate in which she was jointly interested with her sisters, under their mother’s marriage settlement:—*Held*: she was residing upon her own, & irremovable.

(2) The sessions having quashed an order of removal both as to such woman & a child who accompanied her:—*Held*: they thereby virtually declared the child to be within the age of nurture, & irremovable from the mother, & the ct. might presume the fact to be so.—*R. v. BRINGTON (INHABITANTS)* (1827), 7 B. & C. 546; 1 Man. & Ry. K. B. 431; 1 Man. & Ry. M. C. 122; 6 L. J. O. S. M. C. 33; 108 E. R. 826.

**1153. Wife having own estate.**—*R. v. BRINGTON (INHABITANTS)*, No. 1152, *ante*.

**1154. Wife having sufficient residence alone—Husband not having acquired irremovability.**—*R. v. POTT SHRIGLEY (INHABITANTS)*, No. 1394, *post*.

**1155. ———**—The proviso of Poor Removal Act, 1846 (c. 66), s. 1, that, where a man’s wife or children have no other settlement than his own, they shall be removable when he is removable, & not removable when he is not, refers to the case of a man being legally removable, & not to his being in fact removable or not by reason of his presence in the parish or absence from it.

It is the nature of a proviso to refer to a preceding enactment, & to take some cases out of it, which would otherwise be within it. So here the

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general enactment is, that a person who has resided five years shall not be removable, but there may be a case where a married woman has resided more than five years, her husband having resided less, so that, according to the enactment, the husband would be removable, the wife not. In such a case the proviso says the test for both husband & wife shall be, whether the husband is removable (COLERIDGE, J.).—*R. v. ST. EBBE'S (INHABITANTS)* (1848), 12 Q. B. 137; 3 New Mag. Cas. 62; 3 New Sess. Cas. 308; 18 L. J. M. C. 14; 12 L. T. O. S. 171; 13 J. P. 216; 12 Jur. 1002; 116 E. R. 818.

*Annotations:—***Reld.** *R. v. Leaden Roothing* (1849), 13 Jur. 534; *R. v. Kingston Union* (1869), 21 L. T. 488; *West Ham Union v. St. Matthew, Bethnal Green*, [1894] A. C. 230.

**1156. — Wife of marine.]—**(1) The caption of the examinations stated that they were taken on oath "upon the complaint of the churchwardens & overseers of the parish of A."—*Held*: insufficient.

(2) The wife of a marine had resided in parish A. from Feb. 1841, to Oct. 1846, when she became chargeable. At this time her husband, who had only occasionally resided with her during the above period, had been absent for six months serving at sea. *Qu.*: if she was removable under Poor Removal Act, 1846 (c. 66).—*R. v. EAST STONEHOUSE (INHABITANTS)* (1848), 12 Q. F. 72; 17 L. J. M. C. 166; 11 L. T. O. S. 329; 12 J. P. 791; 116 E. R. 793.

**1157. — — —.]—**The wife & children of

husband being absent on Her Majesty's service, the wife & children were removed to the parish of C. On appeal, the sessions quashed the order, subject to a case stating the above facts, on the ground that the wife & children were irremovable:—*Held*: the wife & children might be removed notwithstanding Poor Removal Act, 1846 (c. 66), & Poor Law (Amendment) Act, 1848 (c. 111), though the husband, if present, could not have been removed in consequence of his being a marine; inasmuch as the proviso in that latter statute only prohibits the removal of the wife or children of a person who had acquired the status of irremovability under Poor Law Removal Act, 1846 (c. 66).—*R. v. EAST STONEHOUSE (INHABITANTS)* (1854), 3 E. & B. 596; 2 C. L. R. 1530; 23 L. J. M. C. 137; 23 L. T. O. S. 77; 18 J. P. 522; 18 Jur. 446; 2 W. R. 410; 118 E. R. 1265.

*Annotations:—***Apld.** *R. v. Kingston Union* (1869), 21 L. T. 488. **Reld.** *R. v. Manchester Overseers* (1857), 4 Jur. N. S. 9.

**1158. — Wife of house surgeon.]—***R. v. NORWOOD*, No. 505, *ante*.

**1159. — Wife of soldier.]—**Under Poor Removal Act, 1846 (c. 66), s. 1, as amended by Poor Removal Act, 1848 (c. 111), the status of removability or irremovability of a married woman & her children depends upon the status of the husband.

Thus where a wife & her children had resided for upwards of five years or more in the parish of R., during which time her husband, an Irishman, was absent serving Her Majesty as a soldier:—*Held*: the wife & children had not acquired a status of irremovability in the parish of K., under above statutes.—*R. v. KINGSTON UNION* (1869), 21 L. T. 488; 34 J. P. 549; 18 W. R. 133.

**1160. — Wife of foreign sailor.]—**A woman having a settlement in parish L., but having resided for more than a year in parish G., married a foreign sailor having no settlement. They

resided together in parish G. until he left in the usual course of his occupation as a sailor, intending to return, but not having made any provision for his wife's maintenance. She continued to reside in parish G., & became chargeable thereto. At this time the husband had not resided one year in the parish:—*Held*: the woman was irremovable under Poor Removal Act, 1846 (c. 66), s. 1, & Union Chargeability Act, 1865 (c. 79), s. 8, by reason of her continuous residence before & during marriage; & she was not affected by the proviso in Poor Removal Act, 1848 (c. 111), s. 1.—*R. v. ST. GEORGE-IN-THE-EAST (INHABITANTS)* (1870), L. R. 5 Q. B. 364; 39 L. J. M. C. 90; 22 L. T. 440; 34 J. P. 709; 18 W. R. 787.

*Annotations:—***Consd.** *R. v. St. Olave's Union* (1873), L. R. 9 Q. B. 38. **Apld.** *Medway Union v. Hedminster Union* (1887), 20 Q. B. D. 191. **Fold.** *Tewkesbury Union v. Birmingham Union*, [1904] 2 K. B. 395.

**1161. — Wife of foreigner having no settlement.]—**Poor Removal Act, 1846 (c. 66), s. 1, as amended by Union Chargeability Act, 1865 (c. 79), s. 8, no person shall be removed from any parish in which such person shall have resided for one year next before the application for the warrant for removal.

A married woman resided in a parish for part of a year with her husband, a foreigner having no settlement. The husband then went abroad intending to return. The wife continued to reside with her children in the parish for the remainder of the year, after the expiration of which, during her husband's absence, she became chargeable to the parish:—*Held*: the married woman could not be removed from the parish.—*Tewkesbury v. Birmingham Union*, [1904] 2 K. B. 395; 73 L. J. K. B. 797; 90 L. T. 787; 68 J. P. 397; 20 T. L. R. 499; 2 L. G. R. 864; *sub nom.* *Birmingham Union v. Tewkesbury Union*, 53 W. R. 268; 48 Sol. Jo. 495, D. C.

*Annotation:—***Reld.** *Hambleton Union v. Cuckfield Union* (1914), 84 L. J. K. B. 1265.

**1162. — Husband's residence broken.]—***R. v. LLANELLY (INHABITANTS)*, No. 1093, *ante*.

**1163. — — —.]—***R. v. MANCHESTER OVERSEERS*, No. 1109, *ante*.

**1164. — Husband living apart.]—***Hambleton Union v. Cuckfield Union*, No. 474, *ante*.

**1165. Wife absent with husband on military service.]—**A husband & wife had resided for five years in a parish, when he enlisted for a soldier, & they both followed the regiment abroad for several years, till his death, when the widow returned immediately to the same parish, & after a month's residence became chargeable, when an order was obtained to remove her to her husband's parish of settlement:—*Held*: she had not become irremovable; as the wife's absence with her husband while he is on service as a soldier is not excepted in the Poor Removal Act, 1846 (c. 66), s. 1.—*EASTON OVERSEERS v. ST. MARY, MARLBOROUGH OVERSEERS* (1867), L. R. 2 Q. B. 128; 36 L. J. M. C. 41; 31 J. P. 214; 15 W. R. 310.

**1166. Meaning of "removable"—**Legally removable.]—*R. v. ST. EBBE'S (INHABITANTS)*, No. 1155, *ante*.

**1167. Application of statute to illegitimate children.]—***FULHAM PARISH v. WOOLWICH UNION*, No. 503, *ante*.

**1168. — — —.]—***BRAINTREE UNION v. ROCHFORD UNION*, No. 504, *ante*.

### B. Widows.

*See* Poor Law Act, 1927 (c. 14), s. 108 (4).

**1169. Irremovability for twelve months—When resident with husband at time of death—Widow of merchant seaman.]—**A woman resided in parish

E. from her marriage in 1840 to Oct. 1854. Her husband died in July, 1845; & she continued to reside in E., being a widow, until Oct. 1854, when an order was made to remove her from E. to her settlement. From the time of the marriage until Feb. 1848, her husband was serving the Queen as a marine. He then quitted the service, & resided with his wife at E. until the beginning of 1850, when he became a seaman on board a Queen's ship, & served there until Nov. 1853. He then returned & lived with his wife until the beginning of 1854, from which time, until his death in July, 1854, he served as a hired seaman on board a packet belonging to a private co.; & he died at sea in such service.—*Held*: the widow was not irremovable under Poor Removal Act, 1846 (c. 66), s. 1; for that the husband, excluding the time during which he was in the Queen's service as marine & sailor, had not resided continuously for a period which, joined with the time of her residence after his death, would make up five years' continuous residence. But she was irremovable under sect. 2, the facts showing that the husband was, at the time of his death, domiciled in E., with an *animus revertendi*, & therefore she was in law resident with him at the time of his death, & was irremovable for the twelve months following, while she remained a widow.—*R. v. EAST STONEHOUSE (INHABITANTS)* (1855). 4 E. & B. 901; 3 C. L. R. 855; 24 L. J. M. C. 121; 25 L. T. O. S. 66; 19 J. P. 579; 1 Jur. N. S. 573; 3 W. R. 375; 119 E. R. 335.

*Annotation*:—*Reid*. *R. v. Manchester Overseers* (1857), 4 Jur. N. S. 9.

**1170. How time of residence computed—Whether residence as wife may be added to residence as widow.**—(1) Where a pauper has resided five years continuously in a parish first as a wife & afterwards as widow, the two periods of residence coalesce, so as to render her irremovable under Poor Removal Act, 1846 (c. 66). (2) Where an order of removal has been made before Poor Removal Act, 1846 (c. 66), & the pauper has not been removed, it is no ground of appeal that the pauper has become irremovable by virtue of the statute since the order was made.—*R. v. GLOSSOP (INHABITANTS)* (1848). 12 Q. B. 117; 3 New Mag. Cas. 4; 3 New Sess. Cas. 256; 17 L. J. M. C. 171; 11 L. T. O. S. 451; 12 J. P. 597; 12 Jur. 1071; 116 E. R. 810.

*Annotations*:—*As to* (1) *Appld.* *R. v. St. George-in-the-East* (1870). L. R. 5 Q. B. 364. *Reid*. *R. v. Stowmarket* (1853), 17 Jur. 758; *Medway Union v. Bedminster Union* (1888), 21 Q. B. D. 278. *As to* (2) *Reid*. *R. v. Chedgrave* (1849), 12 Q. B. 206; *R. v. Cudham* (1859), 1 E. & E. 409; *Salford Overseers v. Manchester Overseers* (1863), 1 New Rep. 434. *Generally*, *Reid*. *R. v. Manchester Overseers* (1857), 29 L. T. O. S. 247; *Towkesbury Union v. Birmingham Union*, [1904] 2 K. B. 395. *Mentd.* *R. v. St. Mary, Whitechapel* (1848), 12 Q. B. 120; *West Ham Union v. St. Matthew, Bethnal Green Overseers* (1892), 61 L. J. M. C. 189.

**1171.** ———.—*At the time of the application for a warrant to remove a pauper who had become chargeable to a parish which was not that of her settlement, she had resided there continuously for more than twenty years; part of the time as a single woman, part of the time as wife with her husband, & the remainder as a widow. The husband at the time of his death had only resided in the parish continuously for three years & a half:—Held*: the pauper was irremovable under Poor Removal Act, 1846 (c. 66), s. 1.—*R. v. STOWMARKET* (1853), cited in 4 E. & B. at p. 904; 20 L. T. O. S. 258; 17 J. P. 663; 17 Jur. 758; 1 W. R. 147; 119 E. R. 336.

*Annotation*:—*Reid*. *R. v. Manchester Overseers* (1857), 29 L. T. O. S. 247.

— — — — — **Where break in husband's**

**residence.]—Pauper had lived five years in a parish, not that of her settlement, when she became chargeable & an order was made for her removal. At the commencement of the five years her husband resided with her in the parish; but he left her, during the five years, & went to live in America without *animus revertendi*. During the five years & before the order of removal, he died:—*Held*: the pauper was not irremovable under Poor Removal Act, 1846 (c. 66), s. 1, or Poor Removal Act, 1848 (c. 111), s. 1.—*R. v. MANCHESTER (INHABITANTS)* (1851), 17 Q. B. 46, n.; 18 L. T. O. S. 92; 15 J. P. Jo. 755; 117 E. R. 1190.**

*Annotation*:—*Reid*. *West Ham Union v. St. Matthew, Bethnal Green*, [1891] A. C. 230.

**1173.** ———.—*R. v. MANCHESTER OVERSEERS*, No. 1109, *ante*.

**1174.** ———.—**When part of husband's residence excluded—Absence on naval service.]—*R. v. EAST STONEHOUSE (INHABITANTS)*, No. 1169, *ante*.**

**1175.** ———.—**Husband's residence before marriage not included.]—A woman married a man & resided with him in B., for less than five years, up to the time of his death, at which time he had resided in B. for more than five years:—*Held*: she had not become irremovable from B. by Poor Removal Act, 1846 (c. 66), or Poor Removal Act, 1848 (c. 111).—*R. v. CUDHAM (INHABITANTS)* (1859), 1 E. & E. 409; 28 J. L. J. M. C. 105; 32 L. T. O. S. 253; 23 J. P. 564; 5 Jur. N. S. 269; 7 W. R. 161; 120 E. R. 903.**

**1176. Effect of break of residence—Within twelve months of death of husband—Irremovability destroyed.]—*R. v. ST. MARYLEBONE (INHABITANTS)*, No. 1080, *ante*.**

### C. Deserted Wives.

*See* Poor Law Act, 1927 (c. 14), s. 108 (3).

**1177. How irremovability acquired—One year's residence after desertion.]—About thirteen years ago, in consequence of a quarrel, a man separated from his wife & daughter, & took other lodgings in the same parish, where he cohabited with another woman, by whom he had children, & resided with them up to the present time. The wife, shortly after the separation, having become chargeable to the parish, the man, under threat of legal proceedings by the parish officers, paid her 2s. 6d. a week. The wife afterwards removed with the daughter, who was eighteen years old, unemancipated, & had no settlement of her own, to another parish, where the allowance by the husband was continued, & where, after residing more than a year, mother & daughter became chargeable:—*Held*: the conduct of the man amounted to a desertion of his wife within Poor Removal Act, 1861 (c. 55), s. 3, & the wife was therefore irremovable; but the daughter was removable to her father's place of settlement, as the mother, by the desertion, did not become the head of the family.—*R. v. ST. MARY, ISLINGTON OVERSEERS* (1870), L. R. 5 Q. B. 445; 39 L. J. M. C. 137; 22 L. T. 654; 34 J. P. 646.**

*Annotation*:—*Reid*. *Southwark Union v. City of London Union* (1906), 94 L. T. 763.

**1178.** ———.—*R. v. MAIDSTONE UNION*, No. 472, *ante*.

**1179.** ———.—*Where a married woman is, whether rightfully or wrongfully, sent away by her husband to lead a separate & independent life of her own, she is deserted by him within the meaning of Poor Removal Act, 1861 (c. 55), s. 3, & can so reside as to acquire the status of irremovability apart from him under that sect.*

**Sect. 2.—Irremovability: Sub-sect. 3, C., D. & E.]**

A married woman, having contracted habits of intemperance, frequently pawned her husband's goods in order to procure drink, & on several occasions used for other purposes money given to her by him for payment of his rent, & had conducted herself in such a manner as to render it impossible for her husband to keep a respectable home for his children. He in consequence informed her that they must live apart for a time; that she might take sufficient furniture to furnish a bedroom, & he would allow her 8s. a week; & that she must endeavour to get rid of her drinking habits, & if she did so they could live together again. She accordingly left him & took a lodging for herself, & for eleven months he continued to make her the promised allowance, but then, finding that she had been guilty of adultery, he discontinued it, & she thereupon went to cohabit with another man, & her husband never again lived with her:—*Held*: the husband had deserted his wife within the meaning of the Poor Removal Act, 1861 (c. 55), s. 3.—**SOUTHWARK UNION v. CITY OF LONDON UNION**, [1906] 2 K. B. 112; 75 L. J. K. B. 559; 94 L. T. 763; 70 J. P. 449; 54 W. R. 547; 22 T. L. R. 568; 4 L. G. R. 730, C. A.

*Annotations*.—*Reid*. Eastbourne Union v. Croydon Union, [1910] 2 K. B. 16; Paddington Union v. St. Matthew, Bethnal Green Union, [1913] 1 K. B. 508.

**1180. What constitutes desertion—Absence of husband on sea voyage.**—The wife of a seaman, who had no settlement, became chargeable during her husband's absence on one of his ordinary voyages to Calcutta:—*Held*: the husband's absence, under these circumstances, was, for the purpose of the wife's removability, equivalent to desertion, & an order for her removal to her maiden settlement was good. Although he had partially provided for her maintenance during his absence, & returned to her at the end of the voyage, as he had done after previous voyages, resuming his residence with her in the removing parish.—*R. v. ST. MARYLEBONE (INHABITANTS)* (1851), 16 Q. B. 352; 4 New Sess. Cas. 471; 20 L. J. M. C. 61; 16 L. T. O. S. 411; 15 J. P. 208; 15 Jur. 245; 117 E. R. 914.

*Annotations*.—*Reid*. R. v. Stonehouse (1855), 3 C. L. R. 855; R. v. St. George-in-the-East (1870), L. R. 5 Q. B. 364.

**1181. — Separation of husband & wife—Misconduct of husband.**—*R. v. ST. MARY, ISLINGTON OVERSEERS*, No. 1177, *ante*.

**1182. — — — — —**—On Oct. 28, 1902, a married woman left her husband because he had contracted a venereal disease by misconduct with other women. On Nov. 17, 1902, on a complaint by her that her husband had deserted her, a ct. of summary jurisdiction granted a separation order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39). The wife never subsequently cohabited with her husband, & she resided in the district of resp. union for more than a year previously to Oct. 6, 1908, on which date she was sent to an asylum as a pauper lunatic:—*Held*: the husband had deserted his wife within Poor Removal Act, 1861 (c. 55), s. 3; the separation order did not put an end to the desertion; & the wife was, therefore, irremovable from resp. union.—**EASTBOURNE UNION v. CROYDON UNION**, [1910] 2 K. B. 16; 79 L. J. K. B. 646; 102 L. T. 595; 74 J. P. 286; 26 T. L. R. 447; 8 L. G. R. 503, D. C.

**1183. — — — — — Misconduct of wife.**—*R. v. MAIDSTONE UNION*, No. 472, *ante*.

**1184. — — — — —**—One night in June, 1873, the pauper, a married woman, who had been drinking at a public-house with a man named W.,

with whom her husband reasonably suspected her of too much intimacy, came home the worse for drink & found the door of her husband's house locked. She forced her way in; & in the morning, after some words, her husband threatened to lock her in. He then went out to his work, & when he came back he found his wife absent, & that part of his furniture & clothes had been carried away. The pauper took a room elsewhere, & shortly afterwards went away with W., with whom she lived in adultery until his death in 1879. After W.'s death, the pauper wrote to her husband, asking him to receive her back. He took no notice of her letter, & if she had gone back to him he would not have received her. In Aug. 1881, she became chargeable to the parish of Liverpool as a pauper lunatic, & an order of justices was made for her removal to her husband's parish, which order was confirmed by quarter sessions. Upon appeal against the last-mentioned order:—*Held*: the above facts disclosed no reasonable evidence of desertion of the wife by the husband, within Poor Removal Act, 1861 (c. 55).—*R. v. COOKHAM UNION* (1882), 9 Q. B. D. 522; 47 J. P. 116, D. C.

*Annotations*.—*Reid*. Re Duckworth (1889), 5 T. L. R. 608; Southwark Union v. City of London Union, [1906] 2 K. B. 112; Eastbourne Union v. Croydon Union, [1910] 2 K. B. 16; Paddington Union v. St. Matthew, Bethnal Green Union, [1913] 1 K. B. 508.

**1185. — — — — —**—**SOUTHWARK UNION v. CITY OF LONDON UNION**, No. 1179, *ante*.

**D. Children under Seven.**

See Poor Law Act, 1927 (c. 14), s. 108 (7).

**1186. Whether separated from mother—General rule.**—**SKEFFRETH PARISH v. WALFORD PARISH** (1730), 2 Sess. Cas. 89; 2 Bott, 3; 93 E. R. 152.

*Annotation*.—*N.F. R. v. Barnet Union* (1888), 52 J. P. 612.

**1187. — — — — — Though with mother's consent.**—The rule, that a child within the age of nurture cannot be separated from the mother by order of removal, is established for the benefit of the child, & therefore cannot be dispensed with by the mother's consent. A woman having children by a first marriage, born in parish B., married again; her husband was unable to maintain the children; & the family became chargeable to parish A. The mother consented, & wished, that the children, then in the workhouse of A., & being within the age of nurture, should be removed to their own parish; & two justices thereupon made an order for removing them to B., which the sessions on appeal confirmed, subject to a case. This ct. quashed the orders.—*R. v. BIRMINGHAM (INHABITANTS)* (1843), 5 Q. B. 210; 3 Gal. & Dav. 153; 13 L. J. M. C. 1; 2 L. T. O. S. 119; 7 J. P. 705; 7 Jur. 1014; 114 E. R. 1228.

*Annotations*.—*N.F. R. v. Barnet Union* (1888), 57 L. J. M. C. 39. *Reid*. R. v. Aughton (1861), 4 L. T. 244; Salford Union v. Manchester Overseers (1882), 10 Q. B. D. 172.

**1188. — — — — —**—A widow whose parish of settlement was Aughton, but who was irremovable from Leeds by a five years' residence, had three children, & being unable to maintain them, the Leeds board of guardians made an order for the admission of such three children into the workhouse. A few weeks afterwards the overseers of Leeds obtained an order for the removal of these children to Aughton. The object of the board of guardians in sending them to the workhouse was their removal to their place of settlement. They were sent there with the consent of their mother, but she was not informed that the result of separating her children from her would be their removal to Aughton. Each of the children at the time of the order of removal was under seven years of age:—*Held*: (1) under the



circumstances the separation of the children from the mother was a fraud upon her, & the order of removal was bad; (2) as the children were within the age of nurture, the mother could not consent to their separation from her.—*R. v. AUGHTON (INHABITANTS)* (1861), 4 L. T. 244; 25 J. P. 711.

1189. — *Child not under nurture of mother.*—A woman, settled in parish C., bore a bastard child there before the passing of Poor Law (Amendment) Act, 1834 (c. 76), & it was placed for nurture in parish W. She then married, & lived with her husband, in parish K., the child remaining in W. The child, becoming afterwards chargeable to W. while under the age of sixteen, was removed, by order of justices, to C.:—*Held*: the removal was proper, & consistent with Poor Law Amendment Act, 1834 (c. 76), s. 57.—*R. v. WENDRON (INHABITANTS)* (1838), 7 Ad. & El. 819; 3 Nev. & P. K. B. 62; 1 Will. Woll. & H. 27; 7 L. J. M. C. 22.

*Annotations*.—*Distd.* *R. v. St. Mary, Newington* (1843), 4 Q. B. 581. *Refd.* *R. v. Stafford, R. v. Costock* (1839), 10 Ad. & El. 417; *R. v. All Saints, Derby* (1849), 14 Q. B. 207.

1190. — *Three legitimate children, two above the age of seven years but below the age of sixteen years, & one under the age of seven years, were resident with their mother, a widow, in the parish of N., the settlement of mother & children being in the parish of C. The mother neglected her children, & was unable to support them. At the instance of a relative, they were taken to the workhouse of N. & there maintained by the parish of N., the mother remaining out of the workhouse in N. After the children had remained in the workhouse separate from the mother for three months, an order was obtained for their removal to C. On appeal, the sessions confirmed the order, subject to a case stating the above facts, & finding that the admission of the children into the workhouse was with the consent of the mother, & with the immediate object of relieving the children; & that it was in every way most beneficial to them to be removed thither; & that the ultimate object of their admission was their removal to their place of settlement:—*Held*: Poor Removal Act, 1846 (c. 66), s. 3, did not apply, both because the children were not at the time of the order residing with the mother, & because she, being chargeable in respect of the relief given to the children, might herself have been lawfully removed from N. & though the child under the age of seven could not have been removed, if the effect had been to separate it from the mother so as to deprive it of the benefit of nurture, it was removable, the mother being unable to afford it nurture, & the separation having been *bonâ fide* brought about for the benefit of the child.—*R. v. COMBS (INHABITANTS)* (1856), 5 E. & B. 892; 25 L. J. M. C. 59; 4 W. R. 243; 119 E. R. 713; *sub nom. R. v. COOMBS*, 20 J. P. 516; 2 Jur. N. S. 255.*

*Annotations*.—*Appld.* *R. v. St. Clement Danes* (1862), 3 B. & S. 143. *Consd.* *R. v. Barnet Union* (1888), 58 L. T. 947. *Refd.* *R. v. Aughton* (1861), 4 L. T. 244; *St. Pancras Union v. Norwich Incorporation Union* (1887), 18 Q. B. D. 521.

1191. — *An Irish woman unmarried, & not having any settlement in England, applied to the relieving officer of a union for an order of admission to the workhouse, stating that she was in distress and lived in C., one of the parishes within the union, & expected her confinement that day. He declined to give her an order, but told her when she became bad to go to the workhouse & she would be admitted. In the evening of the same day, finding labour coming on, she went to the workhouse & told the master that she had applied to the relieving officer for an order without success, & that she was living in C.; she*

*was admitted, & delivered of a child two hours after. The master entered the name of the mother in the books as "casual," & charged her & her child to the common fund; & these entries having been laid before the guardians, the relief of the mother & child was charged to the common fund. After remaining in the workhouse a fortnight, the mother returned with her child to her former residence, & continued there for about twelve months; she then went with her child to G., & after four months was admitted into a reformatory in P. The child was not admissible into it, & becoming chargeable to G., an order for its removal to C. was made with its mother's assent, notwithstanding Poor Removal Act, 1846 (c. 66), s. 3:—*Held*: the child was removable, the mother being unable to afford it nurture, & being already separated from it.—*R. v. St. CLEMENT DANES (INHABITANTS)* (1862), 3 B. & S. 143; 1 New Rep. 53; 32 L. J. M. C. 25; 7 L. T. 324; 9 Jur. N. S. 437; 11 W. R. 63; 122 E. R. 55.*

1192. — *Admission to workhouse procured with fraudulent intent.*—*R. v. AUGHTON (INHABITANTS)*, No. 1188, *ante*.

1193. — *Mother cohabiting with another man.*—*R. v. St. NICHOLAS, IPSWICH*, No. 1206, *post*.

1194. — *Lunatic mother—Improbable recovery.*—The ct. will, in the exercise of its discretion, & under exceptional circumstances, such as the dangerous lunacy & improbable recovery of the mother, order the removal of a child within the age of nurture from her care, notwithstanding the rule established by *R. v. Birmingham (Inhabitants)*, No. 1187, *ante*, that a child within the age of nurture cannot be separated from its mother by order of removal, even with her consent.—*R. v. BARNET UNION* (1888), 57 L. J. M. C. 39; 58 L. T. 947; 52 J. P. 612.

1195. *Orphan child.*—*TOXTETH PARK OVERSEERS v. WOOLWICH (CHURCHWARDENS)* (1861), 25 J. P. Jo. 355.

1196. *Illegitimate child—Follows status of mother—Though residence apart.*—An illegitimate child, aged one month, was put out to nurse by its mother, & such child thereafter resided continuously for more than three years in the parish of L., in the W. H. union, & then became chargeable. The mother never resided in such parish, nor in any part of the W. H. union, during the period of the child's residence there:—*Held*: the child was, notwithstanding it was illegitimate, not irremovable by virtue of its residence in L., inasmuch as the mother would have been removable during the whole of such residence.—*HAMPSTEAD UNION v. WEST HAM UNION* (1909), 73 J. P. 492.

#### *E. Children under Sixteen.*

*See Poor Law Act, 1927 (c. 14), s. 108 (5), (6).*

1197. *General rule—Not separated from parent.*—A child under fourteen years, to be sent after father or mother.—*KING'S LANGLEY (INHABITANTS)* (1726), Fortes. Rep. 323; 92 E. R. 872; *sub nom. R. v. KING'S LANGLEY (INHABITANTS)*, 1 Stra. 631.

1198. — *WOODEND (INHABITANTS) v. PAULSPURY (INHABITANTS)*, No. 390, *ante*.

1199. *When removable—Children deserted by father—After death of mother—Parents without English settlement.*—*R. v. ALL SAINTS, DERBY (INHABITANTS)*, No. 415, *ante*.

1200. — *Orphan—Not when father irremovable.*—*R. v. ELVET (INHABITANTS)*, No. 789, *ante*.

*Sect. 2.—Irremovability: Sub-sect. 3, E. & F. Sect. 3: Sub-sect. 1, A.]*

1201. ————.]—*TOXTETH PARK OVERSEERS v. WOOLWICH (CHURCHWARDENS) (1861), 25 J. P. Jo. 355.*

1202. ————.]—*Mother losing irremovability.]—WEST HAM UNION v. POPLAR UNION, No. 1081, ante.*

1203. ————.]—*Child adopted by guardians.]—Where the guardians of a Poor Law union have passed a resolution under Poor Law Act, 1899 (c. 37), that the rights & powers of the parent of a child maintained by them shall vest in them, they are not precluded by that resolution from subsequently removing the child to the union in which it has a settlement.—WANTAGE UNION v. BRISTOL UNION, [1907] 1 K. B. 68; 76 L. J. K. B. 25; 96 L. T. 118; 71 J. P. 54; 23 T. L. R. 54; 51 Sol. Jo. 51; 5 L. G. R. 33.*

1204. ————.]—*Father never having become irremovable — Though not actually removable.]—DONCASTER UNION v. WOOLWICH UNION, No. 1051, ante.*

1205. What constitutes residence with parent—*Residence in workhouse.]—Two children, each under the age of sixteen years, who had for some months resided with their stepmother, went from her house into the workhouse, which was locally situated in the parish in which the stepmother resided:—Held: their residence in the workhouse was not a residence with the stepmother within Poor Removal Act, 1846 (c. 66), & they were removable to the place of their settlement.—R. v. LEEDS OVERSEERS (1851), 4 New Sess. Cas. 710; 17 L. T. O. S. 61; 15 J. P. 706.*

1206. ————.]—*Three legitimate children of a woman aged fourteen, eleven & six, were removed to the place of settlement of their deceased father without their mother. The mother, after their father's death, cohabited with a man & had an illegitimate family by him in parish A. The first three children were kept in a starving condition, & wandered about the neighbourhood during the day, & at night slept at the man's house where the wife & he cohabited. The three children had often been fed & clothed by their uncle, & he procured an order from the relieving officer of parish A. for their admission into the poorhouse, where they were taken on Nov. 1, & continued down to Feb. 13, when the order of removal to their place of settlement was obtained. The relieving officer had previously offered an order to the mother for the admission of her & the three children to the workhouse, but she refused to go for herself, but she consented to the three children going:—Held: the three children might be removed to their place of settlement without the mother being also removed.—R. v. ST. NICHOLAS, IPSWICH (1856), 26 L. T. O. S. 218.*

1207. ————.]—*R. v. COMBS (INHABITANTS), No. 1190, ante.*

1208. ————.]—*A woman left her husband in 1895, & went to live with another man in the W. union by whom she had three children. The man, woman, & children lived together in the W. union from Apr. 1902, until Feb. 28, 1905, when the woman died. On Mar. 2, 1905, the reputed father & the children, who were under the age of sixteen years, were admitted into the workhouse of the W. union, & on Mar. 8, 1905, the reputed father died there:—Held: by Poor Removal Act, 1846 (c. 66), s. 3, the children were irremovable from the W. union.—MAIDSTONE UNION v. WANDSWORTH UNION (1906), 95 L. T. 125; 70 J. P. 403; 4 L. G. R. 1052.*

#### *Children over Sixteen.*

*See Poor Law Act, 1927 (c. 14), s. 108 (3).*

1209. *Unemancipated child.]—F. resided with her father & as part of his family in the parish of B. until, being then under the age of sixteen, she was, in 1847, taken into the workhouse of B., & remained there receiving relief from B. till 1852. At this time the father was settled in A.; but, having resided in B. for more than five years, was irremovable from B. In 1848, F., being still in the workhouse, attained sixteen. In 1849, F.'s father quitted the parish of B. In 1852, F. became lunatic, & was removed from the workhouse of B. to a lunatic asylum. On appeal against an order of two justices, on the guardians of the union comprising A., to pay to the guardians of the union comprising B. the expenses of the lunatic, the sessions confirmed the order, subject to a case stating the above facts:—Held: F., being unemancipated & an infant, though above sixteen, had the same status of removability as her father; & he having quitted B. in 1849, she then ceased to be irremovable under Poor Removal Act, 1846 (c. 66), s. 1; & the order was confirmed.—R. v. ST. ANN'S, BLACKFRIARS (INHABITANTS) (1853), 2 E. & B. 440; 1 C. L. R. 492; 22 L. J. M. C. 137; 21 L. T. O. S. 152; 17 J. P. 615; 17 Jur. 575; 1 W. R. 384; 118 E. R. 832.*

1210. ————.]—*R. v. ST. MARY, ISLINGTON OVERSEERS, No. 1177, ante.*

1211. ————.]—*A woman, nineteen years of age, unemancipated, having no other settlement than that of her mother, who was a widow, resided for two years in resp. union. She then became chargeable, & was removed to her mother's place of settlement:—Held: being unemancipated, & not having gained a settlement in her own right, the woman was removable by virtue of Poor Removal Act, 1846 (c. 111), s. 1, although she had resided more than a year in resp. union.—R. v. ST. OLAVE'S UNION (1873), L. R. 9 Q. B. 38; 43 L. J. M. C. 15; 38 J. P. 502; 22 W. R. 75; sub nom. ST. OLAVE'S UNION v. ST. GEORGE'S UNION, 29 L. T. 426.*

*Annotation:—Consd. West Ham Union v. St. Matthew, Bethnal Green, [1894] A. C. 230.*

1212. ————.]—*MITFORD & LAUNDITCH UNION v. WYLAND UNION, No. 1143, ante.*

1213. ————.]—*HENDON UNION v. HAMPSTEAD UNION (1893), 62 L. J. M. C. 170; 37 Sol. Jo. 717; 5 R. 539.*

1214. ————.]—*Lunatic.]—On Oct. 17, 1854, J., who was then eighteen years old & living, unemancipated, with his father, T., in the parish of A. in the S. union, was removed as a lunatic pauper to an asylum, where he had since continued. At that time both T. & J. had resided in A. for more than the five next preceding years. T. continued to reside there till 1857, when he left, & had not since returned. T.'s settlement, both on & since Oct. 17, 1854, was in the parish of G. J. was maintained in the asylum from that date, at the cost of the S. union, until, it being discovered that T. had left A., an order of justices was, on Oct. 11, 1859, made under 16 & 17 Vict. c. 97, s. 97, adjudging J. to be settled in G., & ordering G. to pay the preceding twelve months' expenses of his maintenance, & a weekly sum for his future support. 16 & 17 Vict. c. 97, s. 102, provides that all expenses incurred for the removal, maintenance, etc., of a pauper lunatic removed to an asylum, "who would at the time of his being conveyed to such asylum" "have been exempt from removal to the parish of his settlement" "by reason of some provision in" Poor Removal Act, 1846 (c. 66), "shall be paid by the guardians*



of the parish wherein such lunatic shall have acquired such exemption," "and where such parish shall be comprised in any union same shall be paid by the guardians, & be charged to the common fund of such union"; "and no order shall be made under any provision" "in this" "Act on the parish of the settlement in respect of any such lunatic pauper." On a case stated for this ct. on an appeal to sessions by G. against the order of Oct. 11, 1859:—*Held*: 16 & 17 Vict. c. 97, s. 102, applied, & the order was therefore bad; J. was, at the time of his being conveyed to the asylum, exempt from removal to G. by reason of a provision in Poor Removal Act, 1846 (c. 66), with which the amending statute Poor Removal Act, 1848 (c. 111), was to be read as one: & had himself, though not *sui juris*, acquired such exemption in A.—*R. v. ST. GILES OVERSEERS* (1860), 3 E. & E. 224; 30 L. J. M. C. 12; 3 L. T. 292; 9 W. R. 52; 121 E. R. 426; *sub nom.* ST. GILES (CHURCHWARDENS) *v.* STRAND UNION, 25 J. P. 227; 7 Jur. N. S. 161.

*Annotations*.—*Consd.* R. *v.* St. Mary Arches, Exeter, Overseers (1862), 1 B. & S. 890. *Refd.* Thame Union *v.* Wandsworth Union (1871), 36 J. P. 167.

1215. ———.—A pauper aged thirty had always lived with her father & mother, being unable to take care of herself. The father had lived in parish M. more than five years when he died in 1856. The pauper then lived with the mother till 1858, when the pauper went into the workhouse, & while in the workhouse the mother, who had acquired no settlement in her own right, went to reside in parish C. Afterwards, in 1860, the pauper was sent from the workhouse to the county lunatic asylum:—*Held*: the pauper's irremovability floated with the mother's, & as, at the date of being sent to the asylum, the mother by breaking her residence was removable, so was the pauper, & the parish of the father's settlement was chargeable with the maintenance.—*R. v. ST. MARY ARCHES, EXETER, OVERSEERS* (1862), 1 B. & S. 890; 31 L. J. M. C. 77; 5 L. T. 637; 8 Jur. N. S. 457; 121 E. R. 944; *sub nom.* ST. MARY ARCHES, EXETER (CHURCHWARDENS) *v.* MANCHESTER UNION, 26 J. P. 356.

*Annotations*.—*Consd.* Mitford & Launditch Union *v.* Wayland Union (1890), 25 Q. B. D. 164. *Refd.* R. *v.* St. Mary, Illington (1862), 3 B. & S. 46; Salford Union *v.* Manchester Overseers (1882), 10 Q. B. D. 172; West Ham Union *v.* St. Matthew, Bethnal Green, Union, [1892] 2 Q. B. 676.

### SECT. 3.—REMOVAL ORDERS.

#### SUB-SECT. 1.—THE ORDER.

##### A. In General.

See Poor Law Act, 1927 (c. 14), ss. 120–132.

1216. **Certainty necessary.**—*BLOXOM PARISH v. KINGSTON PARISH* (1699), 12 Mod. Rep. 323; 88 E. R. 1352.

1217. **Conditional order.**—Justices of the peace cannot make a conditional order of removal.—*OAKHAM PARISH v. WHITTLESEA PARISH* (1709), 11 Mod. Rep. 171; 88 E. R. 969.

1218. **Order in form of command.**—To officers of parish to which pauper removed.—Justice cannot command the officers of the parish whither H. is sent to remove him.—*ST. GEORGE'S (INHABITANTS) v. ST. OLAVE'S (INHABITANTS)* (1702), 2 Salk. 493; 91 E. R. 423.

1219. ——— **Without reference to twenty-one days' notice of removal.**—(1) It is no objection to

an order of removal, that it contains an adjudication that the pauper is settled in such a parish, without any express statement that the justices have had proof of the settlement in that parish.

(2) It is also no objection, that it directs the officers of the removing parish to convey the pauper to his last place of legal settlement, without any mention of the provision in Poor Law (Amendment) Act, 1834 (c. 76), s. 79, that paupers shall not be removed without twenty-one days' notice in writing to the parish to which they are sent, etc.

(3) "The churchwardens & overseers of the township of S," is a sufficient description in the heading of an order of removal, without adding that it is a place maintaining its own poor.

(4) Where an examination returned to a *certiorari* was headed, "The examination of M. V., of the township of S., & appeared on the face of it to be taken at S., & stated that the examinant M. V., & three children by her deceased husband, aged respectively seven years, three years, & one year, "are chargeable to S."—*Held*: there appeared sufficient evidence before the justices that M. V. & her children were inhabiting in S. to give them jurisdiction to remove.—*R. v. ROTHERHAM (INHABITANTS)* (1842), 3 Q. B. 776; 2 Q. B. 557, n.; 2 Gal. & Dav. 523; 12 L. J. M. C. 17; 6 J. P. 802; 6 Jur. 1085; 114 E. R. 705.

*Annotations*.—*As to* (4) *Apld.* R. *v.* Buckinghamshire JJ. (1843), 3 Q. B. 800; *It v.* King's Lynn Recorder (1846), 3 Dow. & L. 725. *Refd.* *Ex p.* Tollerston Overseers (1842), 3 Q. B. 792; *Ex p.* Brighton Union (1850), 14 J. P. 639. *Generally, Mentd.* Ormerod *v.* Chadwick (1847), 16 M. & W. 367.

1220. **Order not obligatory on parish to which sent.**—An order of removal is merely a warrant to enable the officers of a parish to remove paupers, but they are not obliged to carry it into effect.—*R. v. ST. PANCRAS (INHABITANTS)* (1843), 3 Q. B. 347; 2 Gal. & Dav. 671; 12 L. J. M. C. 42; 7 J. P. 226; 7 Jur. 193; 114 E. R. 539.

*Annotation*.—*Apld.* R. *v.* Anglescu JJ. (1813), 12 L. J. M. C. 131.

1221. **Delay in execution of order.**—(1) An order of removal may be executed a year after it is signed, if the pauper's circumstances be not altered in the interval.

(2) An alteration in an order of removal by one justice in the presence of the other, before it is delivered to the parish officers, does not vitiate it.—*R. v. LLANWINIO (INHABITANTS)* (1701), 4 Term Rep. 473; Nolan, 19; 100 E. R. 1126.

*Annotation*.—*As to* (1) *Refd.* R. *v.* Llanllechid (1860), 2 E. & E. 530.

1222. **Alteration in order.**—*R. v. LLANWINIO (INHABITANTS)*, No. 1221, *ante*.

1223. **Proof of order—Secondary evidence.**—Parol evidence of an order of removal, proved to be lost, is sufficient.—*R. v. METHERINGHAM (INHABITANTS)* (1796), 6 Term Rep. 556; 101 E. R. 700.

1224. **Form of order—Whether necessary to show—Time when made.**—An order of removal, dated the [ ] day of Apr. 1804, is good.—*R. v. BRIMPTON (INHABITANTS)* (1805), 2 Smith, K. B. 277.

1225. ——— **Made by parish maintaining its poor.**—*R. v. ROTHERHAM (INHABITANTS)*, No. 1219, *ante*.

1226. ——— **Place where made.**—*R. v. HALIFAX (INHABITANTS)*, No. 1087, *ante*.

1227. ——— **Inhabitation of parish by pauper.**—(1) An order of removal under Poor

PART VI. SECT. 3, SUB-SECT. 1.—A. k. *Non-verification of facts*—On which affidavits founded.—An order of

sessions for removal of a pauper, granted upon insufficient grounds, cannot be sustained by affidavits of facts

omitted to be verified before the order passed.—*BARNARDY v. GARDINER* (1854), 2 N. S. R. (James) 306.—*CAN.*

**Sect. 3.—Removal orders: Sub-sect. 1, A., B., C., D. & E.]**

Relief Act, 1662 (c. 12), & Poor Removal Act, 1795 (c. 101), s. 1, must show upon the face of it that the paupers were inhabiting in the removing parish at the time of making the order; that is they were in the parish for the purpose of inhabiting there, as contradistinguished from the purpose of visiting or passing through it. That rule is sufficiently complied with in the ordinary form, which states that the pauper has "come to inhabit" in the parish; & it is also satisfied by a statement that the pauper "intruded & came into the parish, & is now inhabiting therein" although in the latter form the purpose of the coming is not distinctly stated. An order, therefore, in that latter form was confirmed by this ct.

(2) The insertion of the words "on sight hereof" in the mandatory part of an order of removal is unobjectionable notwithstanding Poor Law (Amendment) Act, 1834 (c. 76), s. 79.

(3) An order, good, in other respects, in not vitiated by the omission of any date of place.—*R. v. ST. PAUL, COVENT GARDEN (INHABITANTS)* (1846), 7 Q. B. 533; 2 New Mag. Cas. 42; 2 New Sess. Cas. 508; 16 L. J. M. C. 11; 8 L. T. O. S. 274; 11 J. P. 70; 10 Jur. 1081; 115 E. R. 589.

*Annotation:—As to* (1) *Consd. R. v. Silchester* (1849), 12 L. T. O. S. 374.

**1228. — Misdescription of parish.]—**Paupers were removed by order of justices to a parish therein described as "the parish of Poplar, in the county of Middlesex." The real description of the parish was All Saints, Poplar, in the same county;—*Held*: not a material variance.—*R. v. BUCKINGHAMSHIRE JJ.* (1843), 3 Q. B. 800; 2 Gal. & Dav. 560; 12 L. J. M. C. 29; 7 J. P. 97; 7 Jur. 256; 114 E. R. 714.

*Annotation:—Mentd. Ex p. Brighton Union* (1850), 14 J. P. 639.

**1229. — "On sight hereof."—***R. v. ST. PAUL, COVENT GARDEN (INHABITANTS)*, No. 1227, *ante*.

**1230. Conclusiveness of order—Facts recited therein.]—**An order of removal of a pauper described her as the "wife of J. C. who is now absent from her, & not residing with her in the same township":—*Held*: it sufficiently appeared on the face of the order that J. C. was not residing in the township in question, & the ct. could not look at affidavits as to this not being the case.—*R. v. LEEDS (INHABITANTS)* (1857), 5 W. R. 499.

**1231. Refusal to make order—Whether mandamus granted.]—**Where justices have examined a pauper as to his settlement, & have refused to make an order for his removal, this ct. will not inquire into the discretion exercised by them.

Where the overseer of parish L. applied to justices for an order for the removal of a pauper to parish B., & the justices, having examined the pauper, refused to make the order, on the ground that the pauper had gained a subsequent settlement in parish L. in 1837, by paying rates, & serving the office of overseer there, the ct. refused a *mandamus*, although the pauper could not, at that time, have gained a settlement in B. by those means. This ct. will not order justices to alter an examination of a pauper according to the facts, so as to make it sufficient evidence of a settlement.—*R. v. ROGERS* (1843), 12 L. J. M. C. 50; 7 J. P. 240.

**Evidence—Production of parish books.]—**See EVIDENCE, Vol. XXII., p. 422, No. 4331.

**— Production of indenture of apprentices.]—**See CROWN PRACTICE, Vol. XVI., p. 316, No. 1289.

**B. Necessity to Show Jurisdiction.**

See Poor Law Act, 1927 (c. 14), s. 121; & generally, MAGISTRATES, Vol. XXXIII., pp. 309, 310, 358, Nos. 285–293, 678–680.

**1232. General rule.]—**If it do not distinctly appear on an order of removal that the justices who made it had jurisdiction, it is a nullity, & not merely voidable; & the parish to which it is directed, may object to it at any distance of time though they never appeared against it, & though they have acted under it for twenty years.—*R. v. CHILVERSCOTON (INHABITANTS)* (1799), 8 Term Rep. 178; 2 Bott, 718; 101 E. R. 1332.

*Annotations:—Reid. R. v. Evenwood & Barony* (1843), 3 Gal. & Dav. 145; *R. v. Casterton* (1844), 6 Q. B. 507. *Mentd. Ellen v. Topp* (1850), 15 Jur. 451.

**1233. Matter showing local jurisdiction—Sufficiency of.]—**Where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; & it is not enough to describe themselves justices of the peace in & for the said county, although the proper county were named in the margin, & were also named last before such description of the justices.—*R. v. MOOR CRITCHELL (INHABITANTS)* (1801), 2 East, 66; 102 E. R. 293.

*Annotations:—N.F. R. v. St. Mary's, Leicester* (1818), 1 B. & Ald. 327. *Consd. R. v. Casterton* (1844), 6 Q. B. 507. *Mentd. Walford v. Anthony* (1831), 8 Bing. 75.

**1234. ———.]—**An order of magistrates was directed to the parish of W. in the county of Rutland, & also to the parish of M. in the county of Leicester; & the words "County of Rutland" were then written in the margin, & the magistrates were, in a subsequent part of the order, described as justices of the peace for the county aforesaid:—*Held*: it thereby sufficiently appeared that they were justices for the county of Rutland.—*R. v. ST. MARY'S, LEICESTER (INHABITANTS)* (1818), 1 B. & Ald. 327; 106 E. R. 121.

*Annotations:—Consd. R. v. Countesthorpe* (1831), 2 B. & Ad. 487. *Reid. R. v. Stockton-upon-Tees* (1845), 14 L. J. M. C. 128.

**1235. ———.]—**An order of sessions, confirming an order of removal, had in the margin the words "Westmorland, to wit," & proceeded: "To the overseers of the poor of the township of K. & to the overseers of the poor of the township of C. in the said county. Whereas you, the overseers of K., have made complaint unto us whose names are hereunto set & seals affixed, being two of Her Majesty's justices of the peace & quorum in & for the said county," etc. The rest of the order was in the usual form, & did not further state the county in & for which the justices acted:—*Held*: the jurisdiction sufficiently appeared by reference to the margin, which was part of the order for this purpose.—*R. v. CASTERTON (INHABITANTS)* (1844), 6 Q. B. 507; 1 Dav. & Mer. 266; 1 New Mag. Cas. 169; 1 New Sess. Cas. 449; 14 L. J. M. C. 5; 4 L. T. O. S. 172; 9 J. P. 117; 8 Jur. 1093; 115 E. R. 189.

*Annotation:—Reid. R. v. King's Lynn Recorder* (1846), 10 J. P. 804.

**1236. ———.]—***R. v. STOCKTON (INHABITANTS)*, No. 1409, *post*.

**1237. ———.]—***R. v. DEVONSHIRE JJ.* (1845), 9 J. P. Jo. 787.

**1238. ———.]—***R. v. KING'S LYNN RECORDER*, No. 1292, *post*.

**1239. ———.]—**An order of removal, having "borough of D." in the margin, reciting a complaint of the overseers of a parish in the borough of D., to R. & K., "being two of Her Majesty's justices of the peace having jurisdiction within & for the said borough," & not otherwise showing that the order was made within the jurisdiction,

is bad.—*R. v. NEWTON FERRERS (INHABITANTS)* (1840), 9 Q. B. 32; 7 L. T. O. S. 203; 10 J. P. Jo. 338; 115 E. R. 1187.

*Annotation*:—*Apud. R. v. Crowan* (1849), 4 New Mag. Cas. 13.

**1240.** ———.]—*R. v. ST. GILES IN THE FIELDS (INHABITANTS)*, No. 1282, *post*.

**1241.** ———.]—*R. v. ST. PAUL, COVENT GARDEN (INHABITANTS)*, No. 1227, *ante*.

**1242.** ———.]—*R. v. HAMMERSMITH (INHABITANTS)*, No. 1405, *post*.

**1243.** ———.]—*R. v. TIFFIELD (INHABITANTS)* (1858), 22 J. P. Jo. 784.

**1244. Necessity to show two justices acting.**—An order of removal must state that it was made by two justices.—*WALTON PARISH v. CHESTERFIELD PARISH* (1096), 5 Mod. Rep. 322; 87 E. R. 682.

**Jurisdiction not shown—Power of High Court to quash on certiorari—Although appeal available.**—*See CROWN PRACTICE*, Vol. XVI., p. 430, No. 2908.

#### *C. Signature and Seal.*

*See Poor Law Act, 1927 (c. 14), s. 121; & generally, MAGISTRATES*, Vol. XXXIII., p. 358, Nos. 675–677.

**1245. Signature—By justices separately—Voidable.**—An order of removal, signed by two justices separately, & in different counties, is only voidable, not void; & the parish wishing to avoid it, must appeal to the next sessions.—*R. v. STOTFOLD (INHABITANTS)* (1792), 4 Term Rep. 596; Nolan, 66; 100 E. R. 1196.

**1246. — Abbreviations.**—An order of removal purported to be made by two justices for the jurisdiction, but did not set forth their names in full; in signing the order, one justice abbreviated his Christian name, the other denoted his Christian name by an initial only. The examination on which the order was made purported by its caption to have been taken by two justices for the jurisdiction; & the *jurat* was “sworn before us the said justices,” & was signed in the same manner as the order.—*Held*: in each case, the signatures were sufficient.—*R. v. WORTHENBURY (INHABITANTS)* (1845), 7 Q. B. 555; 1 New Mag. Cas. 352; 2 New Sess. Cas. 13; 14 L. J. M. C. 144; 5 L. T. O. S. 173; 9 J. P. 607; 9 Jur. 510; 115 E. R. 598.

**1247. Impressed seal.**—It is not necessary that an order of justices should be sealed with wax. An impression made in ink with a wooden block, in the usual place of a seal, is sufficient, when the document purports to be given under the hands & seals of the justices, & is in fact signed & delivered by them.—*R. v. ST. PAUL, COVENT GARDEN (INHABITANTS)* (1845), 7 Q. B. 232; 1 New Mag. Cas. 292; 1 New Sess. Cas. 617; 14 L. J. M. C. 109; 9 J. P. 441; 9 Jur. 442; 115 E. R. 476.

*Annotations*:—*Reid. In the Goods of Morley* (1864), 3 New Rep. 691. *Mentd. R. v. St. Anne, Westminster* (1846), 7 Q. B. 241; *Headington Union v. Ipswich Union* (1890), 25 Q. B. D. 143.

#### *D. By Whom Made.*

*See Poor Law Act, 1927 (c. 14), s. 121; Metropolitan Police Courts Act, 1839 (c. 71), s. 14; Stipendiary Magistrates Act, 1858 (c. 73), s. 1.*

**1248. Whether by quarter sessions.**—The sessions cannot make an original order of removal.—*R. v. BOND* (1686), 2 Show. 503; 2 Bott, 732; 89 E. R. 1066.

**1249. Two justices of the peace—Not necessarily of division in which removing parish situated.**—Removing need not be by justices of the division.—*ANON.* (1696), 2 Salk. 473; *Sett. & Rem.* 272; 91 E. R. 407.

**1250. —**.]—*WARE (INHABITANTS) v. STAN-*

*STEAD-MOUNT-FITCHET (INHABITANTS)* (1700), 2 Salk. 488; 91 E. R. 419.

*Annotation*:—*Reid. R. v. Wykes* (1738), 2 Stra. 1092.

**1251. —**.]—The complaint may be to one justice, the order of removal must be by two.—*R. v. WESTWOOD (INHABITANTS)* (1718), 1 Stra. 73; *Sett. & Rem.* 82; 2 Bott, 688; 93 E. R. 392.

**1252. — One a churchwarden of removing parish.**—An order of removal, signed by two justices, one of whom, at the time, was churchwarden of the removing parish, is bad.—*R. v. GREAT YARMOUTH (INHABITANTS)* (1827), 6 B. & C. 646; 9 Dow. & Ry. K. B. 682; 4 Dow. & Ry. M. C. 461; 5 L. J. O. S. M. C. 73; 108 E. R. 589.

**Disqualification of justices by interest as ratepayer.**—*See MAGISTRATES*, Vol. XXXIII., p. 290, Nos. 63–67.

**1253. — In absence of pauper.**—Under the Poor Removal Act, 1795 (c. 101), s. 2, an order of justices, suspending their order made for the removal of a pauper to his place of settlement, on account of sickness, may be made, though he were not brought before the justices at the time of such orders made; the plain intent & precise object of the statute being to extend the power of suspension to all cases where orders of removal may be made; & orders of removal may be made though the paupers to be removed be not brought personally before the magistrates; however fit that is to be done where it may be done.—*R. v. EVERDON (INHABITANTS)* (1807), 9 East, 101; 103 E. R. 512.

*Annotations*:—*Consd. R. v. Llanllechid* (1860), 2 E. & E. 530. *Mentd. R. v. O'Connell* (1843), 2 L. T. O. S. 248.

**1254. — Examination by one justice—Form of order.**—An order of removal made by two justices, upon the examination of the pauper taken by one of them, pursuant to Poor (Settlement & Removal) Act, 1809 (c. 124), s. 4, need not state the special circumstances of taking the examination, etc.—*R. v. SOUTH LYNN, ALL SAINTS* (1815), 4 M. & S. 354; 105 E. R. 865.

**1255. — Justice of the quorum.**—Poor Relief Act, 1662 (c. 12), s. 1, is entirely repealed by Poor Removal Act, 1795 (c. 101), s. 1, & it is therefore no longer necessary for the removal of a pauper that one of the removing justices should be of the quorum.

*Qu.*: whether the mayor & ex-mayor of a borough are constituted justices of the quorum for the borough by 5 & 6 Will. 4, c. 76.—*R. v. LLANGIAN (INHABITANTS)* (1863), 4 B. & S. 249; 2 New Rep. 240; 32 L. J. M. C. 225; 8 L. T. 422; 27 J. P. 566; 10 Jur. N. S. 16; 11 W. R. 776; 122 E. R. 453.

#### *E. To Whom Directed.*

*See Poor Law Act, 1927 (c. 14), ss. 121, 130.*

**1256. Necessity for certainty.**—How far an order of removal shall not be good, by reason of the uncertainty of the place, to which the persons removed are sent.—*R. v. GRIMSTON (INHABITANTS)* (1726), 1 Barn. K. B. 11; 94 E. R. 8.

**1257. — Rejection of surplusage.**—An order of removal was directed to the churchwardens & overseers of the parish of L. In fact L. was a vill, & there were no churchwardens in it:—*Held*: the word “churchwardens” might be rejected as surplusage, & the sessions might, under 5 Geo. 2, c. 119, s. 1, amend the order by inserting in it the words “or vill.”—*R. v. AMLWCH* (1825), 4 B. & C. 757; 6 Dow. & Ry. K. B. 626; 3 Dow. & Ry. M. C. 303; 107 E. R. 1242.

*Annotations*:—*Reid. R. v. Liverpool, Re Lancaster* (1860), 24 T. P. 646. *Mentd. R. v. Oswestry* (1851), 18 Q. R. 975.

**Sec. 3.—Removal orders: Sub-sect. 1, E., F., G., H. & J.]**

**1258. Place not maintaining its poor.]**—Paupers were removed to the township of B.; the township does not maintain its own poor, but is in the parish of B., which does:—*Held*: the order was informal, but the sessions might amend it.—*R. v. BINGLEY (INHABITANTS)* (1833), 4 B. & Ad. 567, n.; 2 Nev. & M. K. B. 103; 1 Nev. & M. M. C. 145; 2 L. J. M. C. 97; 110 E. R. 568.

*Annotation*:—*Reid. R. v. Liverpool, Re Lancaster* (1860), 24 J. P. 646.

**1259. — Waiver of objection.]**—*R. v. WEST-MORELAND JJ.*, No. 1042, *ante*.

**1260. Township not included in any union.]**—Union Chargeability Act, 1865 (c. 79), does not apply to a union consisting of a single parish.

Where, therefore, by an order of the Poor Law Board, the township of H. was directed to be governed by a board of guardians & was not comprised within any union, & an order was obtained by the overseers of such township & directed to the churchwardens & overseers of the poor of the township of D., which township, with others, is comprised within the N. union:—*Held*: the order was well directed.—*R. v. NORTHWICH* (1867), L. R. 2 Q. B. 383; 8 B. & S. 354; 36 L. J. M. C. 57; 31 J. P. 517; 15 W. R. 742; *sub nom. R. v. NORTHWICH, Re NORTHWICH UNION & HUNSLY OVERSEERS*, 16 L. T. 321.

**F. Inclusion of More Than One Pauper.**

**1261. Whether order bad—Where settlements independent.]**—Though the parishes are the same, yet different persons cannot be removed by the same order upon independent settlements.—*CHEWTON PARISH v. COMPTON MARTIN PARISH* (1721), 1 Stra. 471; 93 E. R. 641.

**1262. — — —.]**—Two persons cannot be removed by one order, although to the same parish, if their settlements are independent of each other.—*R. v. TUTTON & CROMPTON MARTIN, SOMERSETSHIRE PARISH* (1721), 11 Mod. Rep. 356; 88 E. R. 1086.

**1263. — — —.]**—It is no ground for quashing an order of removal, that it removes a mother & son having settlements independent of each other.—*R. v. ALL SAINTS, NEWCASTLE-UPON-TYNE (INHABITANTS)* (1841), 1 Q. B. 428; 1 Gal. & Dav. 133; 10 L. J. M. C. 89; 5 J. P. 595; 5 Jur. 914; 113 E. R. 1197.

**G. The Complaint.**

*See, now, Poor Law Act, 1927 (c. 14), s. 121.*

**1264. Made to one justice.]**—*WARE (INHABITANTS) v. STANSTEAD-MOUNT-FITCHET (INHABITANTS)* (1700), 2 Salk. 488; 91 E. R. 419.

*Annotation*:—*Dodd. R. v. Wykes* (1738), 2 Stra. 1092.

**1265. — — —.]**—*R. v. WESTWOOD (INHABITANTS)*, No. 1251, *ante*.

**1266. Necessity to state order made upon complaint—Of proper authorities.]**—An order of removal must not only state it to have been made upon complaint, but upon complaint of the parish-officers.—*WESTON RIVERS (INHABITANTS) v. ST. PETER'S, MARLBOROUGH (INHABITANTS)* (1695), 2 Salk. 492; 2 Bott. 670; *Foley's Poor Laws*, 3rd ed. 84; *Holt, K. B.* 510; 91 E. R. 423; *sub nom. R. v. WOOTTON RIVERS (INHABITANTS)*, 5 Mod. Rep. 149; 12 Mod. Rep. 89; *sub nom. WOOTTON RIVERS v. MARLBOROUGH (INHABITANTS)*, *Carth.* 365; *Sett. & Rem.* 167; *sub nom. WOOTTON RIVERS v. ST. PETER'S, MARLBOROUGH*, 3 Salk. 254; *sub nom. WOOTTON RIVERS (INHABITANTS)*, *Sett. & Rem.* 18; *sub nom. MARLBOROUGH CASE*, *Comb.* 354.

*Annotation*:—*Consol. R. v. Colbeck* (1840), 12 Ad. & El. 161.

**1267. — — —.]**—*ANON.* (1710), 1 Sess. Cas. K. B. 6; 93 E. R. 2.

**1268. — — —.]**—An order of removal must state that a complaint was made to the justices.—*R. v. HAREBY (INHABITANTS)* (1738), *Andr.* 361; 95 E. R. 435.

*Annotation*:—*Reid. R. v. Bedingham* (1844), 1 New Sess. Cas. 105.

**1269. — — —.]**—*R. v. STOCKTON (INHABITANTS)*, No. 1409, *post*.

**1270. — Whether necessary to state nature of complaint.]**—*SEDGEBURY PARISH v. HUMBLETON PARISH* (1713), 1 Sess. Cas. K. B. 36; 93 E. R. 11.

**1271. — Not stated to be on oath.]**—An order of two justices need not state that the complaint was made upon oath.—*R. v. STANDISH WITH LANGTREE (INHABITANTS)* (1740), *Burr. S. C.* 150; 2 Bott. 671.

**1272. Need not be in writing.]**—*R. v. BEDINGHAM (INHABITANTS)*, No. 1295, *post*.

**H. Statement of Chargeability.**

*See Poor Law Act, 1927 (c. 14), s. 121.*

**1273. Whether actual adjudication of chargeability must appear on face of order.]**—Order quashed for not pursuing the words of the statute.—*WOLVERTON & SOLDEN (INHABITANTS)* (1701), *Fortes. Rep.* 314; 92 E. R. 868.

**1274. — — —.]**—Complaint that H. is likely to be chargeable, not enough without adjudication; but, whereas it appears to us, on complaint, etc., that H. is likely, etc., is sufficient.—*SUDDLECOMBE (INHABITANTS) v. BURWASH (INHABITANTS)* (1701), 2 Salk. 491; 91 E. R. 421.

*Annotation*:—*Reid. R. v. Pitts* (1781), 2 Doug. K. B. 662.

**1275. — — —.]**—Order of removal of certificate man must adjudge him to be actually chargeable.—*MALDEN (INHABITANTS) v. FLETWICK* (1703), 2 Salk. 530; 91 E. R. 451.

**1276. — — —.]**—Order quashed for want of the words that pauper is chargeable.—*WILLERTON PARISH v. WADDINGTON* (1713), 1 Sess. Cas. K. B. 127; 93 E. R. 38.

**1277. — — —.]**—*TEELBY PARISH v. WILLERTON PARISH* (1718), 1 Stra. 77; 93 E. R. 395; *sub nom. ANON.*, 1 Sess. Cas. K. B. 124.

**1278. — — —.]**—It appearing to us, that he is likely to become chargeable, is sufficient, without saying to the parish from whence removed; for it is not to give a jurisdiction, but only the reason of the judgment (*per CUR.*)—*R. v. WITHAM-SUPER-MONTEM (INHABITANTS)* (1719), 1 Stra. 142; 93 E. R. 486.

**1279. — — —.]**—*OSGATHORPE PARISH v. DISWORTH PARISH* (1746), 2 Stra. 1256; 93 E. R. 1165; *sub nom. R. v. OSGATHORPE (INHABITANTS)*, *Burr. S. C.* 261.

*Annotations*:—*Fold. R. v. Wick St. Lawrence* (1833), 5 B. & Ad. 526. *Reid. R. v. Charlbury & Walcott* (1843), 13 L. J. M. C. 19.

**1280. — — —.]**—*ST. ANN'S, WESTMINSTER v. ST. JAMES, WESTMINSTER* (1844), 4 L. T. O. S. 112.

**1281. — Pauper coming to inhabit & settle.]**—Where an order of removal stated that J. and her five children "have lately intruded & come into the parish of St. G., & have become actually chargeable to the same":—*Held*: this was not a sufficient statement that the paupers had come to inhabit or settle in St. G. within Poor Relief Act, 1662 (c. 12).—*R. v. WILLATS* (1845), 7 Q. B. 516; 1 New Mag. Cas. 340; 14 L. J. M. C. 157; 5 L. T. O. S. 172; 9 J. P. 361; 9 Jur. 509; 115 E. R. 583; *sub nom. R. v. WOLLATTS*, 2 New Sess. Cas. 5.

**1282. — — —.]**—An order of removal stated, "whereas complaint has been made unto me, one of her Majesty's justices of the peace in & for the

county of Middlesex (one of the police magistrates of the metropolis, sitting at the police court, Great Marlborough Street, in the parish of St. James, Westminster, within the metropolitan police district), by the churchwardens & overseers of, etc., that J. & E. are lately come into the parish, endeavouring to settle there contrary to law; & it appeareth unto me, etc., & I do adjudge that they are become chargeable to the parish," etc.:—*Held*: (1) the jurisdiction of the single justice, as a police magistrate, sufficiently appeared on the face of the order. (2) The order was bad, inasmuch as it did not purport to have been made upon any complaint of the actual chargeability of the paupers.—*R. v. ST. GILES IN THE FIELDS (INHABITANTS)* (1846), 7 Q. B. 529; 1 New Mag. Cas. 578; 2 New Sess. Cas. 389; 15 L. J. M. C. 122; 7 L. T. O. S. 206; 10 J. P. 553; 10 Jur. 754; 115 E. R. 588.

*Annotation*:—*Reid. R. v. St. Paul's, Covent Garden* (1846), 11 J. P. 70.

1283. ———.]—*R. v. ST. PAUL, COVENT GARDEN (INHABITANTS)*, No. 1227, *ante*.

1284. Whether name of place to which chargeable essential.]—The adjudication need not mention what parish the party is likely to become chargeable to.—*MAIDSTONE PARISH v. DETHING PARISH* (1720), 1 Stra. 393; 93 E. R. 588.

1285. ———.]—Order of removal bad for want of an adjudication of the parish to which the pauper was chargeable.—*R. v. SPALDING* (1734), 2 Sess. Cas. K. B. 290; 93 E. R. 212.

*Annotation*:—*Reid. R. v. Gayer* (1757), 1 Burr. 245.

1286. Proof of chargeability.—Relief given within district.]—Examinations showed relief to the pauper's husband in a foreign parish; relief to the pauper in a foreign parish; & a former order of removal unappealed against. The first ground of appeal denied the settlement of the pauper's husband or of the pauper in applt. parish; the fifth complained that a copy of the former order of removal not appealed against had not been sent to appls. The other grounds of appeal raised specific issues as to chargeability & relief. At the trial the relief was abandoned; appls. called on resps. to prove the former order, insisting that the first ground of appeal traversed it; resps. proved that a copy had been sent, & refused to prove the former order, contending that it was not traversed by the grounds of appeal; & sessions decided that resps. were right:—*Held*: as resps. objected that no copy of the former order had been sent, they were precluded from taking any other specific objection to the former order under the general ground of appeal; though the poor of the city of Norwich were supported by a common fund, the chargeability of a pauper inhabiting in Norwich is, in respect of foreign parishes, to the particular parish in which he is inhabiting.—*R. v. ST. MARY, BUNGAY (INHABITANTS)* (1849), 12 Q. B. 38; 4 New Mag. Cas. 1; 3 New Sess. Cas. 714; 19 L. J. M. C. 39; 14 L. T. O. S. 219; 13 J. P. 779; 14 Jur. 242; 116 E. R. 779.

#### J. Adjudication of Pauper's Settlement.

See Poor Law Act, 1927 (c. 14), s. 121.

1287. Must appear on face of order.]—Place of last legal settlement must be adjudged.—*ST. GILES, CRIPPLEGATE (INHABITANTS) v. HACKNEY (INHABITANTS)* (1697), 2 Salk. 478; 91 E. R. 411.

*Annotation*:—*Reid. R. v. Pitts* (1781), 2 Doug. K. B. 682.

1288. ———.]—An order of removal must aver that the place where was the place of the pauper's "last legal settlement."—*TROWBRIDGE PARISH v. WESTON* (1697), 5 Mod. Rep. 325; Holt, K. B. 579; 24 E. R. 222; 2 Salk. 478; 91 E. R. 411.

*v. WESTON PARISH*, 2 Salk. 473; Sett. & Rem. 240.

1289. ———.]—In an order of removal it is not sufficient that the place of his last legal settlement appears in the complaint; it must also appear in the adjudication of the justices.—*BURY v. ARUNDEL* (1696), 2 Bott. 686; *sub nom. BERRY (INHABITANTS) v. ARUNDEL (INHABITANTS)*, 2 Salk. 479; Sett. & Rem. 259; 91 E. R. 412.

*Annotation*:—*Reid. R. v. Glaston, Rutlandshire* (1728), 2 Sess. Cas. K. B. 110.

1290. ———.]—Order of removal should say last settlement.—*R. v. BAKEWEL PARISH* (1700), Fortes. Rep. 307; 92 E. R. 864.

1291. ———.]—Justices must adjudge the place to which a pauper is removed to be the place of his last legal settlement.—*R. v. WESTWOOD (INHABITANTS)* (1718), 1 Stra. 73; Sett. & Rem. 82; 2 Bott. 688; 93 E. R. 392; *sub nom. WESTWOOD-HAY (INHABITANTS)*, Fortes. Rep. 303.

1292. ———.]—Form of order.]—Where an order of removal was in the following form:—"borough of L., on the complaint of the churchwardens, etc., of the parish of M., in the borough of L. aforesaid, unto us whose name & seals are hereunto set, two of her Majesty's justices of the peace in & for the said borough, that S. W. (the pauper), etc., now inhabit in the said parish of M. not having gained a legal settlement, & are now actually chargeable to the said parish; we, the said justices, upon due proof made thereof, as well on the examination of the said S. W. upon oath, as otherwise, & likewise upon due consideration had of the premises, do adjudge the same to be true; & we do likewise adjudge that the lawful settlement of the said S. W. is in the "township of B.", etc. "Given under our hands & seals Aug. 18, 1845":—*Held*: (1) it sufficiently appeared that the order was made by the justices in the borough of L., & consequently within the jurisdiction; (2) though the adjudication was stated to be made "upon oath, as otherwise" yet the ct. would not intend that the justices adjudicated upon any evidence which was not upon oath, & that the words "as otherwise" must be construed to mean other legal proof; (3) the order was sufficient, without a further statement of an examination into the pauper's settlement at B.—*R. v. KING'S LYNN RECORDER* (1846), 3 Dow. & L. 725; 1 New Mag. Cas. 584; 2 New Sess. Cas. 334; 15 L. J. M. C. 93; 7 L. T. O. S. 117; 10 J. P. 804; 10 Jur. 640.

*Annotations*:—As to (1) *Distd. R. v. Chatham* (1819), 14 L. T. O. S. 200. Generally, *Reid. R. v. St. Paul, Covent Garden* (1846), 7 Q. B. 533. *Mentd. Ormerod v. Chadwick* (1847), 16 M. & W. 367.

1293. Sufficiency of adjudication.—Removal of wife & children.]—*EGLIUM PARISH v. HARTLEY WINTLY* (1713), 1 Sess. Cas. K. B. 44; 93 E. R. 13.

1294. ———.]—An order for the removal of a married woman, not stating her to be such, & her children to Y., adjudging that the lawful settlement of her & her children is in Y., was held well without adjudging that Y. was her husband's settlement.—*R. v. YSPETTY (INHABITANTS)* (1815), 4 M. & S. 52; 105 E. R. 754.

1295. ———.]—An order for the removal of a pauper, his wife, & their six children, recited that it was made upon complaint of the overseers of the poor of the parish of B., & adjudged the place of the last legal settlement of the pauper, his wife, & their six children, to be in the parish of E. The examinations sent to appls. with the order included a copy of the information & complaint of J., one of the overseers of the poor of B., upon which it was admitted at the trial of the

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appeal, that the application of J. was made on behalf & with the consent of the parish officers of B. generally:—*Held*: (1) under these circumstances the complaint was sufficient to found the order of removal; (2) as the order contained an adjudication that the settlement of the children was in E., it was not necessary to state that they had not gained a settlement for themselves.

(3) The examination of the pauper, after setting forth a settlement alleged to have been gained by him in applt. parish, by hiring & service with one S., stated that he had six children, aged respectively eighteen, sixteen, fourteen, twelve, nine & four years; & amongst other instances of relief, that on several of his wife's confinements on the birth of the children, whilst residing in resp. parish, he had been allowed medical attendance upon his wife, by & at the expense of applt. parish:—*Held*: the dates of such relief sufficiently appeared by the examination.

(4) Appls. in one of their grounds of appeal, objected "that the pauper never acquired a settlement in E. by hiring & service, or by any other means":—*Held*: under this ground of appeal, the sessions were right in admitting evidence to show that the relief given by appls. had been given under a mistaken belief that the pauper had acquired a settlement in their parish by the hiring & service with S., set forth in the examination.

(5) Under Poor Relief Act, 1662 (c. 12), s. 1, the complaint upon which an order of removal is made need not be in writing.—*R. v. BEDINGHAM (INHABITANTS)* (1844), 5 Q. B. 653; *Dav. & Mer.* 98; 1 *New Mag. Cas.* 2; 1 *New Sess. Cas.* 105; 13 *L. J. M. C.* 75; 3 *L. T. O. S.* 52; 8 *J. P.* 660; 8 *Jur.* 377; 114 *E. R.* 1395.

*Annotations*:—*As to* (1) *Reid. R. v. Vickery* (1847), 16 *L. J. M. C.* 69. *As to* (4) *Conrad. R. v. Widecombe in the Moor* (1847), 9 *Q. B.* 894. *Distd. R. v. Bucknell* (1854), 13 *Jur.* 533. *Reid. R. v. St. Giles, Colchester* (1848), 12 *Q. B.* 13; *R. v. St. Mary, Bungay* (1849), 12 *Q. B.* 38. *Generally, Reid. R. v. Walford* (1846), 9 *Q. B.* 626.

**1296. Adjudication of settlement of mother & illegitimate child—In same parish.]**—(1) The copies of all the examinations sent, under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, must show on the face of them that they were taken before two magistrates; & it is not sufficient that the magistrates who take the first examination, which sets out their character as such, sign their names to the subsequent examination.

(2) It is not an objection to an order of removal of a mother & her illegitimate child, that it adjudicates the settlement of both the mother & child to be in the mother's parish.—*R. v. SHIPSTON UPON STOUR (INHABITANTS)* (1844), 6 *Q. B.* 119; 1 *Dav. & Mer.* 123; 1 *New Mag. Cas.* 41; 1 *New Sess. Cas.* 230; 13 *L. J. M. C.* 128; 3 *L. T. O. S.* 160; 8 *J. P.* 535; 8 *Jur.* 492; 115 *E. R.* 45.

*Annotations*:—*As to* (1) *Distd. R. v. Milsomere* (1849), 12 *Q. B.* 19. *Generally, Mentd. Parkes v. Parkes* (1852), 18 *Jur.* 1093.

**1297. Reason for adjudication—Need not be given—If bad, vitiates order.]**—(1) T. adjudged last legally settled at A. as living two years there as a yearly servant; good—because where the reason in order not plainly bad, but only circumstances omitted to make completely good, ct. intends them in support of orders; as where children are removed under their father's settlement, if their settlement is adjudged to be there. Ages need not be set out.

(2) Where the reason is plainly no reason, the order cannot be good (*per Cur.*).—*R. v. STANDEM (INHABITANTS)* (1711), 1 *Sess. Cas. K. B.* 28; 93 *E. R.* 8.

**1298. ———.]**—*SEDGEBURY PARISH v. HUMBLETON PARISH* (1713), 1 *Sess. Cas. K. B.* 36; 93 *E. R.* 11.

**1299. ———.]**—Order of adjudication, wherein is a reason which may be good, will be so intended.

Where justices give a reason which cannot possibly be a reason, their order shall be quashed; but where they adjudge a settlement, & give a reason, which may be a good one, as being born there, the ct. will suppose that all necessary circumstances were had (*per Cur.*).—*ST. JOHN BAPTIST PARISH, PETERBOROUGH v. SPALDEN* (1713), 1 *Sess. Cas. K. B.* 37; 93 *E. R.* 11.

**1300. ———.]**—*R. v. ROTHERHAM (INHABITANTS)*, No. 1219, *ante*.

**K. Description of Pauper and Family.**

**1301. Order for removal of pauper & "his family"—Void for uncertainty.]**—An order to remove a pauper & his family is bad on account of the generality of the word "family."—*R. v. WANGFORD, SUFFOLK (INHABITANTS)* (1698), 1 *Ld. Raym.* 395; 91 *E. R.* 1162; *sub nom. WANGFORD PARISH v. BRANDON PARISH*, *Holt, K. B.* 574; *Carth.* 449; *sub nom. ANON.*, 2 *Salk.* 482; *Comb.* 478.

*Annotations*:—*Reid. R. v. Hemlington* (1777), 1 *Doug. K. B.* 9, n.; *R. v. Everdon* (1807), 9 *East*, 101; *R. v. Tavistock* (1823), 3 *Dow. & Ry. K. B.* 426.

**1302. ———.]**—*JOHNSON'S CASE* (1699), 2 *Salk.* 485; 91 *E. R.* 417; *sub nom. R. v. JOHNSON*, 2 *Bott.* 686.

*Annotation*:—*Apld. Beaston Parish v. Scisson Parish* (1718), 1 *Stra.* 114.

**1303. ———.]**—Order of justices to remove a man and his family is ill.—*R. v. ——— (INHABITANTS)* (1700), 1 *Com.* 86; 92 *E. R.* 972.

**1304. ———.]**—*WARE (INHABITANTS) v. STANSTEAD-MOUNT-FITCHET (INHABITANTS)* (1700), 2 *Salk.* 488; 91 *E. R.* 419.

*Annotation*:—*Reid. R. v. Wykes* (1738), 2 *Stra.* 1092.

**1305. ———.]**—*R. v. KIRFORD (INHABITANTS)* (1700), 12 *Mod. Rep.* 398; 88 *E. R.* 1405.

**1306. ———.]**—Order to remove a man & his family, being too general, bad.—*R. v. GREAT AULNE* (1728), 2 *Sess. Cas. K. B.* 77; 93 *E. R.* 149.

**1307. ———.]**—Void as to family only.]—Order to remove A. & family bad as to family; but adjudication that it was the place of the last legal settlement is well enough.—*BEASTON PARISH v. SCISSON PARISH* (1718), 1 *Stra.* 114; 93 *E. R.* 418; *sub nom. SIZETON PARISH v. BEESTON PARISH*, *Sett. & Rem.* 88.

**1308. ———.]**—*R. v. RISLEY (INHABITANTS)* (1729), 1 *Barn. K. B.* 264; 94 *E. R.* 182.

**1309. Children—Necessity for name.]**—Orders of removal must particularise children, & set out their ages.—*ROSTEM v. FLIXTON* (1710), 1 *Sess. Cas. K. B.* 10; 93 *E. R.* 3.

**1310. ———.]**—Order removing wife & children too general; *ergo* quashed as to children.—*ABERGenny PARISH v. LANGHANY* (1714), 1 *Sess. Cas. K. B.* 76; 93 *E. R.* 23.

**1311. ———.]**—*R. v. STILTON (INHABITANTS)* (1731), 1 *Barn. K. B.* 448, 465; 94 *E. R.* 301, 313.

**1312. ———.]**—*R. v. WITHERNWICK (INHABITANTS)*, No. 1578, *post*.

**1313. ———.]**—Necessity to specify ages—Adjudication as to settlement.]—*PETWORTH PARISH* (1711), 10 *Mod. Rep.* 25; 88 *E. R.* 609; *sub nom. RINGMERE PARISH v. PETWORTH PARISH*, *Sett. & Rem.* 28.

**1314. ———.]**—*R. v. BRAMSHAW (INHABITANTS)* (1736), *Burr. S. C.* 98.

*Annotation*:—*Reid. R. v. Heyop* (1846), 2 *New Sess. Cas.* 270.

**1315.** ———.—*R. v. USCULM (INHABITANTS) (1730), Burt. S. C. 138; 2 Bott, 694.*

**1316.** ———.—*An order removing children must mention their ages.—R. v. TRINITY PARISH, CHESTER (1724), 8 Mod. Rep. 337; 2 Sess. Cas. K. B. 70; 88 E. R. 240.*

**1317.** ———.—*R. v. ST. BOTOLPH'S ALD-GATE (INHABITANTS) (1728), 1 Barn. K. B. 130; 94 E. R. 90.*

**1318.** ———.—**Removal without parents—Whether necessary for order to show parents dead.**—*An order of justices removing nurse children to their derivative settlement without taking notice of the death or settlement of their parents, is good.—R. v. BUCKLEBURY (INHABITANTS) (1786), 1 Term Rep. 164; 99 E. R. 1032.*

*Annotation:—Ridd. R. v. Birmingham (1843), 7 J. P. 705.*  
**1319. Name or description of pauper.**—*SOUTHELL PARISH v. NEEDWELL PARISH (1712), Sett. & Rem. 35; 2 Bott, 693.*

#### *L. Sickness Producing Permanent Disability.*

*See Poor Law Act, 1927 (c. 14), ss. 121, 124, 125.*

**1320. Whether order must negative such chargeability.**—*R. v. GOOLE (INHABITANTS), No. 1390, post.*

**1321.** ———.—*It is not necessary to negative, in an order of removal, that the pauper did not become chargeable in respect of relief made necessary by sickness or accident.—R. v. ILANDOGGET (INHABITANTS) (1849), 3 New Sess. Cas. 517; 3 New Mag. Cas. 150; 13 L. T. O. S. 115; sub nom. R. v. ILANDOGGET (INHABITANTS), 13 J. P. 285.*

**1322. Order not showing such chargeability—Appeal on ground of sickness not producing permanent disability.**—*Though it does not appear on the order or examinations that the chargeability of a pauper was occasioned by relief given on account of sickness, yet it is a good ground of appeal that such was the case, & that such sickness was not shown to be likely to produce permanent disability.*

*Paupers became chargeable by sickness on Apr. 20, 1846. Shortly after the passing of Poor Removal Act, 1846 (c. 66), Aug. 26, 1846, they were removed by an order which did not state the sickness, or that the justices were satisfied that it would not produce permanent disability:—Held: such omission was a good ground of appeal.—R. v. PRIORS HARDWICK (INHABITANTS) (1849), 12 Q. B. 108; 3 New Sess. Cas. 510; 3 New Mag. Cas. 157; 18 L. J. M. C. 177; 13 L. T. O. S. 113; 13 J. P. 286; 13 Jur. 533; 116 E. R. 830.*

*Annotation:—Apld. R. v. Bucknell (1854), 3 E. & B. 587.*

**1323.** ———.—*PONTYPRIDD UNION v. CARDIFF UNION (1913), 77 J. P. Jo. 364.*

**1324. Order declaring chargeability due to permanent disability—Conclusive as to fact.**—*Where, under Poor Removal Act, 1846 (c. 66), s. 4, a warrant for the removal of a pauper on account of sickness or accident is granted by justices of the peace, who state therein that they are satisfied that the sickness or accident will produce permanent disability no appeal lies to quarter sessions against this statement.—R. v. ST. MARY & ST. ANDREW WHITTLESEY OVERSEERS (1863), 3 B. & S. 432; 32 L. J. M. C. 78; 7 L. T. 676; 9 Jur. N. S. 820; 11 W. R. 310; 122 E. R. 163.*

**1325. Whether necessary to state in order—Where wife removed owing to illness of husband.**—*Poor Removal Act, 1846 (c. 66), s. 4, by which "no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness will pro-*

*duce permanent disability," applies only to the case of sickness of the person removed.*

*Where a man, in consequence of sickness, left his wife & children in resp. parish & went into an hospital in another, & his wife & children became chargeable to resp. parish:—Held: an order for their removal to the parish of his settlement need not state that the justices were satisfied that the sickness would produce permanent disability.—R. v. ST. GEORGE, MIDDLESEX (INHABITANTS) (1862), 2 B. & S. 317; 31 L. J. M. C. 85; 5 L. T. 791; 26 J. P. 151; 8 Jur. N. S. 714; 121 E. R. 1091.*

#### *M. Service of Order.*

*See Poor Law Act, 1927 (c. 14), s. 125.*

**1326. Service by post—Delivery on Sunday.**—*By Poor Law (Amendment) Act, 1834 (c. 76), s. 79, no pauper shall be removed under any order of removal until twenty-one days after a notice of chargeability, accompanied by a copy of the order & of the examination, shall have been sent, "by post or otherwise," by the overseers of the parish obtaining the order, to the overseers of the parish to whom the order is directed:—Held: admitting that the delivery of those documents in the ordinary manner would be service of an order or process within Sunday Observance Act, 1677 (c. 7), s. 6, the transmission of them by post under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, where, by the ordinary course of post, they reached on Sunday the hands of the overseers of the parish to whom the order was directed, was not void by Sunday Observance Act, 1677 (c. 7), s. 6.—R. v. LEOMINSTER (INHABITANTS) (1862), 2 B. & S. 391; 31 L. J. M. C. 95; 6 L. T. 216; 26 J. P. 342; 8 Jur. N. S. 793; 121 E. R. 1119.*

**1327. Where order suspended—Service within reasonable time.**—*A suspended order of removal must be served within a reasonable time. Therefore, where an order of removal was made & suspended on the same day, on account of the age & infirmity of the pauper; & she survived three years, but no notice of the order of removal was served on the parish to which she was ordered to be removed, till after her death:—Held: the service was not within a reasonable time, & the order of removal was void.—R. v. LAMPETER (INHABITANTS) (1824), 3 B. & C. 454; 5 Dow. & Ry. K. B. 310; 2 Dow. & Ry. M. C. 437; 3 L. J. O. S. K. B. 85; 2 Bott, 705; 107 E. R. 802.*

*Annotation:—Consd. R. v. Ponkrigge (1832), 3 B. & Ad. 538.*

#### *N. Suspension of Order.*

*See Poor Law Act, 1927 (c. 14), ss. 12 (a), 124, 125.*

**1328. Time for suspension.**—*By Poor Removal Act, 1794 (c. 101), s. 2, "in case any poor person shall "be brought before any "justices "for the purpose of being removed from "his place of sojourn "by virtue of any order of removal," " & it shall appear to the "justices that such poor person is unable to travel, by reason of sickness or other infirmity," "the "justices making such order of removal" are required & authorised to suspend the execution of the same, until satisfied that it can be executed without danger to the person to be removed; & the suspension is to be indorsed on the order of removal:—Held: under this statute the suspension of the execution of an order of removal of a pauper can only be made by the justices at the same time as the order of removal itself; the justices being, after that time, functi officio.—R. v. LEANLECHID (INHABITANTS) (1860), 2 E. & E. 53; 29 L. J. M. C. 102; 24 J. P. 548; 6 Jur. N. S. 198; 8*



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W. R. 214; 121 E. R. 199; *sub nom.* LLANLECHID (CHURCHWARDENS & OVERSEERS) v. PISTYLL PARISH OFFICERS, 1 L. T. 326.

*Annotation* :—*Held*. R. v. Soulecoates (1868), L. R. 4 Q. B. 33. 1829. — Failure to suspend at proper time—

*Procedure*.]—Where an order of removal not suspended at the time of the making of the order & not appealed against cannot be executed at the expiration of the twenty-one days by reason of the sickness of the pauper, the justices may make a fresh order of removal & suspend the same without any formal *supersedeas* or notice of abandonment of the previous order.—*ATCHAM UNION v. BIRMINGHAM UNION* (1878), 56 J. P. 297, D. C.

1830. *Period of suspension*.]—By Poor Removal Act, 1794 (c. 101), s. 2, if it appear to the justices that any person ordered to be removed is unable to travel through sickness, or that it would be dangerous for him to do so, they may suspend the execution of the order until they are satisfied it may be executed without danger to any person who is the subject thereof; & the charges incurred by such suspension may by the justices be directed to be paid by the parish of settlement, in case any removal shall take place, or in case of the death of such poor person before the execution of such order. By Poor (Settlement & Removal) Act, 1809 (c. 124), s. 3, where any order of removal shall be suspended on account of the dangerous sickness of any person thereby directed to be removed, the execution of such order shall also be suspended for the same period with respect to every other person named therein. On Nov. 19, 1860, an order was obtained for the removal of J. & E. his wife from St. M. to S., & on the same day the order was suspended on account of the sickness of J. & he remained incapable of being removed until he died on June 13, 1861. Shortly before J.'s death E. became unable to travel by reason of sickness, & continued sick until she died in Apr. 1867, having in Mar. 1866, become irremovable under Union Chargeability Act, 1865 (c. 79), s. 8, by reason of having resided before Nov. 1860, for one year in St. M. without receiving parish relief. An order having been obtained after the death of E. by St. M. on S. for the expenses of maintenance of E. subsequent to the death of J., under Poor Removal Act, 1794 (c. 101), s. 2 :—*Held* : (1) although the order of removal was suspended in consequence of the sickness of J., it continued suspended as to E., & all the expenses of her maintenance up to Mar. 1866, must be paid by S.; (2) the order for the payment of the expenses was rightly made in Apr. 1867, on the death of E., although she had become irremovable in Mar. 1866, by virtue of Union Chargeability Act, 1865 (c. 79), s. 8.—*R. v. SCULCOATES OVERSEERS* (1868), L. R. 4 Q. B. 33; 9 B. & S. 911; 38 L. J. M. C. 33; 19 L. T. 315; 33 J. P. 53; 17 W. R. 100.

1831. *Liability for maintenance during suspension*.]—A pauper settled in O. met with an accident while resident in M., which made him chargeable, & was relieved by M. The pauper being incapable of removal in consequence of the accident, an order of removal to O. was made, & immediately suspended :—*Held* : under Poor Removal Act, 1795 (c. 101), s. 2, O. was liable to the expenses incurred by M. after the order.—*R. v. OLDLAND (INHABITANTS)* (1830), 4 Ad. & El. 929; 2 Har. & W. 4; 6 Nev. & M. K. B. 529; 3 Nev. & M. M. C. 651; 5 L. J. M. C. 94; 111 E. R. 1033.

1832. *Recovery of expenses of maintenance—Warrant of distress—Justices cannot inquire into validity of order—Backing of warrant*.]—Poor Removal Act, 1794 (c. 101), s. 2, after enabling

justices to suspend orders of removal of poor persons, & to order the charges thereby incurred to be defrayed by the pauper's parish, & to direct the charges to be levied by warrant of distress, enacts that if the parties against whom it is issued are out of the jurisdiction of the justice granting the warrant, it shall be indorsed by some other justice within whose jurisdiction they are. This is peremptory on the latter upon request made.—*R. v. KEYNASTON* (1800), 1 East, 117; 2 Bott, 697; 102 E. R. 47.

*Annotation* :—*Held*. R. v. St. James, Bury St. Edmunds (1808), 10 East, 25.

1833. — Issue of warrant.]—An order of removal was suspended; but afterwards, the pauper having died, the suspension was taken off, & an order was made for costs, under Poor Removal Act, 1794 (c. 101), s. 2, upon the parish to which the removal had been made. Neither order was appealed against. After the time for appeal had expired, application was made to a magistrate for a distress warrant, the costs having been demanded & not paid. On the hearing, it was objected that, since the expiration of the time, the parish, to which the removal was ordered, had discovered that there had been a five years' residence in the removing parish, under Poor Removal Act, 1846 (c. 66). The magistrate, on this objection, refused the distress warrant :—*Held* : he was bound to issue it, the objection, if valid, being one which could be taken only by appeal against the order for costs.—*Re WILLIAMS* (1853), 2 E. & B. 84; 118 E. R. 700; *sub nom.* *Ex p. WILLIAMS*, 22 L. J. M. C. 125; 17 Jur. 763.

*Annotation* :—*Held*. R. v. Higginson (1862), 2 B. & S. 471.

1834. — In Feb. 1853, application was made for a distress warrant, to enforce payment of a sum of money exceeding £20 ordered in Oct. 1852, to be paid for the cost of maintaining a pauper, recently dead, during the whole period of the suspension of an order for his removal, made in 1841, & forthwith & thenceforward until the death of the pauper, suspended on account of his inability from sickness, to be removed. The pauper had resided in the removing parish for five years next before the application for the warrant of removal, & it was contended that the costs of maintaining the pauper subsequent to the Poor Law (Amendment) Act, 1847 (c. 110), were chargeable to the common fund of the union, & not to the parish of the settlement. The justice refused to grant the warrant :—*Held* : the objection should have been taken by appeal to the sessions, where the amount might have been reduced, & as there had been no appeal, the magistrate was bound to issue his distress warrant to enforce payment.—*R. v. PARKINSON* (1853), 21 L. T. O. S. 113; 17 J. P. 519; 1 W. R. 327.

1835. — Upon an application, under Poor Removal Act, 1794 (c. 101), s. 2, for a warrant of distress to levy the charges incurred by the suspension of an order of removal, the justice cannot inquire into the merits of the order directing payment, but is bound to enforce it by issuing his warrant. This holds even where, by reason of the amount ordered to be paid not exceeding £20, there is no appeal against the order.—*R. v. HIGGINSON* (1862), 2 B. & S. 471; 31 L. J. M. C. 189; 8 Jur. N. S. 1176; 121 E. R. 1148; *sub nom.* *R. v. NORTH RIDING OF YORKSHIRE JJ.*, 6 L. T. 351; 26 J. P. 629.

1836. — When recoverable—Pauper neither dead nor legally removed.]—In Apr. 1843, an order was made for the removal of a pauper from parish B. to parish C., & was suspended the same day; & C. was served with notice of the order of removal

on Apr. 17, 1843. On Aug. 26, 1840, Poor Removal Act, 1846 (c. 66), came into operation. Pauper had resided in B. five years next before the making the order. In Sept. 1847, execution of the order was directed by another order of justices; & the pauper was removed to C. Afterwards C. appealed against the first order:—*Held*: (1) the appeal was too late, inasmuch as Poor Settlement & Removal Act, 1809 (c. 124), s. 2, makes the time of appealing against a suspended order run from the time of service of the order, & not from the removal; & Poor Removal Act, 1846 (c. 66), s. 1, does not give any power of appeal against the removal itself; (2) the order of Sept. 1847, which, after directing the execution of the first order, ordered C. to pay to B. £100 for charges incurred by the suspension, must be quashed on appeal, since Poor Removal Act, 1795 (c. 101), s. 2, gives such expenses only in the case of the death or removal of the pauper; & here the pauper was not dead, & the removal, being illegal under Poor Removal Act, 1840 (c. 66), s. 1, was as no removal.—*R. v. CHEDGRAVE (INHABITANTS)* (1849), 12 Q. B. 206; 4 New Mag. Cas. 9; 4 New Sess. Cas. 69; 19 L. J. M. C. 54; 14 L. T. O. S. 260; 14 J. P. 242; 14 Jur. 206; 116 E. R. 845.

*Annotations*:—*As to* (2) *Reid*. *Hill v. Thorncroft* (1861), 7 Jur. N. S. 163; *R. v. Sculcoates* (1868), L. R. 4 Q. B. 33.

1337. ————.]—In Apr. 1843, an order was made for removal of a pauper from parish B. to parish C., & was suspended the same day; & C. was served with notice of the order of removal within ten days. On Aug. 26, 1840, Poor Removal Act, 1846 (c. 66), came into operation. In Sept. 1847, execution of the order was directed by another order of justices; & at the same time, they ordered payment, by C. to B., of the expenses of maintenance from Apr. 1843, to Sept. 1847 & the pauper was removed to C. He had resided in B. five years next before the execution of the order. Afterwards C. appealed against both orders. The sessions confirmed both. On cases reserved for this ct., the order of removal was confirmed on the ground that the appeal was too late; but the order for payment was quashed, on the ground that the case was not within Poor Removal Act, 1794 (c. 101), s. 2, the pauper not being dead, nor, in consequence of Poor Removal Act, 1846 (c. 66), s. 1, legally removed:—*Held*: nevertheless, after the decision of this ct., B. was entitled to an order on C. for the same expenses of maintenance, the settlement having now been finally adjudged to be in C., so as to bring the case within Poor Law (Amendment) Act, 1834 (c. 76), s. 84.—*R. v. WODEHOUSE* (1850), 15 Q. B. 1037; 117 E. R. 752.

1338. ————.]—*R. v. SCULCOATES OVERSEERS*, No. 1330, *ante*.

1339. ————.]—*Illegal removal—Order finally confirmed*.]—An order was made for the removal of a pauper, but suspended on account of his sickness. During the suspension Poor Removal Act, 1846 (c. 66), came into operation, & rendered the pauper irremovable. The suspension was subsequently taken off, & the pauper removed. On appeal against the order of removal, the order was confirmed, on the ground that due notice of appeal had not been given:—*Held*: the removing parish were under Poor Law (Amendment) Act, 1834 (c. 76), ss. 84 & 101, entitled to an order on the parish to which he was removed, for the costs of maintenance incurred during the suspension of the order, although the removal was unauthorised in law, on the ground that the pauper had been finally adjudged to belong to the last named parish, & that Poor Law (Amendment) Act, 1834 (c. 76),

applied to suspended orders.—*R. v. CHEDGRAVE OVERSEERS* (1850), 4 New Mag. Cas. 163; 4 New Sess. Cas. 310; 16 L. T. O. S. 148; *sub nom. Re CHEDGRAVE OVERSEERS*, 20 L. J. M. C. 23; 14 Jur. 1092.

1340. ————.]—*Acquisition of settlement during suspension*.]—The power given to magistrates under Poor Removal Act, 1794 (c. 101), s. 2, of ordering the charges incurred during the suspension of an order of removal, to be paid by the parish to which the order is made, is confined to two cases only, viz. the death or removal of the pauper; & therefore, where a pauper, during the suspension of an order of removal, became irremovable in consequence of an estate descending to him:—*Held*: such a case was not within the Act; & the pauper, not having been removed, no order for the payment of any charges incurred during the suspension of the original order of removal, could be made.—*R. v. CHAGFORD (INHABITANTS)* (1821), 4 B. & Ald. 235; 106 E. R. 923.

*Annotations*:—*Distd.* *R. v. Chedgrave* (1849), 12 Q. B. 206. *Reid.* *R. v. Sculcoates* (1868), L. R. 4 Q. B. 33.

1341. ————.]—*Order not suspended*.]—An order of removal was made on Oct. 6, 1853, & a copy thereof, with notice of chargeability, was duly sent. The pauper was, at the time of the order, pregnant, & could not be removed under the order till Mar. 9, 1854, when a demand was made for the costs of her maintenance from the time of the service of the copy of the order. Upon an information, under Poor Law (Amendment) Act, 1834 (c. 76), s. 84, for non-payment of those costs:—*Held*: (1) Summary Jurisdiction Act, 1847 (c. 43), s. 35, by which nothing in the Act shall "extend to any warrant or order for the removal of any person" did not except from the operation of the Act an order made upon an information under Poor Law (Amendment) Act, 1834 (c. 76), s. 84, & therefore the information must be laid within six months, in pursuance of Summary Jurisdiction Act, 1847 (c. 43), s. 11; (2) Poor Law (Amendment) Act, 1834 (c. 76), s. 84, did not apply where the removal was delayed by the illness of the pauper; & therefore, if the information had been laid within six months, the removing parish could only have recovered the costs of maintenance for twenty-one days after the service of notice of chargeability.—*HILL v. THORNCROFT* (1860), 3 E. & E. 257; 30 L. J. M. C. 52; 25 J. P. 262; 7 Jur. N. S. 163; 9 W. R. 96; 121 E. R. 438; *sub nom. COLLUMPTON v. BRIGHTHELMSTON, Ex p. HOWSE*, 3 L. T. 318.

*Annotation*:—*Reid.* *R. v. Sculcoates* (1868), L. R. 4 Q. B. 33.

1342. ————.]—*Amount recoverable*.]—*R. v. SCULCOATES OVERSEERS*, No. 1330, *ante*.

1343. ————.]—*Limitation of time as to recovery*.]—*HILL v. THORNCROFT*, No. 1341, *ante*.

1344. ————.]—*Application for recovery—Whether by summons or ex parte*.]—Where an order for the removal of a pauper has been suspended in consequence of the pauper's inability to travel, an application to justices by the removing union, for an order for the payment by the union to which the pauper belongs, of the costs of his maintenance during the period of suspension, must be made upon summons & not *ex p.*—*R. v. WILKINSON*, [1891] 1 Q. B. 722; 55 J. P. Jo. 293; *sub nom. R. v. WEST RIDING OF YORKSHIRE JJ.*, 60 L. J. M. C. 122; 7 T. L. R. 483, D. C.

1345. ————.]—*Order for—Must show jurisdiction*.]—Justices, by a regular order, having the county as venue, removed a pauper to his settlement; & they, at the same time, by indorsement on the order of removal, suspended the execution on account of his illness. Afterwards one of the same

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justices & another justice, by order indorsed on the first order, directed a removal; &, by a contemporaneous order, similarly indorsed, they directed payment of expenses. The last two orders did not, either by venue in the margin or statement in the body, show that they were made in the county:—*Held*: they were bad for this fault; & they were quashed on *certiorari*.—*R. v. CROWAN (INHABITANTS)* (1849), 14 Q. B. 221; 4 New Mag. Cas. 13; 3 New Sess. Cas. 663; 19 L. J. M. C. 20; 14 L. T. O. S. 172; 14 J. P. 207; 13 Jur. 1099; 117 E. R. 88.

**Amendment.]**—An order made by two justices, described therein as “acting in & for the county of S.,” for the removal of a pauper from B., in that county, to H., also in that county, was on the same day, suspended by them, in consequence of the illness of the pauper. On his death a second order was made, by indorsement on the first, by two other justices, for the payment, by the parish officers of H., of the expenses incurred by the suspension of the first order. In this order the justices described themselves as acting “for the borough of B.” This order contained no statement, in the margin or the body, of the particular locality in which the justices were sitting. The last mentioned order having been brought up by *certiorari*, the ct. amended it, without costs, under Quarter Sessions Act, 1849 (c. 45), s. 7, by altering the words “for the borough of B.” to “in & for the borough of B.”; holding that there were necessarily sufficient grounds in proof before the justices, sitting in their judicial capacity, of the locality in which they were sitting, to have allowed of their drawing up the order as amended.—*R. v. HELLINGLEY (INHABITANTS)* (1859), 1 E. & E. 749; 28 L. J. M. C. 107; 23 J. P. 628; 5 Jur. N. S. 626; 7 W. R. 413; 120 E. R. 1091.

**Annotations.**—*Reid*. *R. v. Liverpool, Re Lancaster* (1860), 24 J. P. 646; *R. v. Bradlaugh* (1875), 43 J. P. 125.

**1347. — Order for removal of husband & family.—Suspended during illness of husband.—Whether further order necessary to remove wife on death of husband.]**—Where husband & wife & their children were removed by an order of justices to the place of their last settlement, & that order was suspended as to the husband, until it should be made appear that he was sufficiently recovered to be able to travel; the wife & children being removed after his death, without any subsequent order, is no reason for the sessions to quash that order on appeal, nor to quash another order for payment of the charges of such suspension.—*R. v. ENGLEFIELD (INHABITANTS)* (1811), 13 East, 317; 104 E. R. 392.

**Annotation.**—*Reid*. *R. v. Sculcoates* (1868), L. R. 4 Q. B. 33.

**1348. — Appeal.—Time for.]**—(1) By Poor Removal Act, 1794 (c. 101), s. 2, the party aggrieved by an order of justices, directing payment, to the amount of above £20 of the charges & costs of the suspension of an order of removal, on account of the illness of the pauper, may appeal to the next sessions, in like manner as against an order of removal, though he omit to give notice of such his appeal within three days after the demand of such charges & costs; by which he makes himself liable to a distress for the amount.

(2) If on appeal the former order be vacated, or the amount of the charges to be paid be reduced, the surplus, if before levied by distress, must be refunded.—*R. v. BRADFORD (INHABITANTS)* (1807), 9 East, 97; 103 E. R. 510.

**1349. Suspension by agreement between parish**

**officers.]**—There is nothing illegal in an agreement between the parish officers of two different parishes that an order obtained by one for the removal of a pauper to the other should not be executed, & that the pauper should be allowed to reside in what would otherwise be the removing parish, the officers of the parish to which he was to be removed indemnifying the ratepayers of the other parish against any charge in respect of him. Such an agreement is binding personally upon the persons who enter it as parish officers.

In declaring upon such an agreement, the consideration being “the pauper’s being allowed to reside in the parish” of which plts. were the officers, it being shown that they were such officers, & as such had obtained an order for the pauper’s removal:—*Held*: the consideration sufficiently appeared to move from plts.—*BENNETT v. BATTEN* (1850), 4 New Mag. Cas. 97; 15 L. T. O. S. 181; 14 J. P. 558.

**O. Abandoning Order.**

*See* Poor Law Act, 1927 (c. 14), s. 126.

**1350. Supersedeas by justices.—Order given in error.]**—Justices of peace may supersede their own order *quia improvide emanavit*.

If the pauper had been removed, the *supersedeas* would have been void (*per* CUR.).—*PANCRAS PARISH v. RUMBALD PARISH, SUSSEX* (1716), 1 Stra. 6; 1 Sess. Cas. K. B. 106; 2 Bott, 661; 93 E. R. 349. **Annotations.**—*Conad*. *R. v. Norfolk JJ.* (1822), 5 B. & Ald. 484. *Reid*. *R. v. West Riding JJ.* (1842), 2 Q. B. 705; *R. v. Stayley* (1843), 3 Q. B. 357. *Mentd.* *Barrons v. Luscombe* (1835), 5 Nev. & M. K. B. 330.

**1351. — After sealing & delivery.]**—*R. v. ANGLESEA JJ.*, No. 1354, *post*.

**1352. — Whether appeal necessary.]**—Where an order of removal has been executed, & by consent of the removing parish & the magistrates making it, it is superseded, & the paupers taken back, it is in the discretion of the sessions to enter an appeal against it or not, according as they may think that justice requires it, in order to compel resps. to pay the costs of maintenance, etc., incurred by appls. before the order was superseded.—*R. v. NORFOLK JJ.* (1822), 5 B. & Ald. 484; 1 Dow. & Ry. K. B. 69; 1 Dow. & Ry. M. C. 17; 106 E. R. 1268.

**Annotations.**—*Conad*. *Barons v. Luscombe* (1835), 3 Ad. & El. 589. *Distd.* *R. v. Middlesex JJ.* (1840), 11 Ad. & El. 809. *Conad*. *R. v. Altemun* (1841), 10 Ad. & El. 699; *R. v. West Riding JJ.* (1842), 2 Q. B. 705. *Reid*. *R. v. Stayley* (1843), 3 Q. B. 357. *Mentd.* *R. v. Bird, Ex p. Needes*, [1898] 2 Q. B. 340.

**1353. Abandonment of order.—Costs.—Right of appellants.]**—An order of removal was, at the instance of the removing parish, & after the pauper had been removed & an appeal lodged at sessions, superseded by an order of the removing justices, which recited that the removing parish had discovered the original order to be founded on an incorrect examination:—*Held*: the *supersedeas* was too late, & appls. had a right to insist on the appeal being heard; & the sessions having refused to hear it, a *mandamus* issued commanding them to enter continuances & hear.—*R. v. MIDDLESEX JJ.* (1840), 11 Ad. & El. 809; 3 Per. & Dav. 459; Woll. 32; 9 L. J. M. C. 59; 4 J. P. 283; 4 Jur. 915; 113 E. R. 622.

**Annotations.**—*Reid*. *R. v. Brighthelmston Directors of the Poor* (1842), 3 Q. B. 342; *R. v. Anglesea JJ.* (1843), 12 L. J. M. C. 131.

**1354. — — — — —.]**—A removing parish may abandon their own order of removal, but applt. parish may, notwithstanding, proceed with the appeal for the purpose of obtaining their costs.

An order having been obtained for the removal of a pauper, the removing parish, after they had been served with a notice & grounds of removal.

but before the removal of the pauper, superseded their order. *Applt.* parish having, notwithstanding, applied to the next sessions to enter the appeal, & the sessions having refused, this *ct.* refused a *mandamus* to compel the entry, it not having been made to appear that any expenses had been incurred by *applt.* parish.

*Qu.*: whether justices have power to supersede an order after sealing & delivery.—*R. v. ANGLESEA JJ.* (1843), 1 *Dow. & L.* 170; 12 *L. J. M. C.* 131; 1 *L. T. O. S.* 292; 7 *J. P.* 482; 7 *Jur.* 701.

1355. ————]—Where *resps.* have served *appls.* against an order of removal, with a notice of their intention to abandon their order, *appls.* have nevertheless a right to enter their appeal at the sessions, in order to obtain costs. Although *resps.* in their notice of abandonment have offered to pay all lawful & reasonable costs.

*Semble*: it makes no difference in this respect whether *resps.* have merely served a notice of abandonment, or have procured the order to be superseded.

*Appls.*, under the foregoing circumstances, having entered an appeal:—*Held*: the sessions might proceed to quash the order & give costs, although *appls.* had not produced the original order, or given *resps.* notice to produce it; the practice of the sessions being, that "the order appealed against, or a copy thereof," is to be delivered to the clerk of the peace when the appeal is entered, & *appls.* having delivered a copy.—*R. v. TOWNSTAL (INHABITANTS), R. v. STAXLEY (INHABITANTS)* (1843), 3 *Q. B.* 357; 2 *Gal. & Dav.* 676; 12 *L. J. M. C.* 72; 1 *L. T. O. S.* 78; 7 *J. P.* 275; 7 *Jur.* 463; 114 *E. R.* 543.

*Annotations*:—*Distd.* *R. v. Anglessea JJ.* (1843), 12 *L. J. M. C.* 131. *Appld.* *R. v. West Riding of Yorkshire JJ.* *Pontefract v. Threw* (1843), 8 *J. P.* 23; *It. v. Merloneth JJ.* (1844), 3 *L. T. O. S.* 201. *Mentd.* *It. v. Brisby* (1849), 18 *L. J. M. C.* 157.

1356. ————]—*Resps.* in an appeal which had been entered & respite, served *appls.* with a notice that they had abandoned the order, on the ground of a defect in the examination, & that they intended to apply at the ensuing sessions to quash the order upon a special entry "quashed, not upon the merits." They also offered to pay *appls.* all reasonable costs up to that time incurred by them, & all costs of maintenance; & warned them that all future costs incurred by them in prosecuting & trying the appeal, would be at their peril. *Appls.* applied at the ensuing sessions to have the appeal heard, & the order quashed generally. The sessions quashed the order, with a special entry in the form desired by *resps.*, & allowed *appls.* their costs up to the time of the notice of the abandonment, & the costs of coming to the sessions. Upon an application for a *mandamus* to the justices to enter continuances & hear the appeal:—*Held*: the sessions had done right.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1843), 8 *J. P.* 23.

1357. ————]—Poor Law Procedure Act, 1848 (c. 31), s. 8, which enables parish officers to abandon an order of removal, applies equally to an appeal that has been adjourned, the appeal, in fact, being at an end from the time of the service of notice of abandonment.

Where, therefore, an appeal came on for trial, & upon an application of *appls.* to amend their grounds of appeal, it was adjourned to the next sessions, before which *resps.* served notice of abandonment, but, nevertheless, *appls.* went to the next sessions & got the order of removal quashed, with costs, & subsequently applied to this *ct.* for a rule under Quarter Sessions Act, 1849 (c. 45), s. 18, to remove the said order of sessions,

in order that it may be enforced:—*Held*: the proceedings were erroneous, & after the notice of abandonment, *appls.* should have proceeded under Poor Law Procedure Act, 1848 (c. 31), s. 8, & should not have gone to the sessions.—*KILLYMAENLLWYDD v. ST. MICHAEL'S, PEMBROKE* (1852), 21 *L. J. M. C.* 79; *sub nom. Ex p. KELLY-MAENLLWYD OVERSEERS*, *Bail Ct. Cas.* 22; *sub nom. R. v. ST. MICHAEL'S, PEMBROKE*, 18 *L. T. O. S.* 202; 16 *J. P.* 150; 16 *Jur.* 87.

1358. ————]—Union Chargeability Act, 1865 (c. 79), applies to costs on abandonment of order of removal. Therefore, where guardians of a union have obtained & abandoned an order of removal, the union upon whom such order was made are entitled to their costs incurred in respect of such order in the same manner as overseers of parishes were before the passing of Union Chargeability Act, 1865 (c. 79).—*R. v. SHEIL* (1881), 30 *W. R.* 134.

1359. ————]—Limitation of time.]—The *W.* union appealed against a removal order obtained by *B.* union, & in Jan. 1887, the *B.* union gave written notice of abandonment of removal order pursuant to Poor Law Procedure Act, 1848 (c. 31), s. 8. The costs were not taxed until Sept. 1888, & an information was laid to recover them in Nov. 1888:—*Held*: the limitation of time specified in Poor Law Payment of Debts Act, 1859 (c. 49), s. 1, applied, as the debt arose on the abandonment of the order, & not on the demand of costs.—*WEST HAM UNION v. BATH UNION* (1889), 54 *J. P.* 69, *D. C.*

1360. ————]—Effect of.—Right to second order.]—An order of removal was obtained on May 26, & served on the following day. On June 13, the parish, which had obtained the above order, having discovered that the examinations, on which it was made, were defective, obtained a fresh order of removal to the same parish on fresh examinations. This order, which was served the following day, contained notice of abandonment of the former order. The former order had not been executed by the removal of the pauper:—*Held*: it was no ground of appeal against the second order, that, at the time of making it, the first order had not been discharged, countermanded, or abandoned, either by notice or by *supersedeas*.—*R. v. ST. PANCRAS (INHABITANTS)* (1843), 3 *Q. B.* 347; 2 *Gal. & Dav.* 671; 12 *L. J. M. C.* 42; 7 *J. P.* 226; 7 *Jur.* 103; 114 *E. R.* 539.

*Annotation*:—*Refd.* *R. v. Anglessea JJ.* (1843), 12 *L. J. M. C.* 131.

1361. ————]—Duty to give reasons for abandonment.]—*R. v. ST. PANCRAS (INHABITANTS)*, No. 1360, *ante*.

## SUB-SECT. 2.—DEPOSITIONS.

### A. In General.

*See, now*, Poor Law Act, 1927 (c. 14), s. 122 (2).

1362. Whether examination of pauper necessary.]—*R. v. BAGWORTH (INHABITANTS)* (1782), *Cald. Mag. Cas.* 179.

*Annotation*:—*Refd.* *R. v. Everdon* (1807), 9 *East*, 101.

1363. ————]—It is not essential to the validity of an order of removal, that the pauper should be examined, but if it is possible, the justices are bound to examine him; & if they corruptly omit to summon him for that purpose, they are liable to an information, or to an action at the suit of the pauper, if he is removed illegally.—*R. v. TAVISTOCK (INHABITANTS)* (1823), 3 *Dow. & Ry. K. B.* 427; 2 *Dow. & Ry. M. C.* 113.

1364. Must be before two justices.]—Examination of a pauper must be by both the justices.—

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**R. v. WYKES (1738)**, Andr. 238; 2 Stra. 1092; 95 E. R. 379.

**1365.** —[**R. v. SHIPSTON UPON STOUR (INHABITANTS)**, No. 1296, *ante*.

**1366. All evidence must be included.**—Under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, copies of all the examinations touching the settlement of a pauper, taken by the justices upon making an order of removal, must be sent with the copy of the order; & the omission of any one examination is ground of appeal, although it may not contain the evidence upon which the order was in fact founded.

The word "examination" means the entire body of evidence taken on the occasion of making the order, the whole of which should be sent (COLERIDGE, J.).—**R. v. OUTWELL (INHABITANTS)** (1839), 9 Ad. & El. 836; 1 Per. & Dav. 610; 8 L. J. M. C. 27; 3 J. P. 210; 112 E. R. 1431.

**1367.** — **Whether evidence given by parish to which pauper removed must be included.**—Justices examined witnesses at the request of the parish upon whom they were about to make an order of removal. Their evidence was not reduced into writing, & the order was made entirely upon the examination of the witnesses produced on the part of the removing parish, a copy of which was sent with the copy of the order:—**Held**: it was unnecessary that the evidence of the witnesses examined on the other side should be reduced into writing, or a copy of it sent.—**R. v. LIOLNE (INHABITANTS)** (1846), 9 Q. B. 70; 1 New Mag. Cas. 544; 2 New Sess. Cas. 364; 15 L. J. M. C. 125; 7 L. T. O. S. 204; 10 J. P. 517; 10 Jur. 737; 115 E. R. 1202.

**Annotation**:—**Refd.** **R. v. Crondall** (1847), 8 L. T. O. S. 446.

**1368. Construction.**—**R. v. ST. SEFULCHRE (INHABITANTS)**, No. 840, *ante*.

**1369.** — **"Children"—Legitimate children.**—Paupers were removed to the settlement of G. as their father, on an examination stating that G. died on May 1, 1843, & his wife the previous day, leaving eight children, some of whom were the paupers; & that the children were residing with their parents, G. & his wife, until their deaths as aforesaid. On appeal, & objection taken that the examination did not show that the paupers were legitimate, & therefore did not warrant the order of removal, the sessions decided in favour of the appeal, subject to the opinion of this Ct. on the question, whether or not the objection was fatal:—**Held**: the legitimacy appeared sufficiently to warrant the order of removal.—**R. v. TOTLEY (INHABITANTS)** (1845), 7 Q. B. 596; 2 New Sess. Cas. 42; 14 L. J. M. C. 138; 5 L. T. O. S. 196; 9 J. P. 583; 9 Jur. 595; 115 E. R. 614.

**Annotation**:—**Refd.** **R. v. Birmingham** (1846), 2 New Sess. Cas. 283.

**1370.** — **"Aforesaid."**—The examination on which an order of removal was made to St. J. stated a derivative settlement of the pauper's mother by renting a tenement, "No. 3 H. Street in the parish of St. J.," & afterwards a settlement of the pauper's father by renting a tenement "No. 8 H. Street aforesaid":—**Held**: the word "aforesaid" did not show the latter tenement to be in the same parish as the former; & as the examinations disclosed a settlement of the father, which must be presumed to be in some parish, though that parish was not stated, the mother's settlement was thereby extinguished, & the removal to it invalid.—**R. v. ST. MARGARET'S, WESTMINSTER (INHABITANTS)** (1845), 7 Q. B. 569; 1 New Mag. Cas. 328; 2 New Sess. Cas. 31; 14 L. J. M. C.

131; 5 L. T. O. S. 195; 9 J. P. 618; 9 Jur. 534; 115 E. R. 603.

**1371. Liability of magistrate—For wrongful omission to make examination.**—**R. v. TAVISTOCK (INHABITANTS)**, No. 1363, *ante*.

**1372. Examination of soldier under Mutiny Acts—Extent of admissibility.**—The Mutiny Act enables two justices to take the examination of a soldier respecting his settlement; & directs them to give an attested copy of it to the soldier, to be by him delivered to the commanding officer in order to be produced when required, and makes such attested copy evidence:—**Held**: no other attested copy of the original examination than that given to the soldier is evidence.—**R. v. CLAYTON LE MOORS (INHABITANTS)** (1794), 5 Term Rep. 704; 101 E. R. 391.

**Annotation**:—**Refd.** **R. v. Warley** (1796), 6 Term Rep. 534.

**1373.** —[**The examination of a soldier, taken under the Mutiny Act, is to be received as evidence as to his settlement, even though he be dead, or absent from the kingdom, at the time when the appeal is tried.**—**R. v. WARMINSTER (INHABITANTS)** (1819), 3 B. & Ald. 121; 106 E. R. 607.

**Annotation**:—**Refd.** **R. v. All Saints** (1828), 1 Man. & Ry. K. B. 663.

**1374.** — **Necessity for authentication.**—The examination of a soldier touching his settlement, which is made evidence by the Mutiny Act, must be authenticated before it can be received in evidence, & does not prove itself *prima facie*, though the paper appear to be in the form prescribed by the statute.—**R. v. BITON (INHABITANTS)** (1800), 1 East, 13; 102 E. R. 5.

**1375. Evidence of pauper—Refusal to answer—Contempt.**—**Qu.**: whether justices of the peace have not the power of committing a pauper for refusing to answer questions relative to his settlement.—**R. v. JACKSON** (1787), 1 Term Rep. 653; 99 E. R. 1302.

**Annotation**:—**Mentd.** **Rc Leak** (1829), 3 Y. & J. 46.

**1376.** — **Contradiction—Effect of.**—**Resps.** who produce the pauper as a witness, may call evidence to contradict him as to a particular fact to which he has sworn. But they must do so at the risk of the pauper being thereby entirely discredited; & if his evidence be material, of failing to make out a case against appts.—**R. v. BINLEY (INHABITANTS)** (1831), 1 L. J. M. C. 2.

### *B. Necessity to Show Jurisdiction.*

**1377. General rule.**—Where an examination of a soldier, taken before two magistrates, was tendered in evidence to prove his settlement, but it did not appear by the examination itself, or by other proof, that the soldier, at the time when he was examined, was quartered in the place where the justices had jurisdiction:—**Held**: it was not admissible.—**R. v. ALL SAINTS, SOUTHAMPTON (INHABITANTS)** (1828), 7 B. & C. 785; 1 Man. & Ry. K. B. 663; 1 Man. & Ry. M. C. 351; 6 L. J. O. S. M. C. 53; 108 E. R. 916.

**Annotations**:—**Apld.** **Falkingham v. Victorian Rys. Comr.**, [1900] A. C. 452; **Refd.** **Taylor v. Clemson** (1844), 11 Cl. & Fin. 610; **R. v. Stainforth** (1845), 11 Q. B. 63; **Parkes v. Parkes** (1852), 2 Rob. Ecol. 518; **Baker v. Cave** (1857), 1 H. & N. 674; **London Corp'n. v. Cox** (1867), L. R. 2 H. L. 239; **Buccleuch v. Metropolitan Board of Works** (1870), L. R. 5 Exch. 221; **R. v. Widdop** (1872), 21 W. L. 176; **Rc Cundall & Vavasour** (1906), 95 L. T. 483.

**1378.** —[**The copy of examinations, transmitted with an order of removal, under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, must show, on the face of it, every fact necessary to give the justices jurisdiction to remove. Where the examination shows all such particulars, & discloses no irregularity, it cannot be objected, on appeal, that the evidence was in fact inadmissible, if the**

objection was not made known to the justices at the examination.

Where an order of removal had been made upon the examination, regular on the face of it, of T., which was transmitted according to Poor Law (Amendment) Act, 1834 (c. 76), s. 79, &, on appeal, appts. offered to prove that T., when examined, was a convicted felon:—*Held*: such evidence was irrelevant if offered as impeaching the examination.—*R. v. ALTERNUN (INHABITANTS)* (1841), 10 Ad. & El. 699; Arn. & H. 163; 1 Gal. & Dav. 261; 10 L. J. M. C. 46; 5 J. P. 290; 5 Jur. 292; 113 E. R. 265.

*Annotation*:—*Reid. R. v. Rotherham* (1842), 3 Q. B. 776.

1379. —[*R. v. WITHAM (INHABITANTS)*, No. 1390, *post*.

1380. —[On appeal against an order for the removal of a pauper, it was shown that the sessions had quashed a former order between the same parties, relative to the same settlement, "upon the grounds of insufficiency in the examinations of the statement of jurisdiction & chargeability," the fact being, that in the statement of the jurisdiction the use of the word "aforesaid," had left it doubtful in & for which of two parts of the county of Lincoln, previously therein mentioned, the justices taking the examination had acted:—*Held*: as the defective statement which was the act of the justices & not of the parties applying for the order, was matter of form & not of merits, the order of sessions quashing the first order was not conclusive between the parties.—*R. v. CONNINGSBY (INHABITANTS)* (1848), 3 New Mag. Cas. 10; 11 L. T. O. S. 103; 12 J. P. 692.

1381. —[*R. v. HALLIWELL* (1849), 13 J. P. Jo. 346.

1382. Each examination must show jurisdiction.]—A parish removing paupers transmitted examinations, the first of which purported to be made touching the last legal settlement of the paupers, & to be taken by justices whose jurisdiction sufficiently appeared. In the margin were the words, "County of Leicester, to wit." The next examination had the same marginal words, & purported to be taken, "touching the abovenamed settlement," & "before us the justices"; their names were subscribed, & were the same as those subscribed to the first examination; but there was no other statement showing their jurisdiction:—*Held*: the latter examination was bad; for each of the examinations, on which an order of removal is made, must contain in itself every statement necessary to show jurisdiction, & the want of such statement cannot be supplied by reference from one examination to another.—*R. v. RATCLIFFE CULEY* (1846), 9 Q. B. 18; 2 New Sess. Cas. 352; 15 L. J. M. C. 109; 7 L. T. O. S. 182; 10 J. P. 458; 10 Jur. 661; 115 E. R. 1182.

1383. Sufficiency.]—*R. v. ROTHERHAM (INHABITANTS)*, No. 1219, *ante*.

1384. —[*R. v. LEEDS (INHABITANTS)*, No. 1230, *ante*.

1385. —Omission of "in & for the said county."—*R. v. CHATHAM (INHABITANTS)* (1849), 12 Q. B. 180, n.; 14 L. T. O. S. 200; 13 J. P. Jo. 761; 116 E. R. 835.

1386. Effect of quashing order not stating jurisdiction—No estoppel as to settlement.]—*R. v. CONNINGSBY (INHABITANTS)*, No. 1380, *ante*.

#### C. Caption.

1387. Whether separate caption to each necessary.]—Where an order of removal is made on several examinations, it is not necessary that each

examination should have a distinct caption, if there be one correct caption, containing the names of all the deponents, at the head of the examinations, & each examination contain a reference to such heading by the words: "The said" A., a deponent named in the general caption, "upon his oath saith."—*R. v. ST. MICHAEL, COVENTRY (INHABITANTS)* (1848), 12 Q. B. 96; 3 New Sess. Cas. 260; 17 L. J. M. C. 156; 11 L. T. O. S. 329; 12 J. P. 629; 12 Jur. 789; 116 E. R. 802.

1388. Whether necessary to show complaint.]—*R. v. ROTHERHAM (INHABITANTS)*, No. 1219, *ante*.

1389. —& nature of complaint.]—The caption of examinations before removing justices began: "The examination of F. O., one of the overseers of M., & of M. L., the pauper, "touching the place of settlement of M. L., "severally made & taken on oath upon the complaint of the overseers of M. before us," etc. "The said F. O., on behalf of the overseers of M., complaineth," etc., stating complaint of the inhabiting & chargeability, etc. "The said M. L., for herself, on her oath as aforesaid, saith," etc., stating facts as to settlement, etc.:—*Held*: the examinations did not sufficiently show jurisdiction in the justices, since it did not appear by any caption that a proper complaint had been made when M. L. was examined.—*R. v. SHEFFIELD (INHABITANTS)* (1848), 12 Q. B. 93; 3 New Sess. Cas. 282; 17 L. J. M. C. 155; 11 L. T. O. S. 328; 12 J. P. 660; 12 Jur. 791; 116 E. R. 801.

*Annotations*:—*Distd. R. v. Pott Shrigley* (1848), 13 Jur. 60. *Fold. R. v. Halliwell* (1849), 13 J. P. Jo. 346.

1390. —[Examinations before removing justices consisted of the examination & complaint of an overseer on behalf of the parish officers, regularly drawn up, stating a coming to inhabit & chargeability; also, of the pauper's examination as to settlement, the caption of which was: "The examination of," "taken on oath," etc., "before us," etc., "justices," etc., "for the said county, touching the place of settlement," etc.; not mentioning any complaint:—*Held*: the caption failed to show jurisdiction, & the examination was invalid, although the order purported to be made on due proof of the complaint as well by examination of the overseer & pauper on oath as otherwise, & the objection might be taken on a ground of appeal stating only "that the said examinations & order are bad on the faces of them respectively."—*R. v. WITHAM (INHABITANTS)* (1848), 12 Q. B. 88; 11 L. T. O. S. 329; 12 J. P. 773; 12 Jur. 792; 116 E. R. 799.

*Annotations*:—*Fold. R. v. St. Andrew's, Plymouth* (1848), 12 J. P. 774. *Reid. R. v. St. Margaret, Leicester* (1849), 12 Q. B. 98.

1391. —[An examination before removing justices was stated in the caption to be the examination of H., overseer of the removing parish, & of A., B., & C., touching the settlement, etc.; but the caption recited no complaint by the overseers. The examination began by stating that, first, H., the overseer, maketh oath & saith that the overseers, etc., complain & say, & this examinant by their direction, etc., maketh oath & saith that, etc.; laying a sufficient complaint, & stating material facts. Then followed the deposition of A., beginning & this examinant A. for herself maketh oath, & saith," etc.; & the other depositions in the same form:—*Held*: the want of a complaint in the caption was not supplied, for that the complaint must precede the examination of any witness.—*R. v. MONK BRFTON (INHABITANTS)* (1848), 12 Q. B. 83; 11 L. T. O. S. 329; 12 Jur. 792; 12 J. P. Jo. 471; 116 E. R. 797.



**Sect. 3.—Removal orders: Sub-sect. 2, C. & D.; sub-sect. 3.]**

**1392.** ———.]—Where the caption of an examination only stated that it was taken upon the complaint of the overseers touching the chargeability & settlement of the pauper:—*Held*: insufficient.—*R. v. ASHWELL* (INHABITANTS) (1848), 3 New Sess. Cas. 278; 12 Jur. 791; 12 J. P. Jo. 470.

**1393.** ———.]—*Sufficiency.*—*R. v. GOMERSAL* (INHABITANTS), No. 1410, *post*.

**1394.** ———.]—(1) A married woman had resided in a parish for more than five years; her husband, who had resided with her more than four years before the completion of the five years, had been removed to the county gaol in another parish upon a criminal charge, & continued there until convicted & sentenced to be transported:—*Held*: the woman becoming chargeable was removable.

(2) A ground of appeal alleged that the examinations were bad, the caption not stating them to be taken on the complaint of the overseers of resp. parish:—*Held*: appts. could not, under this ground, object that the complaint made by the overseers was not sufficiently stated, the caption, in fact, stating the examinations to be taken on the complaint of the overseers, etc., as to the pauper's last place of legal settlement.

(3) In the examinations upon which an order of removal was made, the relieving officer of the union stated—"The pauper is now resident in, & receiving relief from resp. parish":—*Held*: sufficient evidence of chargeability.—*R. v. PORT SHRIGLEY* (INHABITANTS) (1848), 12 Q. B. 143; 3 New Mag. Cas. 64; 3 New Sess. Cas. 317; 18 L. J. M. C. 33; 12 L. T. O. S. 215; 13 J. P. 251; 13 Jur. 60; 116 E. R. 820.

*Annotations*:—As to (1) *Distd.* Hartfield v. Rotherfield (1852), 17 Q. B. 746. *Consd.* West Ham Union v. St. Matthew Bethnal Green, [1894] A. C. 230. *Refd.* *R. v. Leaden Roothing* (1849), 13 Jur. 534; *R. v. Holbeck Overseers* (1851), 16 Q. B. 404; *R. v. Llanolly* (1851), 17 Q. B. 40; *R. v. Potterhanworth* (1858), 1 E. & E. 262.

**1395.** ———.]—The caption of an examination, otherwise formally correct, showed a good complaint, but did not state that it was made to the magistrates, before whom the examination was taken, within their jurisdiction:—*Held*: the complaint must be taken to have been made at the same time that the examination was taken, & as the latter purported to have been taken before magistrates acting in & for the place of their jurisdiction, the complaint must also be deemed to have been so made.—*R. v. CHATHAM* (INHABITANTS) (1849), 12 Q. B. 180, n.; 14 L. T. O. S. 200; 13 J. P. Jo. 761; 116 E. R. 835.

**1396. Examination & complaint must be at same time.]**—It is not necessary either in the examination in support of an order of removal, or in the order itself, to negative that the chargeability became necessary by reason of sickness or accident.

The caption of examinations was in the following form: "The examination of A. B. taken upon oath before us, two of her Majesty's justices, etc., in & for the county of, etc., upon the complaint of the churchwardens, etc., that the pauper now is inhabiting & receiving relief, etc.":—*Held*: sufficient, it clearly appearing upon the face of the caption that the examination & complaint were taken at the same time.—*R. v. GOOLE* (INHABITANTS) (1849), 12 Q. B. D. 172; 3 New Mag. Cas. 158; 3 New Sess. Cas. 668; 13 L. T. O. S. 114; 13 J. P. Jo. 296; 116 E. R. 831.

**1397. Statement that paupers inhabiting parish—Sufficiency of.]**—*R. v. ROTHERHAM* (INHABITANTS), No. 1219, *ante*.

**D. Contents.**

**1398. Necessity for legal evidence.]**—*R. v. ECCLESALL BIERLOW* (INHABITANTS), No. 1525, *post*.

**1399. — Hearsay.]**—*R. v. TETBURY* (1841), 11 Ad. & El. 615, n.; 5 J. P. 596; 113 E. R. 547.

**1400. — — —.]**—An order of removal grounded on the following examination of the pauper, a woman, "I am twenty-eight years of age; I was born illegitimate at S.; I never did any act to gain a settlement," is bad; appts. having stated, as grounds of objection, that no legal evidence of a birth settlement in S. was disclosed in the examination, such evidence being only hearsay; & that the order & examination were bad on the faces thereof.

This examination contains no legal evidence of the place of birth, the time of birth, or the fact of illegitimacy (PATTESON, J.).—*R. v. RISHWORTH* (INHABITANTS) (1842), 2 Q. B. 476; 1 Gal. & Dav. 597; 11 L. J. M. C. 34; 6 J. P. 73; 6 Jur. 279; 114 E. R. 187.

*Annotation*:—*Refd.* *R. v. West Riding Yorkshire JJ.* (1842), 2 Q. B. 705.

**1401. — Proof of previous removal order.]**—Under Poor Law (Amendment) Act, 1834 (c. 70), s. 81, where a removal from parish A. to parish B. is founded on a previous removal from A. to B., unappealed against, the examinations ought to show that the order for such previous removal was produced & proved before the removing justices, or its absence properly accounted for. Therefore, where the sessions had confirmed an order of removal founded on such a previous removal, parol evidence only of that removal appearing by the examination to have been given before the removing justices, this ct. quashed the order of sessions.—*R. v. MILDENHALL* (INHABITANTS) (1842), 2 Q. B. 517; 2 Gal. & Dav. 86; 11 L. J. M. C. 107; 6 J. P. 524; 6 Jur. 535; 114 E. R. 203.

*Annotation*:—*Refd.* *R. v. St. Anne Westminster* (1845), 7 Q. B. 245.

**1402. Sufficiency of evidence—Proof of settlement.]**—The examination of a pauper claiming a settlement by apprenticeship, is insufficient where it does not show that the pauper continued to reside with the master in the place in which the settlement is claimed sufficiently long to gain a legal settlement.—*R. v. WEST RIDING OF YORK JJ.* (1842), 2 Dowl. N. S. 707; 12 L. J. M. C. 37; 6 J. P. 718; 6 Jur. 1063.

*Annotations*:—*Refd.* *R. v. Flockton* (1843), 2 Q. B. 535; *R. v. St. Margaret, Rochester* (1843), 7 J. P. 239.

**1403. — — —.]**—*R. v. WATFORD* (INHABITANTS), No. 414, *ante*.

**1404. Evidence of chargeability.]**—On appeal against an order of removal, it is a good objection, that the copy of examination, sent to appts. under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, does not show that the pauper was chargeable.—*R. v. BLACK CALLERTON* (INHABITANTS) (1839), 10 Ad. & El. 679; 2 Per. & Dav. 475; 8 L. J. M. C. 65; 3 J. P. 450; 3 Jur. 533; 113 E. R. 258.

*Annotation*:—*Refd.* *R. v. Altemun* (1841), 10 Ad. & El. 699.

**1405. Emancipation of pauper.]**—(1) An order of removal purported to be made by B. C., "one of the magistrates of the police cts. of the metropolis, sitting at the Clerkenwell Police Ct., within the metropolitan police district":—*Held*: this sufficiently showed that the Clerkenwell Police Ct. was a ct. appointed under the provisions of Metropolitan Police Courts Act, 1840 (c. 81).



(2) The examinations stated that the pauper's father resided in H. up to the year 1826, when he removed to another parish; that the pauper resided with his parents in H. as part of their family, & was then under twenty one; & in 1816 the father acquired a settlement in H.:—*Held*: nothing appearing to the contrary, it was to be presumed that the pauper was unemancipated in 1816, & took his father's settlement.—*R. v. HAMMERSMITH (INHABITANTS)* (1848), 11 Q. B. 391; 2 New Mag. Cas. 387; 3 New Sess. Cas. 84; 17 L. J. M. C. 47; 10 L. T. O. S. 343; 12 J. P. 130; 12 Jur. 132; 116 E. R. 523.

#### SUB-SECT. 3.—NOTICE OF CHARGEABILITY.

See Poor Law Act, 1927 (c. 14), ss. 122, 127 (4).  
*Failure to serve notice as ground of appeal.*—*See Nos. 1523, 1524, post.*

**1406. By whom to be signed**—Where parishes united.]—Where the laws for the relief of the poor in a single parish are administered by a board of guardians under Poor Law (Amendment) Act, 1834 (c. 76), s. 39, the guardians are officers of the parish, & a notice of chargeability, under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, signed by three or more of them is well signed. By a local Act, several parishes were united for the purposes of the relief of the poor, & a board of guardians was constituted for the united district, with full powers for maintaining, relieving & employing the poor; repairing & enlarging work-houses; laying rates for the purposes of the Act on the ratable property in the district, distinguishing each parish; binding poor children apprentices; taking bastardy bonds; & granting parish certificates; & it was provided that no poor rate was to be laid in the several parishes or either of them, other than was directed by the Act; that no settlement appeal should be made, prosecuted or defended by any of the churchwardens or overseers of the several parishes without an order of the guardians; that the Act should not be construed to alter the laws then subsisting, respecting the removal of the poor, between any parish or place without the district & any of the parishes within the same, but such laws should continue in force, except in the case of certificates & appeals, as above; & that all costs which should accrue to any of the parishes thereby united, from the prosecution or defence of any settlement appeal, should be defrayed out of the rates to be raised by virtue of the Act. An order was obtained for the removal of a poor person from one of the united parishes to a parish out of the district; & a copy of the order & examinations & a notice of chargeability was signed & sent to the overseers of the last mentioned parish, not by the churchwardens & overseers of the removing parish, but by three guardians of the united district, both the notice & order stating that the pauper was chargeable to the removing parish:—*Held*: the guardians of the united district were not officers of the several parishes comprised therein, & the notice of chargeability was insufficient.—*R. v. LAMBETH UNION* (1845), 5 Q. B. 513; 1 New Mag. Cas. 589; 2 New Sess. Cas. 58; 14 L. J. M. C. 133; 5 L. T. O. S. 215; 9 J. P. 600; 9 Jur. 535; 114 E. R. 1343.

**1407. S. P. R. v. ST. MARY, SOUTHAMPTON (INHABITANTS)** (1845), 5 Q. B. 513; 1 New Mag. Cas. 589; 2 New Sess. Cas. 01; 14 L. J. M. C. 133; 5 L. T. O. S. 215; 9 J. P. 600; 9 Jur. 535; 114 E. R. 1343.

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**1408. Signature must be authorised by majority.**]  
 —Under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, notice of chargeability must proceed from a majority of the parish officers, or three guardians at least, of the removing parish. *Qu.*: whether the notice, on the face of it, must show, by the signatures of the parties or otherwise, that it does proceed from such a majority, etc.—*R. v. WESTBURY (INHABITANTS)* (1844), 5 Q. B. 500; 1 Dav. & Mer. 605; 1 New Sess. Cas. 33; 17 L. J. M. C. 121, n.; 2 L. T. O. S. 327; 8 J. P. 532; 114 E. R. 1338.

**1409. Names of paupers—Child within age of nurture.**]  
*Qu.*: if a female pauper & her child within the age of nurture be removed by order of justices, whether such order can be enforced, if the notice of chargeability does not mention the child as chargeable, & in reciting the order made for removal of the mother, does not show that the child is therein named:—*Semble*: although the order named the mother only, the parish to which the removal is made must nevertheless receive the child, if within the age of nurture, & brought with the mother. An order of removal, having the marginal venue "borough of K." & commencing "upon the complaint of the churchwardens," etc., "unto us G. C. & T. F." "being two of Her Majesty's justices of the peace for the said borough of K.," does not sufficiently show that the justices heard the complaint within the jurisdiction. The complaint should appear to have been heard by justices "in & for," etc.—*R. v. STOCKTON (INHABITANTS)* (1845), 7 Q. B. 520; 1 New Mag. Cas. 354; 2 New Sess. Cas. 16; 14 L. J. M. C. 128; 5 L. T. O. S. 194; 9 J. P. 570; 9 Jur. 532; 115 E. R. 585.

*Annotations*:—*Reid. R. v. Newton Ferrers* (1846), 9 Q. B. 32; *R. v. St. Paul's Covent Garden* (1846), 2 New Sess. Cas. 508; *R. v. Hammersmith Overseers, etc.* (1848), 12 Jur. 132; *R. v. Chatham* (1849), 14 L. T. O. S. 200; *R. v. Goole* (1849), 12 Q. B. 172; *R. v. Crowan* (1849), 4 New Mag. Cas. 13. *Mentl. Jones v. Johnson* (1850), 5 Exch. 862.

— "Person named in order hereunto annexed."]  
 —In the caption of an examination before removing justices, it is not sufficient to state that such examination is taken on the complaint of the overseers, touching the chargeability of the paupers, without directly alleging a complaint that they were chargeable. A notice of chargeability stated that "the persons named in the order hereunto annexed" have become chargeable, etc.; not otherwise naming them. A counterpart of the order of removal, naming the paupers, was written on the other side of the same sheet of paper:—*Held*: insufficient.—*R. v. GOMERSAL (INHABITANTS)* (1848), 12 Q. B. 70; 3 New Sess. Cas. 284; 17 L. J. M. C. 163; 11 L. T. O. S. 328; 12 J. P. 774; 116 E. R. 794.

*Annotation*:—*Reid. R. v. Pott Shrigley* (1848), 12 Q. B. 143.

**1411. "Sent"—Delivery by post.**]  
 —Notices of chargeability, etc., when sent by post, are "sent" within the meaning of Poor Law Procedure Act, 1848 (c. 31), s. 9, on the day they are delivered. Therefore, where notice of chargeability, etc., was posted by the removing parish on Sept. 28, & received by the officers of applt. parish on Sept. 29, & application for copies of the depositions was posted by them on Oct. 19 & received on Oct. 20:—*Held*: the copies were applied for within twenty-one days after the notice had been sent.—*R. v. RICHMOND RECORDER* (1858), E. B. & E. 253; 27 L. J. M. C. 197; 31 L. T. O. S. 115; 22 J. P. 674; 4 Jur. N. S. 456; 6 W. R. 521; 120 E. R. 502.

*Annotations*:—*Reid. Browne v. Black*, [1912] 1 K. B. 316; *Retail Dairy Co. v. Clarke*, [1912] 2 K. B. 388.

**Sect. 3.—Removal orders: Sub-sect. 4, A. (a) & (b),**

**SUB-SECT. 4.—THE REMOVAL.**

**A. Within Jurisdiction.**

**(a) In General.**

*See, now, Poor Law Act, 1927 (c. 14), ss. 121, 123, 131.*

**1412. Return of pauper after removal—Commitment—Order quashed at sessions but confirmed in King's Bench.]—**If an order of removal be quashed at sessions, but confirmed on *certiorari* to K. B. the justices may commit the pauper for returning to the place from whence he was removed, although the order was quashed.—*R. v. HALL* (1696), 5 Mod. Rep. 163; 87 E. R. 584.

**1413. ———.]—**Husband & wife, having returned, without a certificate, to the parish whence they were removed, & the wife been committed to prison with him, in consequence:—*Held*: she was not liable to punishment under the Vagrant Acts, for having accompanied her husband in his return; & the warrant of commitment not being for the term, or purposes limited in the statutes, is adjudged to be void.—*BALDWIN v. BLACKMORE* (1758), 2 Keny. 38; 1 Burr. 595; 96 E. R. 1099.

*Annotations:—**Reid. Miller v. Seare* (1777), 2 Wm. Bl. 1141; *R. v. Eriwell* (1790), 3 Term Rep. 707; *Groomie v. Forrester* (1816), 5 M. & S. 314.

**1414. Unlawfully procuring removal—When criminal information granted.]—**The ct. refused to grant a criminal information against overseers for an alleged attempt to procure a pauper & his family to remove themselves clandestinely to another parish, where the remedy by indictment was open to the parties & no circumstances were shown, requiring the prompt interference of the ct.—*R. v. JENNINGS* (1845), 2 Dow. & L. 741; 1 New Sess. Cas. 488; *sub nom. Ex p. ALLISON*, 4 L. T. O. S. 340; *sub nom. Re PEXTON & JENNINGS* (STORWORD OVERSEERS), *Ex p. ALLISON*, 9 J. P. Jo. 84.

**1415. Removal pending appeal against order—Whether indictment lies.]—**It is not an indictable offence if an overseer without fraud or menace remove a pauper under an order after it has been confirmed on appeal by the sessions, subject to the opinion of the Q. B. & before its final determination by that ct.—*R. v. COOPER* (1848), 3 New Mag. Cas. 65; 3 New Sess. Cas. 346; 18 L. J. M. C. 16; 12 L. T. O. S. 216; 13 J. P. 217; 13 Jur. 99.

**1416. Refusal to receive pauper—Whether mandamus or indictment proper remedy.]—**The ct. will not grant a *mandamus* requiring parish officers to receive a pauper in obedience to an order of removal. The proper course is by indictment.—*Ex p. DOWNTON OVERSEERS* (1858), 8 E. & B. 586; 27 L. J. M. C. 281; 6 W. R. 224; 120 E. R. 320.

**Restriction on separating mother & child under seven.]—***See Poor Law Act, 1927 (c. 14), s. 108 (7). See, also, Part V., Sect. 4, sub-sect. 2, B. (b), ante; Part VII., Sect. 1, sub-sect. 7, post.*

**(b) From and to What Places Ordered.**

*See Poor Law Act, 1927 (c. 14), ss. 121, 123.*

**1417. To what places—Extra-parochial places.]—***FOREST OF DEAN (INHABITANTS) v. LINTON PARISH* (1700), 2 Salk. 487; 91 E. R. 419.

*Annotations:—**Reid. R. v. Sparrow* (1740), 7 Mod. Rep. 393; *R. v. Clayton* (1849), 13 Q. B. 354.

**1418. ———.]—***CLERKENWELL PARISH (INHABITANTS) v. BRIDEWELL*, No. 549, *ante*.

**1419. ———.]—**A pauper cannot be sent to an extra-parochial place for want of proper officers.—*R. v. BELVOIR (INHABITANTS)* (1720), 2 Sess. Cas. K. B. 111; 93 E. R. 159.

**1420. ———.]—**A parish was divided into several townships, each supporting its own poor, & having separate poor rates & overseers; & there were no overseers or poor rate for the whole parish. A district of waste land in the parish, bounded by the sea & some of the townships, but not shown to be included in any of the townships, had been inclosed under an Act of Parliament & an award of comrs. founded thereon; & under that Act & award, it contributed in certain proportions to the several rates of all the townships. A pauper, who had gained a settlement in the district, was removed to the parish generally. On appeal by all the churchwardens & overseers of all the townships, describing themselves as the churchwardens & overseers of the parish:—*Held*: the order of removal was bad.—*R. v. CARTMEL (INHABITANTS)* (1835), 2 Ad. & El. 562; 4 Nev. & M. K. B. 357; 2 Nev. & M. M. C. 533; 4 L. J. M. C. 53; 111 E. R. 217.

**1421. — Hamlet included in parish.]—***R. v. TAMWORTH (INHABITANTS)* (1777), Cald. Mag. Cas. 28.

**1422. — Township ceasing to maintain its poor—Whether removable to place of last legal settlement.]—**The pauper, being a settled inhabitant of A., subsequently acquired a settlement in the township of B. The latter township afterwards ceased to exist as a place capable of maintaining its own poor:—*Held*: notwithstanding that the previous settlement in A. having been extinguished, the pauper could not be removed thither from a third town as to the place of his last legal settlement.

*Qu.*: whether in such a case a removal to the parish of which the township of B. formed a part would not be good.—*R. v. SAUGHTON-ON-THE-HILL (INHABITANTS)* (1818), 2 B. & Ald. 162; 106 E. R. 326.

*Annotations:—**Consd. R. v. Tipton* (1842), 3 Q. B. 215. *Appld. R. v. Hunnington* (1843), 5 Q. B. 273. *Reid. R. v. St. Martin, New Sarum* (1846), 9 Q. B. 241.

**1423. — Division of district into townships—Previous settlement in district.]—**That part of the parish of Halesowen which lay in Shropshire consisted of several townships, H., O., & others, but maintained its poor out of a common fund, administered by officers for the whole of that part of the parish. Afterwards, in obedience to a *mandamus*, separate appointments of overseers were made for the respective townships, & each then maintained its own poor. Before the subdivision, a pauper was settled in the Shropshire district of Halesowen by a hiring & service in township H.:—*Held*: he was not therefore removable to township H. as the place of his settlement, when overseers were appointed for that place.—*R. v. HUNNINGTON (INHABITANTS)* (1843), 5 Q. B. 273; 1 Dav. & Mer. 351; 13 L. J. M. C. 24; 8 Jur. 33; 114 E. R. 1252; *sub nom. R. v. HUNNINGTON (INHABITANTS)*, *R. v. HALES OWEN (INHABITANTS)*, 8 J. P. 20.

*Annotations:—**Foll. R. v. Acton Overseers* (1845), 6 L. T. O. S. 146. *Distd. R. v. St. Martin, New Sarum* (1846), 9 Q. B. 241. *Foll. Stourbridge Union v. Droitwich Union* (1871), 40 L. J. M. C. 186. *Reid. St. Sevlour's Union v. Dorking Union* (1898), 78 L. T. 29; *West Ham Union v. L. C. C.* (1902), 18 T. L. R. 275.

**1424. From what places—Extra-parochial place.]—***FOREST OF DEAN (INHABITANTS) v. LINTON PARISH* (1700), 2 Salk. 487; 91 E. R. 419.

*Annotations:—**Reid. R. v. Sparrow* (1740), 7 Mod. Rep. 393; *R. v. Clayton* (1849), 13 Q. B. 354.

*B. To Place Outside Jurisdiction.*

*See* Poor Removal Act, 1845 (c. 117), s. 2; Poor Removal Act, 1862 (c. 113), ss. 1, 2; Poor Removal (No. 2) Act, 1861 (c. 76), ss. 1, 2; Poor Removal Act, 1900 (c. 23), s. 1.

**1425. Child of Irish parents—Child born in England—Mother acquiring settlement after father's death.**—A child of eight years old, born in England but both whose parents were Irish & without any settlement in England & whose mother, after the death of her first husband, had married a settled inhabitant of the parish of A., is removable, if chargeable, to the place of his birth & is not within Poor Relief Act, 1819 (c. 12), s. 33.—*R. v. GREAT CLACTON (INHABITANTS)* (1820), 3 B. & Ald. 410; 106 E. R. 713.

*Annotations* :—*Consd.* *R. v. Preston* (1840), 12 Ad. & El. 822. *Refd.* *R. v. All Saints, Derby* (1849), 3 New Mag. Cas. 231; *R. v. Newchurch* (1862), 3 B. & S. 107.

**1426. ——— Residing with parents.**—A pauper, born in M., in England, not having done any act to gain a settlement in her own right, & being the daughter of Irish parents who had gained no settlement in England, was, at the age of eighteen, delivered of a bastard, in her father's house in S., in England, where she resided as part of his family. The mother of the pauper having applied to S. for relief for the pauper & her bastard only:—*Held*: under 3 & 4 Will. 4, c. 40, s. 2, the pauper was removable to Ireland, not to M.; & Poor Law (Amendment) Act, 1834 (c. 76), assuming that it defines the age of emancipation to be sixteen, & prevents the head of a family from becoming chargeable by relief given to a child after that age, was not applicable, inasmuch as it extends only to English & Welsh poor.—*R. v. MILE END, OLD TOWN (INHABITANTS)* (1835), 4 Ad. & El. 190; 1 Har. & W. 551; 5 Nev. & M. K. B. 581; 3 Nev. & M. M. C. 453; 5 L. J. M. C. 42; 111 E. R. 761.

*Annotations* :—*Distd.* *R. v. Barnsley* (1849), 18 L. J. M. C. 170; *R. v. Newchurch* (1862), 3 B. & S. 107. *Refd.* *R. v. Preston* (1840), 12 Ad. & El. 822; *R. v. St. Mary, Illington* (1862), 3 B. & S. 46.

**1427. ——— Residing apart from parents.**—A female pauper, born in parish A., the legitimate daughter of Irish parents, neither of whom had gained a settlement in England, left their house while under the age of twenty-one, & resided three years, unmarried, in parish B., with a man, by whom she had a child. While so residing, she visited her parents several times, for a fortnight or three weeks at a time. After the death of the man with whom she had been residing, she & her illegitimate child, still residing in parish B., were relieved by that parish. While she was still under twenty-one, parish B. obtained an order to remove her child from B. to A. From the time when the pauper left her parents till the making of the order, they resided, not in A. or B., but in a third parish in England:—*Held*: the pauper & her parents were not removable to Ireland under Poor Removal Act, 1845 (c. 117), s. 2, & the order of removal to A. was rightly made.—*R. v. ST. GILES WITHOUT CRIPPLEGATE (INHABITANTS)* (1851), 17 Q. B. 636; 21 L. J. M. C. 26; 18 L. T. O. S. 137; 16 J. P. 244; 15 Jur. 1154; 117 E. R. 1425.

*Annotation* :—*Appld.* *R. v. Newchurch* (1862), 3 B. & S. 107.

**1428. Wife & children of Scotsman—English mother with maiden settlement.**—By Poor Relief Act, 1819 (c. 12), s. 33, the wife & eight unemancipated children of a Scotsman, who has not acquired any settlement in England, must, if chargeable, be sent by a pass along with the husband to Scotland, & cannot be removed to the maiden settlement of the wife.—*R. v. LEEDS (INHABITANTS)* (1821), 4 B. & Ald. 498; 2 Bott, 78; 106 E. R. 1019.

*Annotations* :—*Distd.* *R. v. Cottingham* (1827), 7 B. & C. 615. *Consd.* *R. v. Mile End, Old Town* (1835), 4 Ad. & El. 196. *Distd.* *R. v. Preston* (1840), 4 Per. & Dav. 509; *R. v. All Saints, Derby* (1849), 13 Jur. 1100. *Consd.* *Poor Law Comrs. of Ireland v. Liverpool Vestry* (1869), L. R. 5 Q. B. 79.

**1429. Irish woman & children—Desertion by husband—Wife's maiden settlement in England.**—An Irishman, having no English settlement, married a woman settled in A., & lived with her in B. for more than five years. He then deserted her & left the kingdom:—*Held*: she was removable from B. to A., not to Ireland.—*MUCH HOOLE OVERSEERS v. PRESTON OVERSEERS* (1851), 17 Q. B. 548; 117 E. R. 1391; *sub nom.* *R. v. MUCH HOOLE OVERSEERS*, 21 L. J. M. C. 1; 18 L. T. O. S. 74; 16 J. P. 212; 15 Jur. 1152.

*Annotations* :—*Consd.* *Poor Law Comrs. of Ireland v. Liverpool Vestry* (1869), L. R. 5 Q. B. 79; *R. v. Kingston Union* (1869), 21 L. T. 488. *Distd.* *R. v. St. George-in-the-East* (1870), L. R. 5 Q. B. 364. *Refd.* *West Ham Union v. St. Matthew, Bethnal Green*, [1894] A. C. 230.

**1430. ——— No settlement in England—No removal without husband as head of family.**—Application was made to justices for the removal of a married woman & her two children from the parish of L., where they had become chargeable, to her birthplace in Ireland. The husband was also Irish, & neither of them had acquired any settlement in England; the children were the issue of the marriage, were unemancipated, & were also born in Ireland. The wife & children had been deserted by the husband; & it was not known where he was living:—*Held*: the wife & children could not be removed to Ireland under Poor Removal Act, 1845 (c. 117), s. 2, without the husband, who was the head of the family.—*POOR LAW COMRS. OF IRELAND v. LIVERPOOL VESTRY* (1869), L. R. 5 Q. B. 79; 10 B. & S. 921; 39 L. J. M. C. 25; 21 L. T. 636; 34 J. P. 294; 18 W. R. 376.

**1431. When appeal against order lies—Necessity for irremovability to any place in Ireland.**—An appeal will not lie against an order for the removal to Ireland of an Irish born pauper unless it be proved either that the pauper was settled in, or irremovable from England, or that the pauper was not liable to be removed to any place in Ireland.

Therefore an appeal cannot succeed where a pauper has been ordered to be removed to L. in Ireland, if the pauper was in fact liable to be removed to Ireland but to a different union.—*LOCAL GOVERNMENT BOARD OF IRELAND v. BLACKBURN UNION*, [1909] 1 K. B. 454; 78 L. J. K. B. 301; 99 L. T. 835; 72 J. P. 514; 7 L. G. R. 1, D. C.

**Restriction on separating mother from child under seven.**—*See* Poor Law Act, 1927 (c. 14), s. 108 (7).

**PART VI. SECT. 3, SUB-SECT. 4.—B.**

**1. Removal from Scotland to England.**—There is no power to remove to England a person becoming chargeable in Scotland, unless such person was actually born in England,

except in the case of a wife, or child, removed together with the husband, or parent. It is not sufficient that such person has a settlement in England in right of her husband, who was born, & is still living, there.—*Re ALSTON* 14

**APPLICATION FOR REMOVAL ORDER** (1903), 68 J. P. 80.—**SCOT.**

**m. ———**—**EDINBURGH PARISH COUNCIL v. SCOTLAND LOCAL GOVERNMENT BOARD**, [1915] A. C. 717, H. L.—**SCOT.**

**Sect. 3.—Removal orders: Sub-sect. 5, A. & B. (a), (b) & (c) i.]**

**SUB-SECT. 5.—APPEALS.**

**A. In General.**

See Poor Law Act, 1927 (c. 14), s. 127.

**1432. Not governed by Summary Jurisdiction Acts.]**—By Summary Jurisdiction Act, 1848 (c. 43), s. 35, orders for the removal of paupers are excepted from the provisions of Summary Jurisdiction Act, 1848 (c. 43), & therefore the seven days' notice of appeal prescribed by Summary Jurisdiction Act, 1879 (c. 49), s. 31, which by sect. 54 is to be construed as one with Summary Jurisdiction Act, 1848 (c. 43), & by Summary Jurisdiction Act, 1884 (c. 43), s. 6, is made applicable to appeals from convictions or orders made in pursuance of Summary Jurisdiction Acts, is not required on an appeal against an order of removal.—*R. v. SOMERSETSHIRE JJ.* (1889), 22 Q. B. D. 625; 58 L. J. M. C. 155; 60 L. T. 834; 53 J. P. 470; 37 W. R. 492, D. C.

*Annotations:—***Reid.** *R. v. Lincolnshire JJ.*, [1912] 2 K. B. 413. **Mentd.** *R. v. Glamorganshire JJ.* (1892), 61 L. J. M. C. 169.

**1433. Where all justices of county interested in appeal.]**—Ct. of K. B. have not the power of ordering an appeal against an order of removal to be heard at the sessions of a county next adjoining a city & county of itself, even though all the justices of the latter are interested in the event of the appeal.—*R. v. KENT JJ.* (1827), 5 L. J. (N. S. M. C. 45).

**Disqualification by interest.]**—See **MAGISTRATES**, Vol. XXXIII., p. 290, Nos. 64–67.

**Appeal against removal to Ireland.]**—See No. 1431, *ante*.

**B. To Quarter Sessions.**

**(a) Who may Appeal.**

See, now, Poor Law Act, 1927 (c. 14), ss. 122 (2), 127.

**1434. Pauper.]**—Upon an order of two justices to remove a poor man, he may appeal to the sessions as well as the parish.—*R. v. HARTFIELD (INHABITANTS)* (1692), Carth. 222; Sett. & Rem. 250; 2 Bott. 739; 90 E. R. 733.

*Annotation:—***Consd.** *R. v. Colbeck* (1840), 12 Ad. & El. 161.

**1435. —.]**—(1) Ratepayers of a parish have no power to appeal against an order of removal, independently of the parish officers.

(2) *Semble*: the pauper may appeal.—*R. v. COLBECK* (1840), 12 Ad. & El. 161; 3 Per. & Dav. 488; 9 L. J. M. C. 61; 4 J. P. 508; 4 Jur. 906; 118 E. R. 772.

*Annotation:—***Generally, Mentd.** *R. v. Westmoreland JJ.* (1843), 1 Dow. & L. 178.

**1436. Individual ratepayer.]**—Any rated inhabitant of a parish to which an order of removal is made, may, as a party aggrieved, appeal against the order under Poor Relief Act, 1862 (c. 12), s. 2, & Poor Relief Act, 1891 (c. 11), s. 9.—*R. v. DENBIGHSHIRE JJ.* (1830), 1 B. & Ad. 616; 9 L. J. O. S. M. C. 109; 109 E. R. 916.

*Annotations:—***Consd.** *R. v. Colbeck* (1840), 12 Ad. & El. 161. **Apld.** *R. v. Westmoreland JJ.* (1843), 1 Dow. & L. 178. **Mentd.** *R. v. Wick St. Lawrence* (1833), 2 Nev. & M. K. B. 289.

**1437. —.]**—*R. v. COLBECK*, No. 1435, *ante*.

**1438. Inhabitants of parish.]**—*R. v. WESTMORELAND JJ.*, No. 1042, *ante*.

**1439. — Not maintaining its poor.]**—*R. v. WESTMORELAND JJ.*, No. 1042, *ante*.

**1440. Township rightly chargeable—Or der made to parish not maintaining its poor.]**—*R. v. WESTMORELAND JJ.*, No. 1042, *ante*.

**1441. Governors & directors—Under local Act.]**

—Where the poor of a parish are under the management of certain governors & directors appointed under a local Act, such governors & directors are the parties aggrieved by an order of removal, within Poor Relief Act, 1862 (c. 12), & any three of such governors & directors may give a valid notice of appeal under Poor Law (Amendment) Act, 1834 (c. 76).

By a local Act, the vestry of a parish were empowered to appoint twenty householders, who, together with the rector, churchwardens, & overseers for the time being were to be the governors & directors of the poor of the parish, & to have the sole care & management of the poor, with power to bind parish apprentices, to take bastardy bonds, to superintend & repair workhouses, etc. An order of removal was addressed to the churchwardens & overseers of this parish, & a notice of appeal against the order was given, signed by three of the governors & directors:—*Held*: (1) the governors & directors were the parties aggrieved, & therefore the proper persons to appeal; (2) the signature of the notice by three of the guardians was sufficient within Poor Law (Amendment) Act, 1834 (c. 76), ss. 81, 109.—*R. v. ST. GEORGE, HANOVER SQUARE (INHABITANTS)* (1849), 13 Q. B. 642; 3 New Mag. Cas. 154; 3 New Sess. Cas. 519; 18 L. J. M. C. 160; 13 L. T. O. S. 116; 13 J. P. 491; 13 Jur. 424; 116 E. R. 1408.

**Lunatic pauper.]**—See **LUNATICS**, Vol. XXXIII., pp. 263–264, Nos. 1829–1833.

**(b) Time for Appeal.**

See, now, Poor Law Act, 1927 (c. 14), ss. 122 (2) (3), 127.

**1442. Option of parish—After service of order—Or after actual removal.]**—Since the passing of the Poor Law Amendment Act, an appeal against an order of removal may be made at the next sessions after the actual removal, & need not be made at the next sessions after the service of the notice of chargeability.—*R. v. SALOP JJ.* (1837), 6 Dowl. 28; Will. Woll. & Dav. 598; 1 J. P. 187; 1 Jur. 868.

*Annotations:—***Apld.** *R. v. Herefordshire JJ.* (1840), 8 Dowl. 638. **Fold.** *R. v. Leeds Recorder* (1847), 8 Q. B. 623. **Reid.** *R. v. West Riding of Yorkshire JJ.* (1844), 14 L. J. M. C. 11. **Mentd.** *Norton v. Salisbury Town Clerk* (1846), 4 C. B. 32.

**1443. — —.]**—A parish served with an order of removal, notice of chargeability, & examinations, under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, may either appeal to the first practicable sessions after such service, although no actual removal has taken place, or wait till there be an actual removal, & then appeal.—*R. v. LEEDS RECORDER* (1847), 8 Q. B. 623; 16 L. J. M. C. 153; 8 L. T. O. S. 443; 11 Jur. 817; 11 J. P. Jo. 117; 115 E. R. 1011; *sub nom.* *Ex p. LEEDS OVERSEERS*, 2 New Sess. Cas. 595.

**1444. Appeal too late—After second removal.]**—On Apr. 22, G. G. was removed alone from M. to D., on an order for the removal of himself & family. There was no appeal entered against the order or the removal. G. G. returned to M.; & on Dec. 23, being again chargeable, he was removed with his family to D., under the same order. The overseers of D. entered an appeal against the removal, at the next Jan. sessions:—*Held*: they were too late, & should have appealed to the first sessions after the order, or after the first removal of G. G.—*R. v. DURHAM JJ.* (1847), 5 Dow. & L. 82; 2 New Sess. Cas. 665; 16 L. J. M. C. 112; 9 L. T. O. S. 250; 11 Jur. 930; 11 J. P. Jo. 504.

**1445. — After first removal—Abortive appeal against order.]**—Where the ct. of quarter sessions

dismissed an appeal against an order of removal, on the ground that appts. had not produced the original order of removal, nor given notice to produce it, as required by the practice of the sessions; & appts. appealed again on the actual removal of the pauper, but the sessions refused to hear it:—*Held*: the sessions were right in dismissing the first appeal, & no new right of appeal accrued after the actual removal.—*R. v. PETERBOROUGH J.J.* (1849), 6 Dow. & L. 512; 3 New Sess. Cas. 365; 18 L. J. M. C. 79; 12 L. T. O. S. 408; 13 Jur. 494; 13 J. P. Jo. 86.

*Annotation*:—*Consd. R. v. Manchester Recorder* (1851), 16 J. P. 73.

**1446.** ——— *Failure to appeal against delay in service.*—An order was made on May 21, 1825, for the removal of a pauper to parish A., & suspended on the same day on account of the infirmity of the pauper. That parish had no notice of the order till Aug. 12, 1826, when it was served. Another order, dated Jan. 24, 1831, directed that the order of removal should be executed, & £80 paid to the removing parish by parish A., & this order was served on, & the pauper removed to, parish A. on Feb. 16, 1831. A. appealed to the then next sessions, & the sessions found that the original order of removal was not served within a reasonable time:—*Held*: it was not, therefore, void, but voidable only by appeal, & parish A. ought to have appealed to the next practicable sessions after it had notice of the original order.—*R. v. PENKRIDGE (INHABITANTS)* (1832), 3 B. & Ad. 538; 1 L. J. M. C. 48; Pratt, 310; 110 E. R. 195.

**1447.** *Where order suspended—Time calculated from service of order.*—*R. v. MIDDLESEX J.J.* (1837), 1 J. P. 370; 1 Jur. 475.

**1448.** ——— *Under Poor Law (Amendment) Act, 1834 (c. 76), after the service of a suspended order of removal, the parish to which the removal takes place need not appeal to a sessions commencing before the expiration of the twenty-one days which, by Poor Law (Amendment) Act, 1834 (c. 76), s. 79, must elapse before the actual removal, & in addition, of the fourteen days which must, by Poor Law (Amendment) Act, 1834 (c. 76), s. 81, elapse, after notice of grounds of appeal, before the sessions at which the appeal is to be tried.*—*R. v. LANCASHIRE J.J.* (1843), 4 Q. B. 910; 1 Dav. & Mer. 488; 3 Gal. & Dav. 296; 12 L. J. M. C. 110; 1 L. T. O. S. 287; 114 E. R. 1140; *sub nom. R. v. LANCASHIRE J.J., HOLYWELL v. WARRINGTON*, 7 J. P. 399; 7 Jur. 512.

*Annotations*:—*Expld. R. v. West Riding J.J.* (1846), 2 New Sess. Cas. 304. *Consd. R. v. West Riding J.J.* (1847), 10 Q. B. 763; *R. v. Sussex J.J.* (1862), 2 B. & S. 664. *Refd. R. v. London J.J.* (1846), 15 L. J. M. C. 127.

**1449.** ——— *R. v. CHEDGRAVE (INHABITANTS), No. 1336, ante.*

**1450.** ——— *Original service defective.*—An order of removal was dated Aug. 1, 1814, & an order of suspension indorsed thereon, in consequence of the sickness of the pauper; & a copy of such order & indorsement was, in 1814, served upon appts., but the original order not produced at the time of serving such copy: & subsequently, in 1815, another part of the order & indorsement executed by the same justices, but bearing date in Aug. 1814, was served upon appts. The pauper was not removed till 1819, when an appeal was duly entered:—*Held*: the services of the original order of removal in 1814 & 1815 were both defective, & the appeal was made in time, notwithstanding Poor (Settlement & Removal) Act, 1809 (c. 124), s. 2.—*R. v. ALNWICK (INHABITANTS)*

(1821), 5 B. & Ald. 184; 2 Bott. 753; 106 E. R. 1160.

*Annotations*:—*Consd. R. v. Middlesex J.J.* (1837), 1 J. P. 370. *Refd. R. v. Mildenhall* (1842), 2 Q. B. 517; Lloyd v. Harris (1849), 8 C. B. 63.

(c) *To What Sessions.*

i. *In General.*

*See Poor Law Act, 1927 (c. 14), ss. 122 (2) (3), 127.*

**1451.** *Sessions of county in which order made.*—Appeal against an order of removal must be to the sessions of the county in which the order was made.—*ANON.* (1701), 12 Mod. Rep. 455; 98 E. R. 1447.

**1452.** ——— *Union extending into several jurisdictions.*—By Poor Law (Amendment) Act, 1867 (c. 106), s. 27, where a union extends into several distinct jurisdictions, every matter, act, charge, or complaint by which the guardians thereof are affected or in which they have any interest, shall for the purpose of jurisdiction be deemed to arise or exist equally throughout the union:—*Held*: the appellate jurisdiction from an order of removal under Poor Law (Amendment) Act, 1867 (c. 106), s. 27, is the same as that under which the order is made; & it does not depend upon the place from which the removal is ordered.—*DUDLEY UNION v. WOLVERHAMPTON UNION* (1872), 25 L. T. 820.

**1453.** *Whether to general sessions—Borough having general sessions twice a year.*—Where by charter the magistrates of a borough, which was a county of itself, held only general sessions twice a year, & not quarter sessions:—*Held*: an appeal against an order of removal might be made to the next general sessions of the peace for such borough.—*R. v. CARMARTHEN J.J.* (1821), 4 B. & Ald. 291; 106 E. R. 944.

**1454.** ——— *Where general sessions distinct from quarter sessions.*—Under Poor Removal Act, 1696 (c. 30), s. 6, the appeal against an order of removal lies to quarter sessions only; not, therefore, to general sessions, distinct from quarter sessions.—*R. v. MIDDLESEX J.J.* (1843), 4 Q. B. 807; Dav. & Mer. 289; 12 L. J. M. C. 134; 1 L. T. O. S. 229; 7 J. P. 494; 7 Jur. 669; 114 E. R. 1101.

**1455.** *Whether borough quarter sessions have exclusive jurisdiction.*—The recorder of a corp. having a grant of quarter sessions under Municipal Corporations Act, 1835 (c. 76), s. 103, with the powers described in Municipal Corporations Act, 1835 (c. 76), s. 105, may try appeals against orders of removal from places within the borough.

*Qu.*: where the sessions for the county wherein such borough is situate had cognisance of such appeals under Poor Removal Act, 1696 (c. 30), before Municipal Corporations Act, 1835 (c. 76), was passed, whether they still have, for that purpose, a concurrent jurisdiction with the borough sessions:—*Held*: if they have, yet, if the first sessions at which it is practicable to appeal be those of the borough, the appeal should be brought there.—*R. v. ST. EDMUNDS, SALISBURY (INHABITANTS)* (1841), 2 Q. B. 72; 1 Gal. & Dav. 137; 10 L. J. M. C. 138; 5 J. P. 483; 5 Jur. 1106; 114 E. R. 30.

*Annotations*:—*Consd. R. v. Lancashire J.J.* (1841), 2 Q. B. 90. *Mentd. R. v. Hayward* (1862), 31 L. J. M. C. 177.

**1456.** ——— *Where a separate ct. of quarter sessions has been granted to a borough, under Municipal Corporations Act, 1835 (c. 76), the recorder, under Municipal Corporations Act, 1835 (c. 76), s. 105, has, in such ct., exclusive jurisdiction of appeals against orders of removal made by the borough justices.*—*R. v. SUFFOLK J.J.* (1841), 2 Q. B. 85; 1 Gal. & Dav. 148; 10 L. J. M. C. 143; 5 J. P. 484, n. 5 Jur. 1108; 114 E. R. 35.

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1457. —.]—*R. v. LANCASHIRE JJ.* (1841), 2 Q. B. 90; 1 Gal. & Dav. 147; 10 L. J. M. C. 142; 5 Jur. 1108; 114 E. R. 37.

1458. —.]—*R. v. SHROPSHIRE JJ.* (1841), 2 Q. B. 87; 114 E. R. 36; *sub nom. R. v. SALOP JJ.*, 1 Gal. & Dav. 146; 10 L. J. M. C. 141; 5 J. P. 484; 5 Jur. 1107.

1459. —.]—An order for the removal of a pauper from a township within a borough, under Municipal Corporations Act, 1835 (c. 76), with a separate commission of the peace & ct. of quarter sessions, was made within the borough by two justices of the county in which the borough was situated, such justices having a concurrent jurisdiction in the borough with the borough justices. Notice of an intention to appeal against the order to the county sessions was given within the time for giving notices of appeal limited by Poor Law Procedure Act, 1848 (c. 31), s. 9. After the expiration of the time so limited for giving notice of appeal, applts. gave notice to resps. that they intended to abandon their notice of appeal to the county sessions, & would prosecute their appeal at the next borough sessions:—*Held*: (1) the county sessions had no jurisdiction to hear the appeal, & the appeal was rightly made to the borough sessions; (2) the first notice was, notwithstanding the reference therein to the county sessions, a sufficient notice of an intention to appeal within Poor Law Procedure Act, 1848 (c. 31), s. 9, & taking the two notices together, there was a valid notice of appeal to the borough sessions.—*R. v. LIVERPOOL RECORDER* (1850), 15 Q. B. 1070; 4 New Sess. Cas. 410; 16 L. T. O. S. 193; 14 J. P. 782; 117 E. R. 764.

*Annotations*:—As to (1) *Appld. R. v. Lancashire JJ.* (1852), 18 Q. B. 361. As to (2) *Distd. R. v. Salop JJ.* (1854), 4 E. & B. 257. *Appld. R. v. Buckinghamshire JJ.* (1854), 4 E. & B. 259, n.; *R. v. Leeds Recorder* (1861), 3 E. & E. 561.

1460. —.]—Where a pauper becomes chargeable in a union which includes a borough having a separate ct. of quarter sessions, the guardians may obtain an order for the removal of such pauper to his place of settlement from the justices of the borough, although the particular parish from which he is to be removed is not within the borough, & in such case, the proper tribunal to hear an appeal against the order is quarter sessions for the borough & not the quarter sessions for the county.—*R. v. STAFFORDSHIRE JJ.* (1872), L. R. 7 Q. B. 288; 41 L. J. M. C. 78; 36 J. P. 679; 20 W. R. 366.

*ii. Next Practicable Quarter Sessions.*

See Poor Law Act, 1927 (c. 14), ss. 122 (2) (3), 127.

1461. What are—Next after service of notice of appeal practicable.]—An order of removal was made on Mar. 16, & served on Mar. 18. Notice of appeal to the next sessions but one was served on Apr. 4. The next sessions, the Easter, were Apr. 8. The practice of the ct. of quarter sessions required seven clear days' notice of appeal to be given:—*Held*: applts. were in time in their appeal to the Midsummer sessions, that being the next practicable sessions.—*R. v. HEREFORDSHIRE JJ.* (1840), 8 Dowl. 638; 5 J. P. 65.

*Annotation*:—*Refd. R. v. Shrewsbury Recorder* (1853), 1 E. & B. 711.

1462. —.]—The next practicable sessions for trying an appeal against a suspended order of removal, are not invariably the next sessions after the service of the order, but the next sessions after the time when the service of a notice of appeal

became practicable.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1842), 6 J. P. 428.

1463. —.]—Justices are bound *ex parte* to enter & respite an appeal against an order of removal at the quarter sessions next after the service of the order, although more than thirty-five days may have elapsed, & a notice of appeal given in time for the next sessions after such entry & respite is sufficient, & the appeal ought then to be heard.—*R. v. LONDON JJ.* (1846), 9 Q. B. 41; 1 New Mag. Cas. 548; 2 New Sess. Cas. 410; 15 L. J. M. C. 127; 7 L. T. O. S. 226; 10 J. P. 425; 10 Jur. 457; 115 E. R. 1191.

*Annotations*:—*Consd. R. v. Kyro* (1857), 7 E. & B. 609. *Refd. R. v. Sussex JJ.* (1862), 2 B. & S. 664.

1464. —Next after service of order.]—Where the sessions were holden within twenty-one days after the order of removal had been sent from the removing parish:—*Held*: it was not necessary to serve a notice of appeal for those sessions.—*R. v. CORNWALL JJ.* (1837), 6 Ad. & El. 894; 6 L. J. M. C. 118; 112 E. R. 342.

*Annotations*:—*Fold. R. v. Salop JJ.* (1837), Will. Woll. & Dav. 598. *Refd. R. v. London JJ.* (1846), 9 Q. B. 41; *R. v. Sussex JJ.* (1865), 4 B. & S. 966.

1465. —.]—An order of removal made on Sept. 8, 1856, was duly served on Sept. 10. On Sept. 21, a letter, dated Sept. 20, was received by resps. from the clerk of applts., stating certain facts as to the paupers, & adding, "I shall on these grounds appeal against your order." On Sept. 29, copies of depositions were applied for, & received on Sept. 30. Notice of intention "to commence an appeal at the next general quarter sessions" was duly received on Oct. 8. At the next quarter sessions, held on Oct. 16, the appeal was not entered or respited; & resps. applied for costs, which were, however, refused. On Oct. 20, the paupers were removed. On Dec. 23, another notice of appeal, & grounds of appeal, were served. At the next sessions, held Jan. 8, 1857, both parties appeared; but, after argument, the justices refused to hear the appeal:—*Held*: (1) the justices acted rightly, & applts. ought to have entered & respited the appeal, even though they could not have tried it, at the Oct. sessions; (2) in judging of the "practicability" of the next sessions, the time of service of the order of removal was the proper time to reckon from.—*R. v. PETERBOROUGH JJ.* (1857), 7 E. & B. 643; 26 L. J. M. C. 153; 29 L. T. O. S. 124; 22 J. P. 20; 3 Jur. N. S. 887; 25 W. R. 565; 119 E. R. 1384.

*Annotations*:—As to (1) *Fold. R. v. West Riding JJ.* (1858), E. B. & E. 713. *Appld. R. v. Sussex JJ.* (1865), 4 B. & S. 966. *Refd. R. v. Skircoat* (1859), 28 L. J. M. C. 224; *Liverpool Gas Co. v. Everton* (1871), L. R. 6 C. P. 414.

1466. —Question for justices to decide on facts.]—It is for the justices at quarter sessions to decide on the facts, in the first instance, whether an appeal against an order of removal has or has not been brought at the next practicable sessions after notice of the order has been received by applts.; & mere proof that there has been some delay on the part of applts. in taking steps to avoid the order does not preclude the justices from exercising their discretion in the matter, nor compel them to dismiss the appeal.—*R. v. DERBYSHIRE JJ.* (1871), 25 L. T. 161; 35 J. P. 663; 19 W. R. 876.

*Annotation*:—*Refd. R. v. Norfolk JJ.*, Ex p. Wayland (1908), 78 L. J. K. B. 236.

1467. —Party treating appeal as to particular sessions.]—On Feb. 26, 1908, an order of removal of a pauper & her child from the Wayland Union to the Forehoe Union was made. Both unions are in the county of Norfolk. On Mar. 31, 1908, the Forehoe Union gave notice of appeal against the order. The notice did not mention any sessions as those to which it was intended to appeal.



On Apr. 8, a ct. of quarter sessions for the county of Norfolk was held, but no appeal against the order of removal was entered for those sessions. The succeeding quarter sessions were held on July 1, 1908, & the appeal against the order was entered for those sessions. The parties treated the notice of appeal as being given for those sessions:—*Held*: (1) the sessions of July 1, 1908, had jurisdiction to hear the appeal & to decide whether it had been entered at the next practicable sessions so as to comply with the requirements of Poor Relief Act, 1662 (c. 12), s. 2; (2) as the parties treated the notice of appeal as having been given for the sessions of July 1, 1908, the objection could not be taken that it applied only to the sessions of Apr. 8.—*R. v. NORFOLK JJ., Ex p. WAYLAND UNION*, [1909] 1 K. B. 463; 78 L. J. K. B. 236; 99 L. T. 936; 73 J. P. 36; 7 L. G. R. 343, D. O.

**1468.** — *Sufficient time for entry at next sessions.—Necessity to enter appeal.*—Parties appealing against an order of removal are entitled to take the full number of days given by Poor Law Procedure Act, 1848 (c. 31), s. 9. If at the expiration of those days there is time to give effectual notice of trial for the next sessions, it should be done; if there is not time for such notice of trial, the appeal, if it be practicable, ought to be entered & respited at the next sessions; & it is too late to enter it at a subsequent sessions.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1858), B. B. & E. 713; 31 L. T. O. S. 232; 6 W. R. 681; 120 E. R. 677; *sub nom. R. v. WEST RIDING OF YORKSHIRE JJ., BROMSGROVE v. HALIFAX*, 27 L. J. M. C. 269; 23 J. P. 148; 5 Jur. N. S. 17.

*Annotations*:—*Consd. R. v. SUSSEX JJ.* (1862), 2 B. & S. 664; *Liverpool Gas Light Co. v. Everton Overseers* (1871), L. R. 6 C. P. 413. *Reid. R. v. SKIRCOAT* (1859), 28 L. J. M. C. 224; *R. v. SUSSEX JJ.* (1865), 4 B. & S. 966; *R. v. SURREY JJ.* (1880), 50 L. J. M. C. 10; *Imperial & Grand Hotels Co. v. Christchurch Union*, [1905] 1 K. B. 89; *R. v. NORFOLK JJ., Ex p. Wayland Union* (1908), 78 L. J. K. B. 236.

**1469.** — *Sufficient time to prepare for trial.—Power of session to grant adjournment.*—An order of removal was served on Sept. 13, 1858, & notice of appeal served on Oct. 2, 1858. By the rules of practice at the sessions, ten clear days' notice of trial was required to be given by appts. No notice of trial, nor grounds of appeal, were served before the next quarter sessions, which were held on Oct. 18, 1858. At these sessions appts. entered & respited their appeal. On Dec. 18, 1858, appts. served a notice of trial of the appeal at the quarter sessions held on Jan. 4, 1859, accompanied with a statement of the grounds of appeal. The appeal was heard at the Jan. sessions, & the order of removal was quashed:—*Held*: the sessions had jurisdiction to adjourn the hearing of the appeal from the Oct. to the Jan. sessions: but as appts. had had time to bring on the trial of the appeal at the Oct. sessions, the better course would have been to refuse an adjournment.—*R. v. SKIRCOAT (INHABITANTS)* (1859), 2 E. & E. 185; 28 L. J. M. C. 224; 33 L. T. O. S. 300; 23 J. P. 502; 5 Jur. N. S. 1010; 121 E. R. 70.

*Annotation*:—*Reid. R. v. SUSSEX JJ.* (1865), 4 B. & S. 966.

**1470.** — — — — —.]—(1) Where an order of removal was executed on Mar. 27, & the next Easter sessions were held on Apr. 9, consequently less than fourteen days after the removal, & appts. took no notice of those sessions, but entered & respited their appeal *ex parte* at the Midsummer sessions, & gave the regular notice, etc., for the Michaelmas sessions, at which the appeal was entered & determined:—*Held*: the sessions had jurisdiction over the appeal to hear &

determine it & appts. were not bound to have entered & respited at the Easter sessions, or to have given notice of appeal for the Midsummer sessions.

(2) Poor Relief Act, 1722 (c. 7), s. 8, does not apply to the first sessions after the removal, but to the first practicable sessions.—*R. v. SURREY JJ.* (1845), 3 Dow. & L. 343; 1 New Mag. Cas. 411; 2 New Sess. Cas. 155; 15 L. J. M. C. 1; 6 L. T. O. S. 131; 10 Jur. 72.

*Annotations*:—*As to (1) Distd. R. v. West Riding JJ.* (1858), E. B. & E. 713. *Reid. R. v. Peterborough JJ.* (1857), L. J. M. C. 153.

**1471.** — *Distance between parish appealing & sessions.*—If, from the distance between the parish to which a pauper has been removed & the place where the sessions are held, there is not time to lodge an appeal at the sessions held immediately subsequent to the removal, the sessions next ensuing are to be considered as the next sessions within Poor Relief Act, 1662 (c. 12), & the justices will be compelled to receive the appeal at such ensuing sessions.—*R. v. EAST RIDING OF YORKSHIRE JJ.* (1779), 1 Doug. K. B. 192; 99 E. R. 126.

*Annotations*:—*Consd. R. v. SURREY JJ.* (1880), 50 L. J. M. C. 10. *Reid. R. v. Herefordshire JJ.* (1789), 3 Term Rep. 504; *R. v. SUSSEX JJ.* (1865), 4 B. & S. 966.

**1472.** — *Counties having original & adjourned sessions.*—Where the quarter sessions are held at two different places in the county, the one being an adjournment only from the other, & an order of removal is executed after the beginning of the original sessions but before the adjourned sessions, an appeal at the next ensuing adjourned sessions is in time, & ought to be received.—*R. v. SUSSEX JJ.* (1797), 7 Term Rep. 107; 101 E. R. 880.

*Annotations*:—*Appld. R. v. Suffolk JJ.* (1847), 2 New Sess. Cas. 554; *R. v. Lancashire JJ.* (1876), 34 L. T. 124. *Reid. R. v. SUSSEX JJ.* (1865), 4 B. & S. 966.

**1473.** — — — — —.]—Where an order of — — — was made & executed on the day before the holding of the Epiphany sessions, & the parish to which the pauper was removed, gave due notice & entered their appeal at the Easter sessions, at which sessions the justices refused to hear the appeal, on the ground that it should have been entered at the Epiphany sessions; this ct. granted a *mandamus* to the justices to receive such appeal, notwithstanding it appeared that the Epiphany sessions continued for fourteen days, & were afterwards twice adjourned to distant days, & that it was the practice of the sessions to allow appeals to be entered at any time during their continuance, or at the adjournments, & to respite the hearing to the next sessions.—*R. v. SURREY JJ.* (1813), 1 M. & S. 479; 2 Bott. 750; 105 E. R. 179.

*Annotation*:—*Consd. R. v. SUSSEX JJ.* (1862), 2 B. & S. 664.

**1474.** — — — — —.]—(1) The delivery of grounds of appeal, against an order of removal, with the notice of appeal, is as valid for all purposes as a delivery of them fourteen days at least before sessions begin. Appts. have not, by Poor Law Procedure Act, 1848 (c. 31), s. 9, twenty-one days, plus the fourteen days after the delivery of the depositions, for giving notice of appeal absolutely, so as to entitle them as of right to have the appeal entered & respited, if after those days have expired there does not remain enough time before sessions to deliver an effective notice of appeal according to the practice of sessions; & the sessions may, in their discretion, refuse to respite if they deem that appts. have been guilty of unreasonable delay in giving their notice of appeal.

(2) Though the time for giving notice of appeal must be calculated with reference to the first day of sessions, yet when for practical convenience the



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county is divided into distinct divisions, & a distinct ct. is held in each division, by adjournment from one to the other, & the rules of practice made by the ct. in each division assume that the day when the ct. for that division begins its sittings is the first day of sessions, it is sufficient if the grounds of appeal are delivered fourteen clear days before the first day of the sitting of the ct. for the division in which the appeal is according to practice to be tried.—*R. v. SUSSEX JJ.* (1865), 4 B. & S. 966; 34 L. J. M. C. 69; 29 J. P. 180; 11 Jur. N. S. 300; 122 E. R. 721; *sub nom.* *R. v. SUSSEX JJ., Re COLEMORE PARISH OFFICERS & FUNTINGTON PARISH OFFICERS*, 11 L. T. 740; 13 W. R. 471, Ex. Ch.

*Annotations:—*As to (1) *Reid*, *Swift v. Lancashire JJ.* (1873), 22 W. R. 76. *Generally, Reid*, *Re Mayor v. Harding* (1867), 9 B. & S. 27, n.; *R. v. Derbyshire JJ.* (1871), 25 L. T. 161; *R. v. Surrey JJ.* (1880), 6 Q. B. D. 100; *R. v. Norfolk JJ., Ex p. Wayland Union* (1908), 99 L. T. 936.

**1475. Proof of practicability.]—**When a sessions has intervened between the date & the service of an order of removal, applts. have a right to enter their appeal at the next sessions, without being called upon to prove the time when the order was served. The fact being within the knowledge of both parties, it is for resps. to prove it, if they desire to show that applts. are out of time.—*R. v. NORTH RIDING OF YORK JJ.* (1828), 6 L. J. O. S. M. C. 55.

**1476. Appeal impracticable—Whether necessary to enter & respite.]—***Semle*: it is unnecessary to enter & respite an appeal at the next sessions, where the order of removal is served so late as to render it impossible to try the appeal at those sessions.—*R. v. KENT JJ.* (1828), 8 B. & C. 639; 3 Man. & Ry. K. B. 15; 2 Man. & Ry. M. C. 11; 108 E. R. 1180.

*Annotations:—**Reid*, *R. v. Suffolk JJ.* (1840), 8 Dowl. 618; *Liverpool Gas Light Co. v. Everton Overseers* (1871), L. R. 6 C. P. 414; *R. v. Surrey JJ.* (1880), 6 Q. B. D. 100.

**(d) Notice of Appeal.**  
**i. In General.**

See Poor Law Act, 1927 (c. 14), ss. 122, 127, 130.

**1477. Contents of notice—Names of removing justices.]—**Notice of appeal against an order of removal described the order by its contents, but did not state the names of the removing justices. On the trial of the appeal this was argued as a preliminary objection; & the sessions, without further hearing, confirmed the order, subject to the opinion of this ct. on a case, which submitted, as the point for decision, whether the notice was defective for the reason above mentioned; directing that, if this ct. held the notice good, the case should be sent back to the sessions, to be heard on the merits. This ct. overruled the objection without argument, & allowed the case to go back to the sessions.—*R. v. WESTHOUGHTON (INHABITANTS)* (1843), 5 Q. B. 300; Dav. & Mer. 388; 13 L. J. M. C. 41; 2 L. T. O. S. 147; 7 J. P. 738; 8 Jur. 106; 114 E. R. 1262.

*Annotation:—**Reid*, *R. v. Kesteven JJ.* (1844), 8 Jur. 445.

**1478. ——— Error in one name.]—**An order of removal, signed by two justices, B. C. & E. L. K., was, in the notice of appeal against it, described as an order made by R. H. C., & E. K. K., Esqrs. The notice being, in other respects, sufficiently distinct, & it clearly appearing that no one had been misled by the mistake, though it was shown there were within the county two justices, Sir R. H. C., Bart., & B. C., Esq.:—*Held*: the variance was immaterial; & the justices were bound to hear the appeal.—*R. v. DENBIGHSHIRE JJ.* (1841),

9 Dowl. 509; Woll. 111; 10 L. J. M. C. 79; 5 J. P. 210; 5 Jur. 99.

*Annotation:—**Mentd.* *R. v. Oxfordshire JJ.* (1843), 4 Q. B. 177.

**1479. ——— ———.]—**Where the name of one of the justices signing an order of removal was so illegibly written in the copy of the order sent to applt. parish, although legible enough in the copy of their examination, that the parties gave their notice of appeal, as against the order of A. B. & Jonah Walter, instead of A. B. & Josiah Wilson, the real name of the justice, & the appeal was entered at the sessions as against the order of A. B. & John Walter, & the sessions refused to entertain the appeal, on the ground of the misdescription: the ct. granted a *mandamus* compelling them to enter continuance & hear the appeal.—*R. v. MIDDLESEX JJ.* (1846), 3 Dow. & L. 745; 1 New Mag. Cas. 588; 2 New Sess. Cas. 341; 15 L. J. M. C. 100; 7 L. T. O. S. 117; 10 Jur. 495; 10 J. P. Jo. 809.

**1480. ——— Venue of appeal—Error in description.]—**Notice of appeal against an order of removal was served in due time, but erroneously described the appeal to be to the county instead of the borough sessions; this was afterwards amended, but too late for the ensuing sessions. Application having been made to the deputy recorder to enter & respite, he allowed it, on condition that the whole question should be brought before, & decided by, the recorder. At the next sessions the recorder held that the notice was bad, & dismissed the appeal. Under the above circumstances, the ct. refused to grant a *mandamus* to the recorder to hear the appeal, as there had been a conditional exercise of discretion, which had been accepted by applt.—*R. v. BERWICK RECORDER* (1863), 7 L. T. 670; 27 J. P. 87; 11 W. R. 265.

**1481. Service of notice—Notice informally conveyed—In letter to overseers.]—**On Oct. 26, an order for the removal of a pauper from A. to C. was served on the overseers of C. On Nov. 6, a letter was written to the overseers of A. by the assistant overseer of C. applying for a copy of the depositions of the grounds of removal, adding, "as it is intended to appeal against such order of removal." No notice was taken of this letter. On Dec. 11, a formal notice of appeal was given by the overseers of C. to the overseers of A. On Dec. 20, application was made by the overseers of C. to the clerk to the justices for a copy of the depositions, which was received on the next day, & notice was given to the overseers of A. that the appeal would be entered & respited at the next sessions, which was accordingly done:—*Held*: quarter sessions had no jurisdiction to enter & respite the appeal; inasmuch as, (a) the application for a copy of the depositions being made to the overseers of the removing parish, & not to the clerk to the justices, was not sufficient within Poor Law Procedure Act, 1848 (c. 31), s. 3; (b) the letter of Nov. 6 was not a notice of appeal.—*R. v. ST. ALKMUND, DERBY (INHABITANTS)* (1863), 3 B. & S. 347; 32 L. J. M. C. 99; 7 L. T. 622; 27 J. P. 263; 9 Jur. N. S. 744; 11 W. R. 262; 122 E. R. 131.

**1482. ——— Delivery after statutory period—Waiver of irregularity.]—**Notice of appeal to sessions to be held on July 8, 1851, against an order for the maintenance of a lunatic pauper, served June 7, 1851, was delivered on June 30, 1851, too late by law, to resps., who, on July 4, 1851, served on applt. a notice to produce documents at the trial. The sessions held that the service of the notice was a step in the cause &

a waiver of the irregularity in the notice of appeal :—*Held* : the question was one of fact & practice for the sessions if they chose so to treat it, & not necessarily one of construction, & their decision ought not to be disturbed.—*R. v. WICKENBY (INHABITANTS)* (1852), 19 L. T. O. S. 105; 16 J. P. 583.

**1483.** — *Service on Sunday.*—*R. v. HUNTINGDONSHIRE JJ.* (1783), *Cald. Mag. Cas.* 283.

*Annotations* :—*Refd.* *Huntley v. Bulwer* (1839), 8 Scott, 325; *Asprell v. Lancashire JJ.* (1852), 16 Jur. 1067, n.

**1484.** — *Service of notice of grounds of appeal against an order of removal on a Sunday is void; & it makes no difference in this respect that the notice is sent through the Post Office. Where, therefore, the time for serving grounds of appeal expired on a Sunday, & the notice was posted on Saturday, & delivered in the usual course on Sunday morning:—Held* : the notice was a nullity; & the sessions right in refusing to hear the appeal.—*R. v. LANCASHIRE JJ.* (1852), 20 L. T. O. S. 95; *sub nom. Ex p. ASHFORD (CHURCHWARDENS & OVERSEERS)*, 16 J. P. Jo. 759; *sub nom. ASPRELL (INHABITANTS) v. LANCASHIRE JJ.*, 16 Jur. 1067, n.

*Annotation* :—*Consd. R. v. Loominster* (1862), 2 B. & S. 391.

**1485.** — *Necessity for proof of.*—The ct. of quarter sessions is not bound, before allowing the entering & respite of an appeal, to call for proof of service of notice of appeal, the allowance of an appeal, in Poor Law Procedure Act, 1848 (c. 31), s. 9, meaning the hearing thereof.—*R. v. GREAT YARMOUTH RECORDER* (1853), 1 W. R. 446; 17 J. P. Jo. 389.

**1486.** *Sufficiency of notice—Respited appeal—Service of order of respite.*—Where an appeal was entered at the Easter, & respited until the Midsummer sessions, & on June 24, a copy of the order of respite was served on resps., without any notice of trial, & resps. appeared at the following sessions in July :—*Held* : the sessions were bound to hear the appeal, though no other notice of trying the appeal had been given than the service of the order of respite.—*R. v. LAMBETH (INHABITANTS)* (1823), 3 Dow. & Ry. K. B. 340; 2 Dow. & Ry. M. C. 26.

*Annotations* :—*Refd.* *R. v. West Riding of Yorkshire JJ.* (1833), 5 B. & Ad. 667. *Mentd. Ex p. Becke* (1832), 3 B. & Ad. 704; *R. v. Bird, Ex p. Noddes*, [1898] 2 Q. B. 340.

**1487.** — *Whether fresh notice necessary.*—Where an appeal, after hearing at one sessions, was respited until the following sessions, in consequence of an equal division of opinion on the bench as to the merits :—*Held* : no fresh notice of trial was necessary for the following sessions, although, in practice, the rule is otherwise, as to respited appeals.—*R. v. BUCKINGHAMSHIRE JJ.* (1825), 6 Dow. & Ry. K. B. 142; 3 Dow. & Ry. M. C. 23.

**1488.** — *On the trial of an appeal against an order of removal, which had been entered & respited at a former sessions, it was objected that notice of the entry & respite, which the practice of the session required should be given to resps. had not been given. The sessions entertained the objection, & refused to hear the appeal:—Held* : the giving notice of the entry & respite, in the case of a respited appeal, was a condition distinct from & in addition to the steps required by law, & which the sessions had no right to impose; & the ct. granted a *mandamus* commanding the sessions to enter continuances & hear the appeal.—*R. v. SURREY JJ.* (1849), 8 Dow. & L. 735; 3 New Mag. Cas. 159; 3 New Sess. Cas. 531; 18 L. J. M. C. 175;

13 L. T. O. S. 190; 14 Jur. 506; 13 J. P. Jo. 331.

*Annotations* :—*Refd.* *R. v. Over* (1849), 4 New Mag. Cas. 4. *Mentd. R. v. Goodrich* (1850), 4 New Mag. Cas. 101; *R. v. Bird, Ex p. Noddes*, [1898] 2 Q. B. 340.

**1489.** — *Original notice withdrawn—Second notice given.*—*R. v. LIVERPOOL RECORDER*, No. 1459, *ante*.

## ii. By and to Whom Given.

*See, now, Poor Law Act, 1927 (c. 14), s. 130.*

**1490.** *By whom given—Must be shown.*—An appeal to sessions not saying by whom allowed.—*ALMONSBURY (INHABITANTS) v. HODSFIELD (INHABITANTS)* (1719), *Fortes. Rep.* 301; 92 E. R. 861.

**1491.** — *Appellant's attorney.*—A notice of appeal against an order of removal, signed by the attorney for the overseers of applt. parish, is sufficient.—*R. v. MONMOUTH JJ.* (1829), 7 L. J. O. S. M. C. 95.

*Annotation* :—*Refd. R. v. Carew* (1850), 14 Jur. 1119.

**1492.** — *Notice of appeal against an order of removal signed by an attorney on behalf of the parish officers is sufficient.*—*R. v. CAREW (INHABITANTS)* (1850), 4 New Mag. Cas. 164; 4 New Sess. Cas. 306, n.; 20 L. J. M. C. 44, n.; 16 L. T. O. S. 149; 14 Jur. 1119; 14 J. P. Jo. 702.

**1493.** — *Notice of appeal against an order of removal may be signed by the attorney for the parish officers, & if so signed will be perfectly valid, if the attorney is in fact duly authorised.*—*R. v. MIDDLESEX JJ.* (1850), 1 L. M. & P. 621; 4 New Mag. Cas. 166; 4 New Sess. Cas. 302; 20 L. J. M. C. 42; 16 L. T. O. S. 156; 14 J. P. Jo. 736.

*Annotations* :—*Fold. R. v. Carew* (1850), 20 L. J. M. C. 44, n. *Refd. R. v. Kent JJ.* (1873), L. R. 8 Q. B. 305.

**1494.** — *By agent of appellant—Necessity for authority.*—Notice of grounds of appeal against an order of removal was signed by W. R., churchwarden, & T. G., overseer; also by W. P. H. "for" W. H., who was a churchwarden; & by J. E., "guardian." The parish had two churchwardens, two overseers, & one guardian, & was part of a union formed under Poor Law (Amendment) Act, 1834 (c. 76) :—*Held* : the notice of grounds was insufficient under Poor Law (Amendment) Act 1834 (c. 76), s. 81., for the signature of W. P. H. for W. H. could not avail, no evidence of authority appearing; & J. E., as guardian of a union, was not guardian of applt. parish, & therefore was not competent to sign, under sect. 81.—*R. v. SURREY JJ.* (1844), 5 Q. B. 506; *Dav. & Mer.* 106; 1 New Sess. Cas. 124; 3 L. T. O. S. 53; 8 Jur. 379; 114 E. R. 1340; *sub nom. R. v. SURREY JJ., ALLHALLOWS v. WIMBLEDON*, 13 L. J. M. C. 86; 8 J. P. 440.

*Annotation* :—*Refd. R. v. Lambeth, R. v. St. Mary's Southampton* (1845), 14 L. J. M. C. 133.

**1495.** — *Guardian.*—Where a parish is incorporated under 22 Geo. 3, c. 28, the notice of appeal must be signed by the guardian, & he must describe himself therein as such. It is insufficient that he should describe himself as an overseer.—*Ex p. HARNLEY OVERSEERS* (1843), 1 Dow. & L. 673; *sub nom. R. v. WEST RIDING OF YORKSHIRE JJ., Re HARNLEY & ROTHWELL (INHABITANTS)*, 13 L. J. M. C. 39; 2 L. T. O. S. 154; 7 Jur. 1132.

*Annotations* :—*Distd. R. v. West Riding of Yorkshire JJ., Sprotborough v. Attercliffe-cum-Darnall* (1844), 8 J. P. 774; *R. v. Colerne* (1848), 12 Jur. 599.

**1496.** — *Governors & directors—Under local Act.*—*R. v. ST. GEORGE, HANOVER SQUARE (INHABITANTS)*, No. 1441, *ante*.

**Sect. 3.—Removal orders: Sub-sect. 5, B. (d) iii., (e)**

**iii. Length of Notice.**

See Poor Law Act, 1927 (c. 14), ss. 122 (3), 127 (1).

**1497. Whether fourteen days before sessions.]—**

It is not necessary, under Poor Law (Amendment) Act, 1834 (c. 76), that notice of appeal against an order of removal should be given fourteen days before the sessions at which such appeal is intended to be tried. The practice, with respect to the time for giving such notice, remains as it was before the passing of the Act.—*R. v. DRAUGHTON (INHABITANTS)* (1839), 2 Per. & Dav. 224; 8 L. J. M. C. 92; 3 J. P. 661.

*Annotation.*—*Consd.* *R. v. Sussex JJ.* (1862), 2 B. & S. 664.

**1498.** —[Where sessions are held on certain fixed days at different places for different divisions of a county, & the practice of the sessions is to try all matters arising in each division at the sessions held for that division, the notice & statement of grounds of appeal, under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, must be given at least fourteen days before the first day of holding the sessions at the first place & will not be in time if given only fourteen days before the adjourned sessions at which the appeal is to be tried.—*R. v. SUFFOLK JJ.* (1847), 4 Dow. & L. 628; 2 New Sess. Cas. 554; 1 Saund. & C. 296; 16 L. J. M. C. 36; 8 L. T. O. S. 370; 11 Jur. 288; 11 J. P. Jo. 68, 70.

*Annotation.*—*Overd.* *R. v. Sussex JJ.* (1865), 4 B. & S. 966.

**1499.** —[*R. v. SUSSEX JJ.*, No. 1474, *ante*.

**1500. Hearing postponed to following sessions.]—**A notice of appeal against an order of removal & of the grounds of appeal, were served fourteen days before the Epiphany sessions, when the appeal was intended to be tried, but by reason of the pressure of business it was made a *remanet* to the Easter sessions. Fourteen days before the Easter sessions another & different notice of the grounds of appeal was served. Appls. having elected to rely upon the last notice, it was objected that the notice was invalid, it not being given fourteen days before the sessions at which the appeal was intended to be tried, as required by Poor Law (Amendment) Act, 1834 (c. 76), s. 81:—*Held*: the notice was sufficient, & the sessions were bound to hear the appeal.—*R. v. DERBYSHIRE JJ.* (1838), 6 Ad. & El. 612, n.; 3 Nev. & P. K. B. 591; 1 Will. Woll. & H. 365; 7 L. J. M. C. 91; 2 J. P. 568; 112 E. R. 235.

*Annotation.*—*Distd.* *R. v. Arleford* (1839), 11 Ad. & El. 87. *Fold.* *R. v. Kendal* (1859), 1 E. & E. 492

**1501. Subject to practice of sessions.]—**Under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, notice of appeal against an order of removal need not be given within twenty one days from the time of sending the notice of chargeability & the copies of the order & examination to the overseers of the parish charged by such order:—*Held*: the practice as to notices of appeal not being expressly altered by Poor Law (Amendment) Act, 1834 (c. 76), remained as before, although, by Poor Law (Amendment) Act, 1834 (c. 76), s. 81, the statement of the grounds of appeal was required to be delivered with such notice, or at least fourteen days before the sessions; & therefore where, by the practice of the sessions, eight days' notice only was required, a notice of a given eight days before the sessions was sufficient, provided such statement of the grounds of appeal be delivered fourteen days before the sessions; at least where the delivery of such statement was accompanied with the service of a notice of appeal *de facto*, although such notice be erroneous, as purporting to be given for the borough, instead

of the county sessions.—*R. v. SUFFOLK JJ.* (1835), 4 Ad. & El. 319; 1 Har. & W. 618; 5 Nev. & M. K. B. 503; 3 Nev. & M. M. C. 316; 5 L. J. M. C. 3; 111 E. R. 806.

*Annotations.*—*Fold.* *R. v. Draughton* (1839), 8 L. J. M. C. 92; *R. v. Herefordshire JJ.* (1840), 8 Dowl. 638. *Distd.* *R. v. Sussex JJ.* (1865), 4 B. & S. 966. *Reid.* *R. v. Middlesex JJ.* (1840), 4 Jur. 1086; *R. v. West Riding of Yorkshire JJ.* (1844), 1 New Sess. Cas. 445; *R. v. Derby Recorder* (1850), 1 L. M. & P. 657; *R. v. Lancashire JJ.* (1870), 34 L. T. 124. *Mentd.* *Imperial Grand Hotel Cos. v. Christchurch Union Assmt. Com.* (1904), 49 Sol. Jo. 84.

**1502.** —[Where by the practice of sessions twenty-eight days' notice of trial was required to be given in the case of respited appeals, & where that notice had not been given, & the sessions therefore refused to hear the appeal, & confirmed the order of removal:—*Held*: the practice was not so unreasonable as to induce this ct. to grant a *mandamus*, commanding the sessions to enter continuances & hear the appeal.

The quarter sessions are the judges of their own rules of practice; & this ct. will not interfere with their determinations respecting them, unless the rules on which they have acted are so unreasonable as to be illegal.—*R. v. MONTGOMERYSHIRE JJ.* (1845), 3 Dow. & L. 119; 1 New Mag. Cas. 333; 2 New Sess. Cas. 78; 14 L. J. M. C. 142; 5 L. T. O. S. 220; 9 Jur. 927; 9 J. P. Jo. 380.

*Annotations.*—*Mentd.* *R. v. Derbyshire JJ.* (1852), 22 L. J. M. C. 31; *R. v. Bird, Ex p. Needes*, [1898] 2 Q. B. 340.

**1503.** —[*R. v. SUSSEX JJ.*, No. 1474, *ante*.

**1504. Fourteen days after receipt of depositions.—Postal delay.]—**Under Poor Law Procedure Act, 1848 (c. 31), s. 9, which provides that a period of fourteen days, after "the sending" a copy of the depositions on which an order of removal is made, shall be allowed for "the giving" notice of appeal, such notice, if sent by post under Poor Law (Amendment) Act, 1851 (c. 105), s. 10, is to be considered as given on the day on which, by the ordinary course of post, it ought to have reached the party to whom it is sent, though in fact it arrive by the post on a later day.—*R. v. SLAWSTONE (INHABITANTS)* (1852), 18 Q. B. 388; 21 L. J. M. C. 145; 19 L. T. O. S. 105; 16 J. P. 279; 16 Jur. 1066; 118 E. R. 145.

*Annotations.*—*Fold.* *R. v. Richmond Recorder* (1858), E. B. & E. 253. *Reid.* *R. v. Lancashire JJ.* (1852), 20 L. T. O. S. 95; *R. v. Leominster* (1862), 2 B. & S. 391. *Mentd.* *Browne v. Black*, [1912] 1 K. B. 316; *Retail Dairy Co. v. Clarke*, [1912] 2 K. B. 388.

**1505. Receipt within twenty-one days of order.]—***R. v. RICHMOND RECORDER*, No. 1411, *ante*.

**1506. Twenty-one days after notice of chargeability.]—**A notice of appeal against an order of removal of a pauper may be given, after the twenty-one days from the time of sending the notice of chargeability, etc., required by Poor Law (Amendment) Act, 1834 (c. 76), s. 79, & before an actual removal.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1844), 2 Dow. & L. 488; 1 New Sess. Cas. 445; 14 L. J. M. C. 11; 4 L. T. O. S. 160; 9 J. P. 806; 9 Jur. 13.

*Annotation.*—*Apprvd.* *R. v. Leeds Recorder* (1847), 8 Q. B. 623.

**1507. Insufficient notice.—Power of court to adjourn.]—**Poor Relief Act, 1722 (c. 7), s. 8, only applies to the first sessions after executing an order of removal of a pauper, & therefore the ct. will not interfere with the discretion of the magistrates at the second as to adjournment, if it is in furtherance of a reasonable practice.—*R. v. MONMOUTHSHIRE JJ.* (1835), 3 Dowl. 306; 1 Har. & W. 111.

*Annotations.*—*Appld.* *R. v. Montgomeryshire JJ.* (1845), 3 Dow. & L. 119; *R. v. Surrey JJ.* (1845), 3 Dow. & L. 343. *Reid.* *R. v. Derbyshire JJ.* (1852), Bail Ct. Cas. 113.

**1508. Removal of pauper lunatic.]**—The provisions in Poor Law Procedure Act, 1848 (c. 31), s. 9, apply to appeals against orders made under 8 & 9 Vict. c. 126, & therefore notice of appeal against such orders must be given within twenty-one days after the receipt of notice of chargeability, etc., or within fourteen days from the time when copies of the depositions are sent to those upon whom the orders are made.—*R. v. GLAMORGANSHIRE JJ.* (1849), 13 Q. B. 501; 3 New Sess. Cas. 535; 18 L. J. M. C. 118; 13 L. T. O. S. 231; 13 J. P. 506; 13 Jur. 453; 116 E. R. 1377.

*Annotations*.—*Apld.* *R. v. St. Peter, Barton upon Humber* (1851), 17 Q. B. 630. *Distd.* *R. v. Derbyshire JJ.* (1853), 22 L. J. M. C. 147. *Foll.* *R. v. Glamorganshire JJ.* (1858), 30 L. T. O. S. 242. *Apld.* *R. v. Newport Poor Law Union* (1864), 33 L. J. M. C. 155. *Reid.* *Ex p. Brighton Union* (1860), 14 J. P. 639; *R. v. Stepney Union* (1874), 43 L. J. M. C. 145.

—*See, also, LUNATICS, Vol. XXXIII., p. 264, Nos. 1837, 1841.*

### (e) Grounds of Appeal.

#### i. In General.

*See* Poor Law Act, 1927 (c. 14), ss. 122, 127.

**1509. Necessity for statement.]**—On the trial of an appeal against an order of removal, it appeared that appts. had given no statement of grounds of appeal: & the sessions thereupon dismissed the appeal, subject to a case. Afterwards, at the same session, which was the first after the order, an appeal was entered & respited. No case was drawn up; & on the second appeal coming on to be tried at the following sessions, the ct., finding that the order now appealed against was that which had been the subject of the former appeal, dismissed it, without further hearing:—*Held*: the dismissal was proper.—*R. v. OUNDLE (INHABITANTS)* (1842), 3 Q. B. 353; 2 Gal. & Dav. 77; 11 L. J. M. C. 79; 6 J. P. 506; 6 Jur. 533; 114 E. R. 541.

*Annotation*.—*Reid.* *Uxbridge Union v. Winchester Union* (1904), 91 L. T. 533.

**1510. Delivery of statement—With notice of appeal.]**—*R. v. SUSSEX JJ.*, No. 1474, *ante*.

**1511. — Whether within time prescribed for notice.]**—Poor Law Procedure Act, 1848 (c. 31), s. 9, which enacts, that no appeal shall be allowed against any order of removal, if notice of such appeal be not given as required by law, within the space of, etc.; does not require that the statement of the grounds of appeal should be given within the prescribed time.—*R. v. DERBY RECORDER* (1850), 1 L. M. & P. 657; 4 New Sess. Cas. 306; 20 L. J. M. C. 44; 16 L. T. O. S. 176; 14 J. P. Jo. 752.

**1512. — Calculation of time for.]**—Where an act is required by statute to be done so many days at least before a given event, the time must be reckoned, excluding both the day of the act & that of the event. A statement of grounds of appeal under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, is not duly served unless fourteen days elapse between the day of service & the first day of the sessions at which the appeal is to be tried.—*R. v. SHROPSHIRE JJ.* (1838), 8 Ad. & El. 173; 3 Nev. & P. K. B. 286; 1 Will. Woll. & H. 158; 7 L. J. M. C. 56; 2 Jur. 807; 112 E. R. 803.

*Annotations*.—*Foll.* *R. v. Sussex JJ.* (1862), 2 B. & S. 664, (*See* 4 B. & S. 966.) *Reid.* *Young v. Higgon* (1840), 6 M. & W. 49; *Mitchell v. Foster* (1841), 9 Dow. 527; *Chambers v. Smith* (1843), 1 L. T. O. S. 170; *R. v. Middlesex JJ.* (1845), 3 Dow. & L. 109; *Norton v. Salisbury Town Clerk* (1846), 4 C. B. 32; *R. v. Aberdare Canal Co.* (1850), 14 Q. B. 854; *Re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204. *Mentd.* *R. v. Turner* (1909), 3 Cr. App. Rep. 103.

**1513. Delivery of defective statement—Whether**

**appeal adjourned—Where regular notice served.]**—*Semble*, the statement of the grounds of appeal under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, must be sent or delivered to the overseers themselves; & service on their attorney is insufficient. But, assuming that to be so, the sessions, where such statement has been served on the attorney only, may, if they think fit, adjourn the appeal, such power being incident generally to them as a ct., except where taken away by statute. *Qu*: whether, there having been time to serve the statement regularly before the sessions at which the appeal is entered, & a statement having been served irregularly as above, appts. can, upon the sessions adjourning the appeal serve a fresh statement. If a sufficient notice of appeal be served, but a defective statement of grounds of appeal, the sessions are not bound to adjourn the appeal; the compulsory clause in Poor Relief Act, 1722 (c. 7), s. 8, not extending to the notice of grounds of appeal.—*R. v. KIMBOLTON (INHABITANTS)* (1837), 6 Ad. & El. 603; 1 Nev. & P. K. B. 606; Nev. & P. M. C. 257; Will. Woll. & Dav. 241; 6 L. J. M. C. 90; 1 J. P. 84; 112 E. R. 231.

*Annotations*.—*Apld.* *R. v. Oundle* (1812), 3 Q. B. 353. *Distd.* *R. v. Carrow* (1850), 14 J. P. Jo. 702. *Consd.* *R. v. Middlesex JJ.* (1850), 1 L. M. & P. 621. *Reid.* *R. v. Bond* (1837), 6 Ad. & El. 905; *R. v. Helton* (1848), 11 Q. B. 379; *R. v. Macclesfield* (1849), 13 Q. B. 881; *R. v. Lancashire JJ.* (1857), 8 E. & B. 563. *Mentd.* *R. v. North Riding of Yorkshire JJ.* (1837), 6 L. J. M. C. 110.

**1514. —**—*A* ct. of quarter sessions is not bound, on the application of counsel at the trial of an appeal, to adjourn the hearing in order that a defect in the notice of the grounds of the appeal may be cured.—*R. v. STAFFORDSHIRE JJ.* (1842), 6 J. P. 747.

**1515. — Substantial technical error.]**—One of the grounds of appeal against an order of removal stated that the pauper was rated for & in respect of a tenement in the township of H, consisting of two dwelling-houses of the value of £10, etc.:—*Held*: such statement was insufficient, by reason of its omitting to state that the dwelling-houses were “separate & distinct,” pursuant to the words of the Poor Relief (Settlement) Act, 1825 (c. 57), s. 2.—*R. v. RIPON (INHABITANTS)* (1845), 7 Q. B. 225; 1 New Sess. Cas. 612; 14 L. J. M. C. 102; 11 L. T. O. S. 90; 9 J. P. 617; 9 Jur. 441; 115 E. R. 472.

**1516. Sufficiency—Question for sessions.]**—*R. v. CARNARVONSHIRE JJ.*, No. 1539, *post*.

**1517. —**—The sufficiency of grounds of appeal in point of particularity of statement is a question for the sessions, & where they have come to a decision upon the point, this ct. will not grant a *mandamus* to enter continuances & hear the appeal.—*R. v. KESTEVEN JJ.* (1844), 3 Q. B. 810; Dav. & Mer. 113; 1 New Mag. Cas. 8; 1 New Sess. Cas. 151; 13 L. J. M. C. 78; 3 L. T. O. S. 55; 8 J. P. 629; 8 Jur. 445; 114 E. R. 718.

*Annotations*.—*Consd.* *R. v. Macclesfield* (1844), 1 New Mag. Cas. 59. *Apld.* *R. v. West Riding JJ.* (1844), 1 New Sess. Cas. 247; *R. v. Flintshire JJ.* (1847), 2 New Mag. Cas. 160. *Reid.* *R. v. Marton-Cum-Crafton* (1847), 16 L. J. M. C. 159; *R. v. Cambridgeshire JJ.* (1850), 1 L. M. & P. 47. *Mentd.* *R. v. Somerset JJ.* (1847), 11 Jur. 351; *R. v. Canterbury (Archbishop)* (1848), 11 Q. B. 483; *R. v. Sutton Coldfield Overseers* (1874), L. R. 9 Q. B. 153; *Walsall Overseers of the Poor v. L. & N. W. Ry.* (1878), 4 App. Cas. 30.

*See, also, CROWN PRACTICE, Vol. XVI., p. 311, No. 1225.*

**1518. —**—*R. v. CORNWALL JJ.*, No. 1535, *post*.

**1519. — Irregular examination for removal.]**—The caption of examinations taken to found an order of removal, purported to be “touching the place of the last legal settlement” of the pauper

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"now residing" in the parish "upon the complaint" of one of the overseers on behalf of the others, without stating what the complaint was. The grounds of appeal were, (a) that it did not appear on the face of the examinations, or of any of them, that the justices had any jurisdiction to take the examinations or to make the order. (b) That it did not appear on the face of the examinations that the alleged complaint, recited in the heading of the examinations, was made to the justices or either of them within the local limits of their jurisdiction. (c) After setting out various specific objections to the examinations, "nor did it appear on the face of the examinations of what nature the complaint recited in the headings thereof really was, nor what was its purport or effect":—*Held*: the caption was bad, & the objection to it had been properly allowed by the sessions under the grounds of appeal.—*R. v. ST. ANDREW'S, PLYMOUTH (INHABITANTS)* (1848), 12 L. T. O. S. 191; 12 J. P. 774.

1520. ——— *Irregularity rectified.*—It is no sufficient ground of appeal against an order of removal, made before Poor Law Procedure Act, 1848 (c. 31), founded upon examinations showing a settlement by apprenticeship to allege merely "that the covenant indenture mentioned in the examinations was not produced before the justices making the order, nor any copy of it sent with the examinations."—*R. v. DALTON (INHABITANTS)* (1850), 14 L. T. O. S. 485; 14 J. P. Jo. 111.

1521. ——— *—*—An order of removal was made by justices in respect of an alleged settlement under Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), s. 34, which provides that an order of removal in respect of a settlement acquired under that sect. shall not be made upon the evidence of the person to be removed without such corroboration as the justices or ct. think sufficient. There was no corroborative evidence before the justices who made the order. Upon appeal to the quarter sessions against the order, the grounds of appeal were, (a) that the pauper had not acquired a settlement under Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), s. 34; & (b) that there was no corroborative evidence before the justices who made the order of removal. Corroborative evidence was tendered on behalf of resp. at the sessions, & received by the ct., who considered the same sufficient, but quashed the order of removal on the ground that, as a matter of law upon the facts proved, the pauper had not acquired a settlement under Divided Parishes & Poor Law Amendment Act, 1876 (c. 61), s. 34:—*Held*: the sessions were right in receiving the corroborative evidence, but, the case being governed by *R. v. Brampton Union*, No. 490, *ante*, they were wrong in holding that the settlement was not acquired, & consequently the order of removal must stand good.—*R. v. ABERGAVENNY UNION* (1880), 6 Q. B. D. 31; 50 L. J. M. C. 1; 43 L. T. 602; 29 W. R. 303; *sub nom.* *MONMOUTH UNION v. ABERGAVENNY UNION*, 45 J. P. 205.

1522. ——— *Removal order defective.*—A statement in an examination, that the pauper, "in or about the year 1832," was hired as a yearly servant, is insufficient, inasmuch as the hiring might have taken place after Aug. 14, 1833, & the year's service under it consequently have not been completed before Aug. 14, 1834, & so no settlement have been acquired, by Poor Law (Amendment) Act, 1834 (c. 76), s. 65. A statement that the

pauper, "being then unmarried & having no child or children," was hired by S. as a yearly servant, & served him under such yearly hiring for four years & more, & lived & lodged in applt. parish "for more than forty days next preceding the termination of the said service," was held insufficient, inasmuch as the language imported several yearly hirings, & it was not stated that, at the time of the last hiring, the pauper was unmarried & without child or children.—*R. v. ST. ANNE, WESTMINSTER (INHABITANTS)* (1846), 7 Q. B. 241; 2 New Sess. Cas. 393; 15 L. J. M. C. 119; 7 L. T. O. S. 225; 10 J. P. 518; 10 Jur. 494; 115 E. R. 480.

1523. ——— *Failure to serve notice of chargeability.*—Where an order of removal has been served upon a parish under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, but without notice of chargeability the parish may take advantage of such omission as a ground of appeal against the order.—*R. v. BRIKHAM (INHABITANTS)* (1838), 8 Ad. & El. 375; 3 Nev. & P. K. B. 408; 1 Will. Woll. & H. 356; 7 L. J. M. C. 87; 2 J. P. 440; 2 Jur. 441; 112 E. R. 880.

*Annotations:—Overd. R. v. Shrewsbury Recorder* (1853), 1 E. & B. 711. *Reid. R. v. St. Pancras* (1848), 12 Q. B. 129.

1524. ——— *—*—Under Poor Law (Amendment) Act, 1834 (c. 76), & Poor Law Procedure Act (c. 31), s. 9, the sessions have no jurisdiction to hear an appeal against an order of removal, where notice of chargeability has not been served on the parish to which the removal is ordered.—*R. v. SHREWSBURY RECORDER* (1853), 1 E. & B. 711; 1 C. L. R. 49; 22 L. J. M. C. 98; 21 L. T. O. S. 58; 17 J. P. 503; 17 Jur. 547; 1 W. R. 287; 118 E. R. 603.

1525. ——— *Inadmissible evidence of settlement.*—It is a good ground of appeal, under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, against an order of removal, that the examination upon which it was made, though it sets forth facts which show a settlement, does not disclose any legal evidence of such facts. Therefore, where an order of removal was made upon the examinations of the pauper & his father, in which the father stated that the place of his father's settlement was E., as he had heard his father say & believed to be true, & that he had heard his father say he had received relief from the overseers of E.; & the pauper himself stated that his father's place of settlement was at E., as he had heard him say & believed to be true:—*Held*: such order was bad on an appeal stating, as one of the grounds, that the order was "bad & inoperative," & the examinations on which it was made "defective & insufficient to ground & support the same."—*R. v. ECCLESALL BIERLOW (INHABITANTS)* (1841), 11 Ad. & El. 607; 1 Gal. & Dav. 160; 10 L. J. M. C. 90; 5 J. P. 595; 5 Jur. 460; 113 E. R. 544. *Annotations:—Appld. R. v. Lydeard, St. Lawrence* (1841), 10 L. J. M. C. 147. *Fold. R. v. Tetbury* (1841), 11 Ad. & El. 615, n. *Expld. R. v. Rishworth* (1842), 2 Q. B. 476. *Reid. R. v. West Riding of Yorkshire JJ.* (1842), 2 Q. B. 705.

1526. ——— *—*—*R. v. TETBURY* (1841), 11 Ad. & El. 615, n.; 5 J. P. 596; 113 E. R. 547.

1527. ——— *Removal of permanently disabled pauper—Permanent disability questioned.*—*R. v. ST. MARY & ST. ANDREW WHITTLESEY OVERSEERS*, No. 1324, *ante*.

1528. ——— *Removal based on parents' removal order.—Failure to submit such order.*—Where the examinations in support of an order of removal stated that a previous order for the removal of the pauper's father was produced before removing justices, a copy of such previous order should be sent to applt. —*R. v. WELLINGTON (INHABITANTS)*

(1845), 11 Q. B. 65, n.; 1 New Mag. Cas. 431; 2 New Sess. Cas. 176; 6 L. T. O. S. 146; 9 J. P. Jo. 758; 116 E. R. 400.

*Annotation*.—*Held*. R. v. Mylor (1847), 10 L. T. O. S. 111.

**1529. — Settlement by renting—Omission of residence.**—[The grounds of appeal against an order of removal stated a subsequent settlement as follows: "That T." (the father of an unemancipated pauper), "in Nov. 1832, rented a house at E." (third parish), "from M., at the rent of £10 & upwards, & occupied the same under such renting or hiring from that time until Michaelmas, 1836, & paid rent for the same, & was assessed to & paid the poor rate for the same during the whole of that time." The sessions quashed the order of removal, subject to a case, which showed that evidence was given of T. having in fact resided in E. for more than a year from Nov. 1832, & having rented, etc., as alleged in the grounds of removal; & which also stated, as the finding of the sessions, that T., "by renting & occupying premises in the manner aforesaid, had gained a settlement in E."; & which left, as a question for the ct., "whether the statement of the grounds of appeal was sufficient":—*Held*: (1) the grounds of appeal were insufficient, under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, for not showing a residence in E.; (2) the finding of the sessions did not preclude this ct. from disaffirming the settlement in E., on the deficiency of the statement in the grounds of appeal.—R. v. OLD STRATFORD (INHABITANTS) (1842), 2 Q. B. 513; 2 Gal. & Dav. 82; 11 L. J. M. C. 115; 6 J. P. 523; 6 Jur. 534; 114 E. R. 201.

—*See, also*, Sub-sect. 5, B. (c) ii., *post*.

## ii. Denial of Respondent's Grounds for Appeal.

*See* Poor Law Act, 1927 (c. 14), ss. 122, 127.

**1530. Denial of settlement in appellant parish—Children in respondent parish—Nature of settlement not indicated.**—[The parish of G. gave notice to the parish of P. of an appeal against an order removing H. & his wife, & children of the wife by a former husband, being under the age of sixteen, from P. to G., stating, as the ground of appeal, that H. was not settled in G., setting out objections to this settlement, & that the children were settled in P., not stating what the nature of their settlement was:—*Held*: this was sufficient notice, as to the children, under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, & the sessions having refused to receive evidence as to the settlement of the children, distinct from that of the husband, on the ground of insufficiency of notice, this ct. issued a *mandamus* commanding them to enter continuances & hear the appeal.—R. v. CORNWALL J.J. (1836), 5 Ad. & El. 134; 6 Ad. & El. 886, n.; 2 Har. & W. 157; 3 Nev. & M. M. C. 615; 1 Nev. & P. K. B. 144; 5 L. J. M. C. 106; 111 E. R. 1116.

*Annotations*.—*N.F. Ex p. Broseley* (1837), 7 Ad. & El. 423. *Dbtd.* R. v. Derbyshire J.J. (1837), 6 Ad. & El. 885. *Consd.* R. v. Salop J.J. (1837), Will. Woll. & Dav. 598. *Refd.* R. v. Kelvedon (1836), 1 Nev. & P. K. B. 138.

**1531. — Material variance.**—[An order of removal to E. was made upon an examination stating a hiring in 1813 & a service in E. under such hiring. On appeal, upon the ground that there was no such hiring, *resps.* proved a hiring in 1810; upon which sessions refused to go on with the case, & quashed the order. *Mandamus* to enter continuances & hear the appeal refused: (a) because the sessions had in fact heard; (b) because the variance was material.—*Ex p. BROSELEY* (INHABITANTS) (1837), 7 Ad. & El.

423; 2 Nev. & P. K. B. 355; Nev. & P. M. C. 349; 1 J. P. 278; 112 E. R. 529.

*Annotation*.—*Consd.* R. v. Carnarvonshire J.J. (1841), 2 Q. B. 325.

**1532. — Omission from statement—Whether proof by respondent necessary.**—[Where a notice, under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, states, as the ground of appeal against an order of removal, that the pauper was settled in a third parish, not adding, as a ground, that he had no settlement in applt. parish, *resps.* are not bound to prove a settlement there. If, in proof of a settlement by renting a tenement, under 6 Geo. 4, c. 57, a writing not under seal be produced, demising land, & also professing to demise incorporeal hereditaments, at an entire rent, evidence may be given to show how much of such rent the land was worth. If the amount is £10 a year, & the land has been occupied, & rent paid, according to the statute, the settlement is good. The instrument above described reserved a rent of £75, & had a stamp of £1 10s.:—*Held*: sufficient: & the writing did not require to be stamped as a lease not otherwise charged, under Stamp Act, 1815 (c. 184), Sched. part 1.—R. v. HOCKWORTHY (INHABITANTS) (1837), 7 Ad. & El. 492; Nev. & P. M. C. 372; 2 Nev. & P. K. B. 383; Will. Woll. & Dav. 707; 7 L. J. M. C. 24; 1 J. P. 249; 112 E. R. 555.

**1533. — Grounds for denial insufficiently stated.**—[Parish Apprentices Act, 1816 (c. 139), ss. 1, 2, provides several requisites to the due binding of parish apprentices; among others, that the binding be ordered, & indenture allowed & signed, by particular justices; & where the child is bound by a parish to a party residing in another parish, that notice be given to the overseers of the latter, & proved, or admitted before the justices by one of such overseers personally, before the indenture be signed. Parish Apprentices Act, 1816 (c. 139), s. 5, enacts that no settlement shall be gained by such apprenticeship unless such order be made, & such allowances signed, "as herein-before directed." An applt. parish stated, Poor Law (Amendment) Act, 1834 (c. 76), s. 81, as the ground of appeal against a removal founded on a settlement by parish apprenticeship, "that the requisites of Parish Apprentices Act, 1816 (c. 139), & more particularly Parish Apprentices Act, 1816 (c. 139), s. 5, were not complied with":—*Held*: applt. parish could not, under this statement, dispute the settlement at sessions, on the ground that their overseers had no notice, & were not present at the binding.—R. v. WHITLEY UPPER (INHABITANTS) (1839), 11 Ad. & El. 90; 3 Per. & Dav. 81; 9 L. J. M. C. 12; 4 J. P. 20; 4 Jur. 23; 113 E. R. 348.

*Annotations*.—*Consd.* R. v. St. John, Margate (1841), 4 Per. & Dav. 653. *Refd.* R. v. St. Pancras (1849), 3 New Sess. Cas. 677.

**1534. — —.**—[Pauper was removed to applt. parish on his examination, at which he produced an indenture of apprenticeship, & swore to its execution, & that the consideration was £15, & that he was bound under it to C., that he was then fifteen years old, & that he served the time in applt. parish. Appls. gave notice of appeal, on the ground that the pauper did not acquire a settlement in applt. parish by reason of his being bound an apprentice by indenture, dated, etc., to one, etc., & by serving, etc., because the premium of £15 was paid by parish officers, & not by the pauper's father, & "that the requisitions of Parish Apprentices Act, 1816 (c. 139), "made for the regulation & binding of parish apprentices, then in force, were not complied with." On trial



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of the appeal, the sessions held that the execution of the indenture was not admitted by the notice of grounds of appeal, & that resps. were bound to begin by proving their case; which not being done, they quashed the order, subject to a case, which provided that the order of sessions, if the sessions were wrong, was to be quashed, & the appeal reheard. This ct., holding that the execution of the indenture was admitted, & that appls. ought to have begun by establishing their objection, quashed the order of sessions; but did not send the case back to be reheard.—*R. v. ST. JOHN, MARGATE (INHABITANTS)* (1841), 1 Q. B. 252; 4 Per. & Dav. 653; 5 J. P. 79; 5 Jur. 839; 113 E. R. 1125.

**1535.** ————]—Where grounds of appeal against an order of removal set up a settlement in a third parish by apprenticeship, but gave no date of the apprenticeship, & the sessions, therefore, held them insufficient, & confirmed the order, this ct. refused to interfere, on the ground that the sessions were the proper judges whether the date was necessary.—*R. v. CORNWALL JJ.* (1844), 1 New Sess. Cas. 161, n.

**1536.** ————]—Failure to show residence in respondent parish.]—A notice of grounds of appeal stated that the pauper's husband, in 1828, 1829, or 1830, subsequently to the settlement proved in the examination, "did rent & occupy" for twelve months "a house & land" in resp. parish, as tenant to C., of the yearly rent & value of £10 & upwards, " & did pay upwards of £10 rent for the same, & did thereby gain a settlement" in resp. parish:—*Held*: the notice of grounds was insufficient, not showing a residence in resp. parish.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1842), 2 Q. B. 505; 1 Gal. & Dav. 706; 11 L. J. M. C. 80; 6 J. P. 408; 6 Jur. 506; 114 E. R. 198.

*Annotations*:—*Consd.* *R. v. Brighton* (1842), 6 Jur. 536. *Appld.* *R. v. Old Stratford* (1842), 2 Q. B. 513; *R. v. St. Margaret, Rochester* (1843), 2 Q. B. 533. *Consd.* *R. v. Cornwall JJ.* (1844), 8 Jur. 289. *Refd.* *R. v. Richmond Recorder* (1858), 27 L. J. M. C. 197; *Uxbridge Union v. New Winchester Union* (1904), 68 J. P. 190. *Mentd.* *R. v. Cheshire JJ.* (1846), 1 New Mag. Cas. 602.

**1537.** ————]—Relief given by appellants—By mistake.]—*R. v. BEDINGHAM (INHABITANTS)*, No. 1295, *ante*.

**1538.** ————]—On instructions of clerk.]—The clerk to the guardians of W. union, comprising, among other places, the township of Wigan, wrote to the guardians of L. union, stating that he was directed to request them to relieve, on account of the W. union, certain paupers resident in the union of L. & chargeable there. The clerk added a sched., stating, among other particulars, that the paupers were settled in Wigan. The L. union thereupon advanced money to the paupers, & the sum was repaid to them by the clerk of W. union:—*Held*: on appeal against an order of removal to Wigan, that these facts were *prima facie* evidence of an acknowledgment by Wigan that the paupers were settled there, without proof of a written order by the W. guardians, & without further evidence of the circumstances under which the clerk was directed to write.—*R. v. WIGAN (INHABITANTS)* (1849), 14 Q. B. 287; 3 New Mag. Cas. 238; 3 New Sess. Cas. 670; 19 L. J. M. C. 18; 14 L. T. O. S. 174; 14 J. P. 37; 13 Jur. 1052; 117 E. R. 113.

**1539.** ————]—Relief given by respondents.]—(1) Where the sessions have decided that grounds of appeal, against an order of removal, are insufficiently stated, & consequently confirmed the order without going into the case, this is a decision on a preliminary point, & not on the merits; &

this ct. will therefore compel them to hear by *mandamus*, if their decision is wrong.

(2) A ground of appeal, stating that resp. parish have acknowledged the pauper's husband to be an inhabitant of & legally settled in their parish, by relieving the said husband & the said pauper, as part of his family, from time to time, during the last six years whilst the said husband & the said pauper were resident in other places out of resp. parish; & particularly by giving relief to the said pauper, as part of his family, several times in the years 1839 & 1840, during which he & his family were residing in the town of Liverpool:—*Held*: sufficient.—*R. v. CARNARVONSHIRE JJ.* (1841), 2 Q. B. 325; 1 Gal. & Dav. 423; 5 J. P. 798; 114 E. R. 127; *sub nom.* *R. v. CAERNARVONSHIRE JJ.*, 11 L. J. M. C. 3.

*Annotations*:—*As to* (1) *Distd.* *R. v. Charlbury & Walcott* (1843), 3 Q. B. 378. *Overd.* *R. v. Kesteven JJ.* (1844), 3 Q. B. 810. *M.F. R. v. West Riding JJ.* (1844), 1 New Sess. Cas. 247.

**1540.** ————]—Relief given by third parish.]—*Qu.*: whether evidence can be given in support of a ground of appeal which states that a pauper was settled in a third parish by reason of that parish having relieved him whilst resident out of that parish.—*R. v. HOLME ST. CUTHBERT'S (INHABITANTS)* (1847), 2 New Mag. Cas. 92; 8 L. T. O. S. 444; 11 J. P. 134.

**1541.** ————]—Settlement alleged in another parish—Inadequate statement.]—(1) Appls. against an order of removal stated, as their grounds of appeal, that the pauper, subsequently to the settlement alleged to have been obtained by her in applt. parish, gained a settlement in another parish by hiring & service for a year & upwards; & also that she gained a settlement subsequent to that first mentioned, by hiring & service for a year & upwards, & by having served several years under a general hiring, in resp. parish. The statement did not specify dates or names:—*Held*: an insufficient statement, under Poor Law (Amendment) Act, 1834 (c. 76), s. 81.

(2) The notice of appeal & statement of grounds are sufficiently signed, if two overseers sign them, though there is also a churchwarden, who does not.—*R. v. DERRYSHIRE JJ.* (1837), 6 Ad. & El. 885; 1 Nev. & P. K. B. 703; Nev. & P. M. C. 283; Will. Woll. & Dav. 248; 6 L. J. M. C. 140; 1 J. P. 104; 112 E. R. 339.

*Annotations*:—*As to* (1) *Refd.* *Ex p. Brosley* (1837), 1 J. P. 278; *R. v. Salop JJ.* (1837), 7 L. J. M. C. 3; *R. v. Bridge-water* (1841), 10 Ad. & El. 693; *R. v. Ealing* (1849), 12 Q. B. 178, n.; *R. v. Ruyton* (1861), 1 B. & S. 534. *As to* (2) *Refd.* *R. v. North Riding of Yorkshire JJ.* (1837), 2 Nev. & P. K. B. 103; *R. v. Surrey JJ.* (1843), 7 J. P. 675. *Generally.* *Mentd.* *Redheugh Colliery v. Gateshead Assmt. Com.* (1923), 93 L. J. K. B. 499.

**1542.** ————]—*R. v. ST. OLAVE'S, SOUTHWARK (INHABITANTS)*, No. 908, *ante*.

**1543.** ————]—Objection for uncertainty.]—A ground of appeal, which stated that B. the husband of the pauper, who was removed by the order to her maiden settlement, was born in or about the year 1810, in the parish of P. in the county of S. was objected to for uncertainty:—*Held*: the ground of appeal was sufficient, & the sessions were wrong in refusing to receive evidence in support of it.—*R. v. EALING (INHABITANTS)* (1849), 12 Q. B. 178, n.; 3 New Mag. Cas. 159; 3 New Sess. Cas. 514; 18 L. J. M. C. 185; 13 L. T. O. S. 115; 13 Jur. 470; 13 J. P. Jo. 297; 116 E. R. 834.

**1544.** ————]—Proof of settlement in respondent parish.]—(1) The examination of a pauper showed that he was born in applt. parish, & was afterwards bound & served as apprentice, & inhabited, under such service, partly in applt. parish &



partly in resp. parish, & more than forty days in each. Resps. proposed, at the sessions, to rely on the birth settlement:—*Held*: they were not precluded from so doing, by the fact that the examination contained allegations which, if true, showed a subsequent settlement by apprenticeship.

(2) Appls. relied upon a settlement in resp. parish, & proved that, on the last night of the service, the pauper slept in that parish:—*Held*: to establish this settlement, they must prove the apprenticeship, & could not treat it as admitted by resps., though the latter had sent examinations in which it was alleged, & it had not been traversed by the grounds of appeal.—*R. v. LATCHFORD (INHABITANTS)* (1844), 6 Q. B. 567; 1 Dav. & Mer. 290; 1 New Mag. Cas. 147; 1 New Sess. Cas. 387; 14 L. J. M. C. 20; 4 L. T. O. S. 133; 9 J. P. 132; 8 Jur. 1094; 115 E. R. 212.

*Annotations*:—*As to* (1) *Distd. R. v. St. Margaret's, Westminster* (1845), 1 New Mag. Cas. 328. *Follid. R. v. Ellesmere* (1849), 12 Q. B. 19. *Refd. R. v. St. Mary in Bungay* (1849), 12 Q. B. 38.

**1545. — Derivative settlement—Alternative settlement untraversed.**—An examination, transmitted with an order of removal, began thus. "The examination of A. B., now resident," etc., "taken before us, C. D. & E. F., two of Her Majesty's justices of the peace in & for the county of Salop, upon the complaint," etc., "this Jan. 25, 1847. The said examinant, A. B., upon his oath saith," etc. At the foot were the words "Taken & sworn at E.," in Salop, "this Jan. 25, 1847. C. D., E. F." The examination stated that the pauper was born in applt. parish, & had done no act to gain a settlement; & it then went into a detail of facts showing a derivative settlement in the same parish, acquired by the pauper through his father:—*Held*: resps. were entitled, at the sessions, to abandon the derivative & rely upon the birth settlement, & thereupon to have the order of removal confirmed, the birth settlement not being traversed by the grounds of appeal.—*R. v. ELLESMERE (INHABITANTS)* (1849), 12 Q. B. 19; 3 New Mag. Cas. 103; 3 New Sess. Cas. 551; 18 L. J. M. C. 181; 13 L. T. O. S. 232; 13 Jur. 657; 13 J. P. Jo. 346; 116 E. R. 772.

*Annotation*:—*Refd. R. v. St. Mary in Bungay* (1849), 12 Q. B. 38.

**1546. — Inquiries by respondents.**—On appeal against an order of removal of an illegitimate child under the age of sixteen years, whereby such child was adjudged to be settled in the place of its birth, it was admitted by resps. that the child's mother was still living; but no evidence was given to show that she had any settlement, nor, on the other hand, was there any evidence of failure by resps. to make inquiries:—*Held*: in the absence of proof that the mother had a settlement elsewhere, the burden of which proof, there being no evidence of failure by resps. to make inquiries, was upon appls.; the child must be deemed to be settled in the place of its birth.—*HEADINGTON UNION v. IPSWICH UNION* (1890), 25 Q. B. D. 143; 59 L. J. M. C. 92; 62 L. T. 786; 54 J. P. 516; 38 W. R. 586, C. A.

**1547. — Onus of proof.**—An order of justices for removing the wife & daughters of a pauper to the place of their settlement is supported *prima facie* by showing that the parish to which the removal was made was the place of settlement of the wife before her marriage; although it also appeared by a copy of the marriage register that the husband was therein described to be of another parish; which description was held to be no evidence of his having a settlement there: & such evidence throws the burden of

proof upon appls., that the husband was settled in another parish.—*R. v. HARBERTON (INHABITANTS)* (1811), 13 East, 311; 104 E. R. 390.

*Annotations*:—*Follid. R. v. Yelvertoft* (1845), 6 Q. B. 801. *Refd. R. v. Cottingham* (1827), 7 B. & C. 615; *R. v. St. Mary Beverley* (1830), 1 B. & Ad. 201; *R. v. Birmingham* (1846), 8 Q. B. 410; *Rotherghlen Parish Council v. Glasgow Parish Council*, [1902] A. C. 360.

].—The only settlement disclosed by the examinations was the birth settlement of the pauper's late husband:—*Held*: under a ground of appeal which stated generally that "the pauper was not at the time of the order, nor was the late husband at the time of his decease, legally settled" in applt. parish, resps. were bound to give evidence of the birth of the pauper's late husband in applt. parish, though there was no ground of appeal traversing the fact of his being born there, or alleging that he was born elsewhere.—*R. v. St. GILES, COLCHESTER (INHABITANTS)* (1848), 12 Q. B. 13; 3 New Mag. Cas. 6; 3 New Sess. Cas. 240; 17 L. J. M. C. 148; 11 L. T. O. S. 434; 12 J. P. 645; 12 Jur. 726; 116 E. R. 770.

**1549. — Rectifiable error in statement.**—A pauper was removed on an examination, taken May 1, 1847, stating a settlement through a binding, in 1804, by indenture of apprenticeship, which was destroyed thirty-eight years ago, & service thereunder & residence. The ground of appeal was that the pauper "was not, in the year 1834, legally bound apprentice" "as stated in the examination." The sessions held that the apprenticeship was not traversed, & confirmed the order, subject to a case, stating the facts as above, & that the order of sessions was to be quashed if this ct. should be of opinion that the grounds of appeal did raise an issue on the question of settlement:—*Held*: the order of sessions was wrong, & must be quashed, inasmuch as it could be collected from the examination & statement of grounds that resps. could not have been misled by the variance in the latter as to the date; & such date must be rejected as insensible.—*R. v. ASTON NIGH BIRMINGHAM (INHABITANTS)* (1849), 12 Q. B. 26; 4 New Mag. Cas. 13; 3 New Sess. Cas. 661; 19 L. J. M. C. 17; 14 L. T. O. S. 153; 14 J. P. 208; 13 Jur. 1077; 116 E. R. 775.

**1550. — Proof of settlement by respondents.**—H., the wife of W., having been removed to her maiden settlement, upon the hearing of an appeal against the order of removal, resps. proved that the maiden settlement of H. was in applt. parish, & also that W. was born in the city of Ipswich where there were several parishes, but in which of them did not appear:—*Held*: as it was incumbent on resps. to show that the pauper was settled in the parish to which the removal was made, & as they had disproved that by showing that the husband had a birth settlement in some parish in Ipswich, the sessions ought to have quashed the order of removal.—*R. v. St. MARY, BEVERLEY (INHABITANTS)* (1830), 1 B. & Ad. 201; 9 L. J. O. S. M. C. 17; 109 E. R. 762.

*Annotations*:—*Distd. R. v. Yelvertoft* (1845), 6 Q. B. 801. *Appld. R. v. Birmingham* (1846), 8 Q. B. 410. *Refd. R. v. Ealing* (1849), 12 Q. B. 178, n.

**1551. —**—Under the general ground of appeal "that the statements contained in the said examinations are not true," appls. are entitled to call upon resps. to prove the settlement relied upon in the examinations.

It is for the sessions to consider any question of inconvenience arising from such general ground of appeal, & if it amounts to a frivolous & vexatious statement, to award costs under Poor Law (Amendment) Act, 1834 (c. 76), & Poor Law Procedure

*Sect. 3.—Removal orders: Sub-sect. 5, B. (e) ii. & iii., (f) & (g) i.]*

Act, 1848 (c. 31).—*R. v. St. PANCRAS (INHABITANTS)* (1849), 12 Q. B. 31; 3 New Mag. Cas. 236; 3 New Sess. Cas. 677; 19 L. J. M. C. 23; 14 L. T. O. S. 174; 14 J. P. 175; 13 Jur. 1077; 116 E. R. 777.

1552. —[Grounds of appeal against an order of removal stated a settlement acquired by the pauper's grandfather, & that, after the acquisition of that settlement, the father was an unemancipated member of the grandfather's family; & that neither the pauper nor his father had gained any settlement in their own right:—*Held*: sufficient, without enumerating & negating the modes in which the pauper's father might have been emancipated.—*R. v. ROTHWELL (INHABITANTS)* (1845), 7 Q. B. 574, n.; 1 New Mag. Cas. 362; 2 New Sess. Cas. 46; 14 L. J. M. C. 159; 5 L. T. O. S. 197; 9 J. P. 714; 9 Jur. 552; 115 E. R. 605.

*iii. Amendment of Statement.*

*See Quarter Sessions Act, 1849 (c. 45), s. 3.*

1553. Where appeal adjourned—Amended statement served.—For ensuing sessions.]—If appts. serve a statement of the grounds of appeal, under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, fourteen days before the sessions for which notice of trying the appeal is given, & the appeal be entered & adjourned, they may, fourteen days before the sessions to which the adjournment is made, serve another statement, varying from the first, & treat such new statement as the only one.—*R. v. DERBYSHIRE JJ.* (1838), 6 Ad. & El. 612, n.; 3 Nev. & P. K. B. 591; 1 Will. Woll. & H. 365; 7 L. J. M. C. 91; 2 J. P. 568; 112 E. R. 235.

*Annotations:—Distd. R. v. Arlecdon* (1839), 11 Ad. & El. 87. *Fold. R. v. Kendal* (1859), 1 E. & E. 492.

1554. —[On appeal against an order of removal, appts., under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, served a statement of grounds of objection, which only impugned the alleged settlement. On the hearing of the appeal the bench, being equally divided, adjourned the case to the next sessions. Before the next sessions, appts. served another statement, containing an objection to the notice of chargeability under Poor Law (Amendment) Act, 1834 (c. 76), s. 79. The sessions having quashed the order of removal, on the objection last mentioned:—*Held*: the objection ought not to have been entertained, since it was not mentioned in the original statement of grounds of appeal; & the ct. sent the case back to sessions to be heard on the merits.—*R. v. ARLECDON (INHABITANTS)* (1839), 11 Ad. & El. 87; 3 Per. & Dav. 93; 9 L. J. M. C. 9; 9 L. J. Q. B. 33; 4 J. P. 219; 4 Jur. 7; 113 E. R. 347.

*Annotation:—Distd. R. v. Kendal* (1859), 1 E. & E. 492.

1555. —[Appts. against an order of removal delivered to resps. notice of trial of the appeal, & a statement of grounds of appeal, fourteen days before the then next sessions. The appeal came on at those sessions. After resps.' counsel had begun to state his case, the sessions, on the application of appts.' counsel, adjourned the appeal to the next sessions, on the ground of the absence, through illness, of a material witness. Fourteen days before the sessions to which the appeal was adjourned, appts. delivered a fresh statement of grounds of appeal, raising several new grounds. At the adjourned hearing, resps. objected to any fresh grounds being entered upon: but the sessions overruled the objection, & quashed the order on evidence given solely in support of

one of the new grounds. On a case stated by the sessions:—*Held*: the trial of the appeal having been adjourned, the sessions to which it was adjourned were "the sessions at which such appeal" was "intended to be tried," within Poor Law (Amendment) Act, 1834 (c. 76), s. 81; & appts. were entitled to deliver fresh grounds of appeal fourteen days before those sessions.—*R. v. KENDAL (INHABITANTS)* (1859), 1 E. & E. 492; 28 L. J. M. C. 110; 32 L. T. O. S. 274; 23 J. P. 550; 5 Jur. N. S. 545; 7 W. R. 191; 120 E. R. 994.

*Annotation:—Consd. R. v. Cambridge Union* (1861), 1 B. & S. 61.

1556. Extent of amendment permitted—Jurisdiction of justices.]—The powers of amendment of grounds of removal or of appeal conferred upon quarter sessions by Poor Law Procedure Act, 1848 (c. 31), s. 4, extend to the addition of an entirely new ground. The decision of the sessions as to such amendment is final.

Where the sessions upon the hearing of an appeal against an order of removal, added a new ground of removal setting up a previous order for the removal of the same pauper, which had not been appealed against:—*Held*: such an amendment was within the jurisdiction conferred upon them by Poor Law Procedure Act, 1848 (c. 31), s. 4, & this ct. had no power to interfere.—*R. v. LIANGENNY (INHABITANTS)* (1863), 4 B. & S. 311; 32 L. J. M. C. 265; 10 Jur. N. S. 126; 122 E. R. 476; *sub nom. LIANGENY v. MERTHYR TYDFIL*, 8 L. T. 696; 27 J. P. 452.

*Annotations:—Apld. Epping Union v. Canterbury Union* (1909), 73 J. P. 411. *Fold. Uxbridge Union v. Winchester Union* (1904), 91 L. T. 533.

1557. —[On an appeal against a removal order, one of the grounds of chargeability having stated that the pauper served as an apprentice in parish T. but slept in applt. parish the last forty days of such apprenticeship & was settled in applt. parish, appts. traversed this ground but did not allege any settlement in T.:—*Held*: appts. could not be allowed to prove that the settlement was in T.; (2) the justices at quarter sessions might have amended the grounds of appeal so as to allow an allegation that the pauper was settled in T.—*R. v. WEST BROMWICH (INHABITANTS)* (1863), 27 J. P. 726.

*(f) The Hearing.*

*See Poor Law Act, 1927 (c. 14), s. 127 (3) (4); & generally, MAGISTRATES, Vol. XXXIII., pp. 390-406.*

1558. Adjournment—Justices equally divided.]—The sessions, if the magistrates present are equally divided, cannot make any order, but ought to enter continuance till the next sessions, in order that the ct. may again proceed on the appeal.—*R. v. WESTMORELAND JJ.* (1735), 2 Sess. Cas. K. B. 352; 2 Bott. 734; 93 E. R. 227.

1559. —[For attendance of pauper.]—The sessions are not warranted in refusing to hear an appeal against an order of removal, because appts. do not produce the pauper; they tendering evidence that he had absconded, & that they had *bonâ fide* used due diligence to find him out.

Nor are they warranted in so refusing, although appts. had previously obtained an adjournment, to enable them to find out the pauper, upon an understanding that no further time should be applied for.—*R. v. CORNWALL JJ.* (1831), 9 L. J. O. S. M. C. 82.

1560. —[Material witness absent—Conditional on payment of costs.]—On appeal against an order of removal both parties attended at sessions, full

notice of appeal having been given, & no countermand. Appls. then moved to enter the appeal, & to respite it, on the ground of a material witness being absent. The sessions refused to comply with the motion, unless on payment of the costs of the day, which it was their practice to require in such cases; & the appeal was not entered. On motion for a *mandamus*:—*Held*: the sessions had exercised a proper discretion in refusing to respite, & their not having entered the appeal was immaterial.—*R. v. MONMOUTHSHIRE JJ.* (1831), 1 B. & Ad. 895; 9 L. J. O. S. M. C. 116; 109 E. R. 1019.

—*See, also, MAGISTRATES, Vol. XXXIII., pp. 386, 387, Nos. 961, 963, 972.*

**1561. Refusal to hear appeal—Pauper absent.]—***R. v. CORNWALL JJ., No. 1559, ante.*

—*See, also, MAGISTRATES, Vol. XXXIII., pp. 304, 393, 441, 445, 446, Nos. 201, 1036, 1037, 1508, 1546, 1556, 1561.*

**1562. Witnesses not examined by justices called—No obligation to call those examined.]—**(1) *Resps.*, on the hearing of an appeal, may prove their case by a witness not produced before the removing magistrates; & may omit calling a witness who appeared before the magistrates, though appls. require it & the witness is in ct.

(2) Pauper was removed to his mother's maiden settlement in Y. His father, in the examination, stated that he believed that he himself was born in London, but had never heard in what parish, & had never done any act to gain a settlement in his own right:—*Held*: on proof of the mother's settlement in Y., the justices might remove pauper thither, & that, on appeal against the removal, *resps.*, at sessions, might rely *prima facie* on the mother's maiden settlement, without proving any inquiry made as to the settlement of the father.

(3) The mother's brother, in the examination, stated that she was born at Y. & was the person mentioned in a certificate of baptism, which was produced, & at the date of which he was less than four years old:—*Held*: to be evidence, on which the removing magistrates might act, of the mother's birth in Y.—*R. v. YELVERTON (INHABITANTS)* (1845), 6 Q. B. 801; 1 Dav. & Mer. 310; 1 New Mag. Cas. 200; 1 New Sess. Cas. 476; 14 L. J. M. C. 78; 4 L. T. O. S. 312; 9 J. P. 199; 9 Jur. 106; 115 E. R. 302.

*Annotation:—Is to (2) Apld. R. v. Birmingham (1846), 8 Q. B. 410.*

**1563. Right of appellants to copy of depositions.]—**Where an order has been made under 8 & 9 Vict., c. 126, adjudicating the settlement of a lunatic pauper to be in a given parish, & an order for the maintenance of such pauper is also made & served upon the treasurer of the union in which such parish is:—*Held*: appls. were entitled to a copy of the examinations on which the orders were made, for an appeal against the order of maintenance was substantially an appeal against the order of settlement, & the provisions of Poor Law (Amendment) Act, 1834 (c. 76), s. 79, are incorporated into 8 & 9 Vict., c. 126, so far as they are in their nature applicable to appeals under that Act.—*R. v. MIDDLESEX JJ.* (1847), 11 J. P. 461.

#### (g) Evidence.

##### i. In General.

**1564. Declaration as to settlement—Statement by deceased person.]—**On an appeal against a removal order of a woman to S. parish on the ground that her father was settled in S., & she had no other settlement than his, evidence was tendered of a statement of deceased father that he never was married, & therefore that the settle-

ment failed:—*Held*: the statement was admissible, it being a case of pedigree about the father's family, & the father was a member of his own family.—*R. v. ST. MARYLEBONE (INHABITANTS)* (1863), 27 J. P. 423.

—*See EVIDENCE, Vol. XXII., pp. 97, 98, 100, 240, Nos. 677–682, 705, 2162.*

—**Ex parte examination of pauper—Witness unavailable.]—***See EVIDENCE, Vol. XXII., p. 131, No. 1055.*

—**Production of parish certificate.]—***See EVIDENCE, Vol. XXII., p. 353, No. 3581.*

—**Interpretation of deed.]—***See DEEDS, Vol. XVII., p. 324, No. 1345.*

**1565. Former order of sessions—How far conclusive.]—**Where, upon the hearing of an appeal, a former order of sessions, quashing an order of removal between the same parishes, is relied upon by one party, it is competent to the other party to give evidence of the grounds upon which that order of sessions was made; & if it appear that they were independent of the merits, the order is not conclusive.—*R. v. WORCESTERSHIRE JJ.* (1828), 7 L. J. O. S. M. C. 72.

**1566. ———.]—**Where, on the trial of an appeal against an order of removal, appls. produced a former order between the same parties, which had been quashed generally, & *resps.* tendered evidence of the circumstances under which it had been quashed, namely that they had abandoned it on account of some defect in form, without going to the sessions:—*Held*: the sessions were bound to receive such evidence &, having refused, a *mandamus* issued to compel them to hear.—*R. v. FLINTSHIRE JJ.* (1844), 1 New Sess. Cas. 288; 13 L. J. M. C. 103; *sub nom. R. v. FLINTSHIRE JJ., Ex p. LLANGERNIEW PARISH & CWM PARISH*, 3 L. T. O. S. 207; 9 J. P. 135; 8 Jur. 929.

**1567. ———.]—**The sessions, on appeal, quashed an order of removal "not upon the merits," & "without prejudice to the making of any other order" to remove the same pauper. On appeal against a subsequent order:—*Held*: appls. were not at liberty to show, by parol evidence, that the first order of sessions was made on such grounds as, though the sessions deemed them merely technical, did legally conclude the question of settlement.—*R. v. ST. ANNE'S, WESTMINSTER (INHABITANTS), The WOOD* (1847), 9 Q. B. 878; 2 New Mag. Cas. 61; 2 New Sess. Cas. 525; 10 L. J. M. C. 41; 11 J. P. 183; 11 Jur. 229; 115 E. R. 1511.

**1568. ———.]—**Upon the trial of an appeal against an order of removal *resps.* relied upon a former order unappealed against. It was proved that on the former occasion the assistant overseer of the removing parish delivered the paupers, together with a true copy of the order, to the overseers of applt. parish; who received them, sent them to a house for the night, & gave them relief the next morning:—*Held*: sufficient evidence, from which the sessions might infer that the order had been properly served.—*R. v. ASHE* (1848), 2 New Mag. Cas. 405; 10 L. T. O. S. 324; 12 J. P. Jo. 53.

—**Production of original order of removal.]—***See EVIDENCE, Vol. XXII., pp. 242, 243, Nos. 2194, 2195.*

**1569. Evidence as to notice of chargeability—Enforcement of admission.]—**Where the sessions refuse to hear evidence offered by appls. to show that no complaint of chargeability had been made, on the ground that it was sufficient to recite such notice in the order of removal, the ct. will grant a *mandamus* to enter continuances & hear the

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appeal.—*R. v. EAST SUSSEX JJ.* (1844), 1 New Mag. Cas. 167; *sub nom. R. v. SUSSEX JJ.*, 1 New Sess. Cas. 438; 9 J. P. 103.

*Examination out of court.*—See EVIDENCE, Vol. XXII., p. 568, No. 6185.

1570. Evidence of settlement in appellant parish—Whether admissible—Where settlement shown in third parish.]—It is no objection to an order of removal, that the examination upon which it is founded discloses evidence, by relief, of a subsequent settlement of the pauper in a third parish.

Where the examination stated an acknowledgment of a settlement in S. applt. parish, by relief, & a subsequent acknowledgment by relief in C., & the sessions refused to enter into the question of the settlement in S., on the ground that they were concluded by the statement of a subsequent settlement in C., & therefore quashed the order of removal, this ct. quashed the order of sessions.—*R. v. WHITWICK (INHABITANTS)* (1844), 1 New Sess. Cas. 22; 14 L. J. M. C. 25; 2 L. T. O. S. 320; 8 J. P. 742.

1571. Variance between depositions & evidence—Duty of magistrates to adjudicate.]—*R. v. ST. LAWRENCE, APPLEBY (INHABITANTS)* (1843), 1 New Mag. Cas. 190; 1 L. T. O. S. 107; 7 J. P. 255.

*ii. Restricted to Grounds in Depositions or Statement.*

See Poor Law Act, 1927 (c. 14), s. 127 (4).

1572. Evidence for appellants—Confined to particulars of grounds of appeal.]—A pauper being removed to a parish as settled there by hiring & service, the parish gave notice of appeal, stating, as the ground (pursuant to Poor Law (Amendment) Act, 1834 (c. 76), s. 81), that the pauper, at his hiring, stipulated to have two days' holidays at Spalding Club Feast in July; & that he had such holidays during his year of service. On the hearing of the appeal, the pauper, called for resps., proved on cross-examination that he, at his hiring, bargained for one day's holiday to go to Holbeach Fair, & had it during the year; but that he did not bargain for, or have, any holiday at Spalding Club Feast. The sessions having found an exceptive hiring, subject to the opinion of this ct. whether evidence as to the one day's holiday was admissible:—*Held*: under the notice given, such evidence could not be received.—*R. v. HOLBEACH (INHABITANTS)* (1836), 5 Ad. & El. 085; 2 Har. & W. 414; 1 Nev. & P. K. B. 137; Nev. & P. M. C. 20; 6 L. J. M. C. 5; 111 E. R. 1824.

*Annotations*:—*Appld. R. v. Surrey JJ.* (1837), 1 Jur. 774. *Refd. R. v. Derbyshire JJ.* (1837), 6 Ad. & El. 885; *R. v. Salop JJ.* (1837), 7 L. J. M. C. 3; *R. v. Whitley Upper* (1839), 11 Ad. & El. 90. *Mentd. Ex p. Broseley* (1837), 7 Ad. & El. 423.

1573. ———.]—No objection, which is not stated in the grounds of appeal, can be taken, either at sessions or in this ct., to an order of removal, although such objection appear on the face of the case sent up from the sessions.—*R. v. STAFFORD (INHABITANTS), R. v. COSTOCK (INHABITANTS)* (1839), 10 Ad. & El. 417; 1 Per. & Dav. 414; 8 L. J. M. C. 62; 3 J. P. 467; 3 Jur. 504; 113 E. R. 159.

*Annotation*:—*Appld. R. v. Heyop* (1846), 10 Jur. 200.

1574. ———.]—An order for the removal of H., widow, from S. to B. was made, on an examination showing that she was sent to B. as the settlement of her deceased husband; that in 1815 an estate in B. was given by oral grant to the husband's father, who entered upon & occupied it

for thirteen years, during which time he paid the poor rates as occupier; that from 1815 the pauper's husband lived on the estate with his father as part of his family; & that he was married to pauper in 1826, when he was residing with his father on the estate. The examination did not show that the rate books were produced before the removing, or that evidence was given to account for the non-production. The grounds of appeal, after traversing the several grounds of removal in fact, &, amongst others, the payment of rates by the father, objected "that the examination is informal & wholly insufficient in law, & bad on the face of it; that the examination does not contain any sufficient evidence of a settlement gained" by the father: & that the examination does not show in what year the father paid rates: nor a sufficient residence by the father, nor that the husband was unemancipated at the time of his marriage: with other specific objections: but there was no specific objection to the non-production of the rate books. The sessions quashed the order, finding that resps. were entitled to judgment on the merits, but that the examination was insufficient on the face of it; on which point, however, they desired the opinion of this ct.:—*Held*: under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, on these grounds of appeal appls. could not insist that the examination did not show any proof given of the father having been actually rated; the general ground conveying no information as to that point, & the specific grounds rather leading to the conclusion that appls. did not mean to take it.—*R. v. STAPLE FITZPAINE (INHABITANTS)* (1842), 2 Q. B. 488; 1 Gal. & Dav. 605; 11 L. J. M. C. 38; 6 J. P. 89; 6 Jur. 277; 114 E. R. 192.

*Annotations*:—*Distd. R. v. Flockton* (1843), 2 Q. B. 535. *Consd. R. v. Birmingham* (1840), 6 L. T. O. S. 479. *Refd. R. v. St. Mary, Bungay* (1840), 4 New Mag. Cas. 1; *R. v. St. Pancras* (1849), 12 Q. B. 31.

1575. ———.]—Where it is intended to rely on any fact stated in the examination on which a pauper is removed, as forming part of the grounds of appeal against such removal, there should be an express reference in the statement of the ground of appeal to such examination, & to the facts stated therein, as being the facts relied on by appls.—*R. v. STOWFORD (INHABITANTS)* (1842), 2 Q. B. 526; 2 Gal. & Dav. 390; 12 L. J. M. C. 7; 7 J. P. 36; 6 Jur. 970; 114 E. R. 206.

1576. ———.]—In the examinations on which an order of removal from the township of L. to the parish of C. was founded, M. stated that she was the widow of A., who was born at C. of parents settled there, as she believed; & J. stated that he was an elder brother of A., who was born in C. The grounds of appeal alleged that the order, notice of chargeability, & examinations were bad on the faces thereof, & that the examinations contained no legal evidence of the pauper's settlement in C., or of their having come to settle in, or being chargeable to L. At the trial of the appeal, appls. contended that the examinations did not show that the A. mentioned by the widow was the same A. mentioned by J. Resps. objected that this point was not raised by the grounds of appeal. The sessions quashed the order on the point raised by appls. A rule nisi for a *mandamus* having been obtained:—*Held*: the objection was sufficiently raised by the grounds of appeal, & the decision of the justices was final.—*R. v. STAFFORDSHIRE JJ.* (1847), 4 Dow. & L. 624; 2 New Mag. Cas. 164; 2 New Sess. Cas. 557; 16 L. J. M. C. 53; 11 Jur. 108; 11 J. P. 459; *sub nom. R. v. STAFFORDSHIRE JJ., CAULDON v. LEEK & LOWE*, 8 L. T. O. S. 394.

1577. — — —.]—(1) On appeal against an order of removal, appls. offered evidence of a former judgment of quarter sessions quashing an order of removal founded on the same alleged settlement. The order of sessions, as entered on their minutes, stated that the order of removal was quashed "on the ground that the examinations are insufficient to support the same":—*Held*: this entry was general enough to let in evidence on the part of resps. that the adjudication proceeded on matter of form, not merits.

(2) To make the examination of a person in custody admissible under Poor Relief Act, 1819 (c. 12), s. 28, on a question of settlement, it must be proved expressly that the party was in custody, as required by the statute, at the very time when such examination was tendered in evidence.

(3) The wife & children of B., were removed on examinations showing settlement of B. by hiring & service under C., & by birth. Appls. stated as distinct grounds of appeal: that the parents of B. were removed to, & acknowledged as settled inhabitants by, a third parish, & that he had acquired no settlement in his own right: that B. did not become settled in applt. parish by hiring & service under C.: & that the paupers were not settled in applt. parish in any manner whatever:—*Held*: appls. could not give evidence that B. was not born in applt. parish.—*R. v. WIDECOMBE IN THE MOOR (INHABITANTS)* (1847), 9 Q. B. 894; 2 New Mag. Cas. 64; 2 New Sess. Cas. 539; 16 L. J. M. C. 44; 8 L. T. O. S. 364; 11 J. P. 213; 11 Jur. 227; 115 E. R. 1518.

*Annotations*:—*Distd. R. v. St. Giles, Colchester* (1843), 12 Q. B. 13. *Refd. R. v. Landkey* (1847), 11 J. P. 440.

1578. — — —.]—*Though order manifestly bad.*—Poor Law (Amendment) Act, 1834 (c. 76), s. 81, precluding appls. against an order of removal from entering, at sessions, into any ground of appeal not specified in the statement sent with their notice of appeal, etc., extends to objections apparent on the face of the order.

In an order removing parents & children, the omission to state the children's names is not a defect apparent on the face of the order (*COLERIDGE, J.*).—*R. v. WITTENBURNICK (INHABITANTS)* (1837), 6 Ad. & El. 273; 1 Nev. & P. K. B. 423; Nev. & P. M. C. 135; Will. Woll. & Dav. 19; 6 L. J. M. C. 54; 1 J. P. 36; 1 Jur. 38; 112 E. R. 104.

*Annotations*:—*Appld. R. v. Middleton, Toesdale* (1840), 10 Ad. & El. 688. *Consd. R. v. Middlesex JJ.* (1847), 11 J. P. 405. *Refd. R. v. Stafford, R. v. Costock* (1839), 8 L. J. M. C. 62.

1579. — — —.]—*Particulars incomplete in depositions.*—A copy of examination furnished, under Poor Law (Amendment) Act, 1834 (c. 76), s. 79, on removal of a pauper, does not give sufficient information of the settlement relied upon, if it merely state that the party gained a settlement by renting & occupying a tenement of J., the landlord, in the township, etc., to which the pauper is removed, of the yearly rent of £10; no time being specified. On appeal, appls. may take advantage of such defect, though their notice of grounds of appeal state only that the order of removal, examination, & notice of chargeability, are bad upon the faces thereof.—*R. v. MIDDLETON, TEESDALE (INHABITANTS)* (1840), 10 Ad. & El. 688; 3 Per. & Dav. 473; 9 L. J. M. C. 55; 4 J. P. 686; 4 Jur. 653; 113 E. R. 261.

*Annotations*:—*Consd. R. v. Alternun* (1841), 10 Ad. & El. 699. *Appld. R. v. Lydeard St. Lawrence* (1841), 11 Ad. & El. 616; *R. v. North Bovey* (1842), 2 Q. B. 500. *Distd. R. v. Staple Fitzpaine* (1842), 2 Q. B. 488. *Appld. R. v. Flookton* (1843), 2 Q. B. 535. *Distd. R. v. Lilleshall* (1845), 7 Q. B. 158. *Consd. R. v. St. Pancras* (1849), 13 Q. B. 31. *Refd. R. v. Bridgewater* (1841), 10 Ad. & El. 693.

1580. — — —.]—An examination of a pauper stated an apprenticeship, & that the indentures "were assigned to W. of F.," applt. parish, "with whom I went & resided between three & four years":—*Held*: under Poor Law (Amendment) Act, 1834 (c. 76), s. 81, not to be a sufficient statement of the pauper's residence in F. to let in evidence of a settlement in F. by apprenticeship; & the objection might be taken on grounds of appeal, one of which was "that the examination was bad on the face thereof," the other grounds raising merely questions of fact.—*R. v. FLOCKTON (INHABITANTS)* (1843), 2 Q. B. 535; 2 Gal. & Dav. 664; 12 L. J. M. C. 70; 12 L. J. Q. B. 260; 1 L. T. O. S. 78; 7 J. P. 369; 7 Jur. 439; 114 E. R. 210.

1581. *Evidence of respondents—Confined to grounds for removal in depositions.*—The parish of S., removing a pauper to M., sent to M. his examination, which stated that the pauper was hired by one D. P. of T., to serve him for a year, from May Day, 1829; that pauper went into his service in the parish of T.; that, when he had been there a fortnight, his master said that the servant of his mother, Mrs. P., of M., did not suit, & proposed to pauper to go & live with Mrs. P. instead of him; & that pauper consented, went to M., & served the remainder of his year with Mrs. P., without any fresh agreement. M. appealed, stating, by their notice of grounds of appeal, that the pauper did not gain any settlement in M. by reason of his having been hired by D. P. of T. to serve him for a year, & having served D. P. for a fortnight in T., & D. P.'s mother for the rest of the year in M., under the circumstances stated in the examination; & that pauper's contract of service with D. P. was dissolved on pauper's leaving the same. At the sessions, resps. opened as their case, that the pauper had been hired by & served D. P., father of the above-mentioned D. P., & husband of Mrs. P., for a year ending at May Day, 1829; that the hiring in 1829 was by D. P. the younger, as agent for his father, & that the pauper in fact served for the whole year, beginning on May Day, 1829, under the original hiring made on behalf of D. P., the father. The sessions received proof of this case, & confirmed the order, subject to the opinion of the ct. of K. B. on the admissibility of the evidence:—*Held*: by Poor Law (Amendment) Act, 1834 (c. 76), s. 81, resps. were precluded from going into such evidence.—*R. v. MISTERTON (INHABITANTS)* (1837), 6 Ad. & El. 878; 2 Nev. & P. K. B. 109; Nev. & P. M. C. 328; Will. Woll. & Dav. 435; 6 L. J. M. C. 107; 1 J. P. 184; 1 Jur. 450; 112 E. R. 336.

*Annotation*:—*Consd. R. v. Derbyshire JJ.* (1837), 6 Ad. & El. 885.

1582. — — —.]—(1) Where the pauper's examination differs from his evidence at sessions, as to any circumstance making a part of the matter pointed to in the statement of grounds of appeal, it is for the sessions to decide whether the variance be material within Poor Law (Amendment) Act, 1834 (c. 76), s. 81.

(2) The examination of the pauper is to be construed as strictly as the statement of grounds of appeal.—*R. v. WEST RIDING OF YORKSHIRE JJ.* (1840), 10 Ad. & El. 685; 3 Per. & Dav. 462; 4 J. P. 333; 4 Jur. 533; 113 E. R. 260; *sub nom. R. v. WEST RIDING JJ., Ex p. BIRSTWITH (INHABITANTS)*, 9 L. J. M. C. 57.

*Annotation*:—*As to (2) Distd. R. v. Bridgewater* (1841), 10 Ad. & El. 693.

1583. — — —.]—The examination of a pauper stated facts tending to show general admissions

**Sect. 3.—Removal orders: Sub-sect. 5, B. (g) ii., (h) & (i).]**

of a settlement by applt. parish: the notice of objections denied the fact of any such settlement & the fact of the admissions. On the appeal, the sessions admitted evidence by resps. of a settlement in applt. parish by hiring & service; & confirmed the order of removal:—*Held*: such evidence was inadmissible, under Poor Law (Amendment) Act, 1834 (c. 76), s. 81: & this ct. quashed the order of sessions.—*R. v. EAST VILLE (INHABITANTS)* (1841), 1 Q. B. 828; 1 Gal. & Dav. 150; 10 L. J. M. C. 132; 10 L. J. Q. B. 263; 5 J. P. 624; 5 Jur. 484; 113 E. R. 1348.

1584. ———.]—An order made for the removal of certain paupers therein described as “J. P. the lawful wife of W. P. P., now absent from her, & their three children, born in lawful wedlock” to the maiden settlement of J. P. was appealed against, & at the trial of the appeal applt. proved a settlement of W. P. P. in a parish at Cambridge, as stated in their grounds of appeal. Resps. then tendered evidence to show that the marriage of the pauper with W. P. P. was null & void, he having a wife alive at the time he married J. P. The sessions admitted this evidence, & confirmed the order of removal:—*Held*: this evidence ought not to have been admitted, & resps. could not be allowed to set up one ground of removal & adopt another.—*R. v. HENFIELD* (1843), 2 L. T. O. S. 147; 8 J. P. 21. \*

1585. ———.]—The grounds of removal of a female pauper stated a derivative settlement from her great-grandfather; & alleged an acknowledgment of that settlement by relief given to her great-grandmother, & by a collateral relation having been removed to the parish. On the trial of an appeal at quarter sessions against the order of removal, resps. offered evidence to show the removal to applt. parish of another collateral relation—the wife of a grandson of the common ancestor—on a settlement also derived from him. This evidence was objected to, but received, & the question of its admissibility was reserved for this ct.:—*Held*: (1) the ct. of quarter sessions were prohibited by Poor Law Procedure Act, 1848 (c. 31), from reserving the above question for the consideration of this ct.; (2) the evidence was receivable.—*R. v. RUYTON OF THE ELEVEN TOWNS (INHABITANTS)* (1861), 1 B. & S. 534; 30 L. J. M. C. 229; 25 J. P. 741; 7 Jur. N. S. 907; 121 E. R. 13.

*Annotations*:—*Consd. R. v. Llangenny* (1863), 4 B. & S. 311. *Refd. Epping Union v. Canterbury Union* (1909), 73 J. P. 411.

1586. ———.]—**Jurisdiction of justices to amend.**—The notice of the grounds of removal of a female pauper from resp. parish, having alleged a settlement in applt. parish, gained by the pauper's deceased husband, by renting a tenement & payment of taxes under Poor Law (Amendment) Act, 1834 (c. 76), s. 66, quarter sessions, though of opinion that a good settlement under that statute had not been proved, & though no other was alleged in the notice, upheld the order of removal, on the ground that a good settlement had been proved by payment of parochial rates under Poor Relief (Settlement) Act, 1825 (c. 57), s. 2:—*Held*: quarter sessions had jurisdiction to confirm the order of removal on a ground not stated in the notice.—*CHELTENHAM UNION v. BIRMINGHAM UNION* (1874), 30 L. T. 702; 39 J. P. 39.

*Annotation*:—*Refd. Epping Union v. Canterbury Union* (1909), 73 J. P. 411.

**(h) Judgment.**

*See, generally, MAGISTRATES, Vol. XXIII., pp. 390–406.*

1587. **Removal order quashed or affirmed—Not superseded.**—Sessions may affirm or quash, but not supersede an original order, or make a new one.—*OSWELL (INHABITANTS) v. WOKING (INHABITANTS)* (1696), 2 Salk. 472; 91 E. R. 406; *sub nom. R. v. HASWELL (INHABITANTS)*, 5 Mod. Rep. 208; 87 E. R. 618.

*Annotation*:—*Refd. R. v. Abbots-Langley* (1729), 1 Barn. K. B. 148.

1588. **Removal order amended.**—An order of removal on the complaint of the parish officers of A., was made for a removal to B. By mistake, the order was filled up as made on the complaint of the parish officers of B. Upon an appeal against the order, the mistake was discovered. The sessions refused to amend under Quarter Sessions Act, 1731 (c. 19), & allowed the appeal:—*Held*: they ought to have amended; & *mandamus* ordered that they should.—*R. v. DURHAM JJ.* (1830), 8 L. J. O. S. M. C. 103.

—.]—*See, now, Poor Law Act, 1927 (c. 14), s. 127 (3) (4).*

1589. **Removal order affirmed—Where previously quashed—In same sessions.**—The sessions may confirm an order of removal, though it has been previously quashed, during the same sessions.—*BATTERSEA (INHABITANTS) v. WESTHAM* (1698), 5 Mod. Rep. 396; 87 E. R. 726.

1590. **Jurisdiction to order removal—To third parish—Third parish not party to suit.**—Sessions on appeal cannot send to a third place, not party.—*AMNER PARISH CASE* (1696), 2 Salk. 475; Sett. & Rem. 270; 91 E. R. 408.

1591. ———.]—**Pauper returned to removing parish.**—*HONITON PARISH v. SOUTH BEVERTON PARISH* (1696), Sett. & Rem. 191.

1592. ———.]—*R. v. MILVERTON PARISH* (1702), 7 Mod. Rep. 10; Sett. & Rem. 208; 2 Bott. 734; 87 E. R. 1062.

1593. ———.]—**Original order.**—*R. v. MILVERTON PARISH* (1702), 7 Mod. Rep. 10; Sett. & Rem. 208; 2 Bott. 734; 87 E. R. 1062.

1594. **Conclusiveness of judgment—Removal order quashed—Not on merits.**—On appeal against an order of removal, the order was quashed, after notice of abandonment by resps., on the application of applt., & with the consent of resps. In pursuance of a rule of practice of the sessions, that “whenever any order of removal shall be quashed, otherwise than on the merits, a minute of the grounds of the judgment shall be entered on record,” the judgment was entered by direction of the ct. in the following form: “order of justices quashed, the merits of the case not being inquired into.” Resps. afterwards obtained another order of removal to the parish of applt. on appeal from which it was contended, that the quashing of the former order was conclusive:—*Held*: the judgment of the ct. of quarter sessions was not conclusive.—*R. v. YNISAWDRA* (1842), 6 Jur. 1058.

1595. ———.]—A pauper was removed, & copies of the order, examinations, etc., sent to the parish to which she was removed; but the copy of the order of removal did not contain the signatures of the removing justices. On this objection, the order of removal was quashed on appeal, subject to a case. Resps., however, took no step to bring the case up. Afterwards the pauper became again chargeable, having obtained no fresh settlement:—*Held*: she might, even before the time for obtaining a *certiorari* to bring



up the order of sessions expired, be removed to the same parish as before; for the former order was not conclusive as to the merits.—*R. v. GREAT BOLTON (INHABITANTS)* (1845), 7 Q. B. 387; 1 New Mag. Cas. 822; 1 New Sess. Cas. 630; 14 L. J. M. C. 122; 5 L. T. O. S. 191; 9 J. P. 536; 9 Jur. 706; 115 E. R. 536.

*Annotations*:—*Distd. R. v. Conningsby* (1848), 12 J. P. 692. *Reid. R. v. Pott Shrigley* (1848), 3 New Mag. Cas. 64; *R. v. Macclesfield* (1849), 3 New Mag. Cas. 199.

**1596.** ————.]—An appeal against an order of removal having been entered & respited, resps. gave notice to the appls. that they abandoned the order on the ground that the examinations were defective, & that they should apply at the next sessions to quash the order on a special entry, “quashed not upon the merits,” & that they were ready to pay appls. their reasonable costs. The sessions refused to hear the appeal, & quashed the order, with the above special entry, & with costs to appls., to the time of notice of abandonment, & costs of coming to the sessions:—*Held*: the sessions had done right.—*Ex p. PONTEFRACT OVERSEERS* (1843), 3 Q. B. 391; 3 Gal. & Dav. 188; 2 New Sess. Cas. 181; 13 L. J. M. C. 5; 7 Jur. 1086; 114 E. R. 556.

**1597.** ————.]—On merits—*Material omission in depositions*.—*R. v. CHARLBURY & WALCOTT (INHABITANTS)*, No. 1016, *ante*.

**1598.** ————.]—For informality.]—An order of sessions quashing an order of removal “for informality” was confirmed by this ct., although the order of removal appeared upon the face of it to be free from defect.

The ct. will in such a case intend, that the sessions used the word “informality” as expressive merely that their decision had proceeded upon grounds distinct from the merits of the appeal.—*R. v. COTTINGHAM (INHABITANTS)* (1834), 2 Ad. & El. 250; 4 Nev. & M. K. B. 215; 2 Nev. & M. M. C. 479; 4 L. J. M. C. 65; 111 E. R. 97.

*Annotations*:—*Reid. R. v. Kingsclere* (1844), 8 J. P. 72; *R. v. Dukinfield* (1848), 17 L. J. M. C. 113. *Mentd. R. v. Hastings* (1844), 8 J. P. 520; *R. v. Customs & Excise Comrs.*, [1913] 3 K. B. 483.

**1599.** ————.]—Appeal refused—Not on merits—Whether right to further appeal lost.]—*R. v. MACCLESFIELD (INHABITANTS)*, No. 1006, *ante*.

—————.]—On second hearing.]—*See MAGISTRATES*, Vol. XXXIII., p. 402, No. 1126.

—————.]—*See, also*, CROWN PRACTICE, Vol. XVI., p. 417, Nos. 2763, 2764; ESTOPPEL, Vol. XXI., pp. 181, 182, Nos. 318–320; MAGISTRATES, Vol. XXXIII., pp. 389, 402, 438, 439, 447, 452, Nos. 1003–1005, 1128, 1478–1482, 1572, 1638.

*Certiorari*—When granted.]—*See CROWN PRACTICE*, Vol. XVI., pp. 421, 422, 430, 446, Nos. 2819, 2902–2908, 3120, 3122, 3127, 3128.

#### (i) Costs.

**1600. Discretion to allow.**—Allowance of costs on appeal from order is in the discretion of sessions.—*R. v. NOTTINGHAM J.J.* (1719), 2 Bott. 776.

**1601. Where appeal abandoned—Judgment given by default—Absence of jurisdiction.**—Parish officers, having given notice of appeal against an order of removal, served a countermand, stating that they did so on account of the absence of a witness, but should give fresh notice of appeal. The countermand was too late for the sessions. At the sessions, resps. entered the appeal & moved for costs. The sessions made an order, whereby, after reciting that service of notice of appeal on resps. had been proved, & that no one appeared for appls. to prosecute such appeal, they adjudged that the order of removal should be confirmed, &

that appls. should forthwith pay resps. £15 for their costs & charges which they had incurred & been put to in attending the sessions that day to support the order:—*Held*: the order of confirmation was bad for want of jurisdiction, & the order for costs could not be separated from it; & therefore the whole must be quashed.—*R. v. STOKES BLISS (INHABITANTS)* (1844), 6 Q. B. 158; 1 Dav. & Mer. 135; 1 New Mag. Cas. 61; 1 New Sess. Cas. 267; 13 L. J. M. C. 151; 3 L. T. O. S. 179; 8 J. P. 675; 8 Jur. 536; 115 E. R. 61.

*Annotations*:—*Distd. R. v. Over* (1849), 14 Q. B. 425; *R. v. Green, etc. J.J.* (1851), 2 L. M. & P. 130. *Reid. R. v. Bolton Recorder* (1844), 1 New Sess. Cas. 416; *Ex p. Coley* (1851), 4 New Sess. Cas. 507.

**1602.** ————.]—Appls. entered & respited an appeal against an order of removal, but did not deliver grounds of appeal. Afterwards they gave notice of abandoning their appeal, but did not satisfy resps. as to costs. Resps., therefore, went to the next quarter sessions, & moved, appls. not being present, that the order might be confirmed. The sessions confirmed the order of removal, & awarded costs to be paid by appls. to resps.:—*Held*: on *certiorari* & motion to quash, although the confirmation was an excess of authority, the order of sessions was valid as to the award of costs.—*R. v. OVER (INHABITANTS)* (1849), 14 Q. B. 425; 4 New Mag. Cas. 4; 4 New Sess. Cas. 77; 19 L. J. M. C. 57; 14 L. T. O. S. 269; 14 J. P. 176; 14 Jur. 197; 117 E. R. 166.

**1603.** ————.]—If resp. parish give notice to applt. parish, under Poor Law Procedure Act, 1848 (c. 31), s. 8, that they abandon their appeal against an order of removal, the ct. of quarter sessions have no power to proceed with the appeal, though it has been respited on terms at a previous session; & if they make an order quashing the appeal, & giving costs to appls., such order is null, & cannot be removed into the Ct. of Q. B. for the purpose of being enforced.—*KILLYMAENLLWYDD v. ST. MICHAEL'S, PEMBROKE* (1852), 21 L. J. M. C. 79; *sub nom.*, *Ex p. KELLYMAENLLWYD OVERSEERS*, Bail Ct. Cas. 22; *sub nom.* *R. v. ST. MICHAEL'S, PEMBROKE*, 18 L. T. O. S. 262; 16 J. P. 150; 16 Jur. 87.

**1604.** ————.]—Overseers of a parish, on which an order of removal of a pauper had been made by two borough justices, gave notice of an appeal against the order to the next quarter sessions for the county in which the borough was situate. The borough had a separate ct. of quarter sessions, which alone had jurisdiction to hear the appeal. The day before the borough sessions next after the notice of appeal were held, appls. gave notice to resps. that, finding that the sessions for the county had no jurisdiction, they abandoned the appeal. Appls. did not appear, & resps. did, at the borough sessions; which ct. on the application of resps. dismissed the appeal, & made an order for the payment by appls. to resps. of the costs incurred by the latter in the appeal:—*Held*: discharging a rule for a *certiorari* to bring up this order, the order was rightly made, the borough sessions would have had jurisdiction to hear the appeal, if persisted in; the erroneous statement in the notice of appeal that the appeal would be made to the county sessions being merely surplusage, & upon the abandonment of the appeal, the borough sessions had jurisdiction under Quarter Sessions Act, 1849 (c. 45), s. 6.—*R. v. LEEDS RECORDER* (1861), 3 E. & E. 561; 30 L. J. M. C. 86; 3 L. T. 699; 25 J. P. 389; 7 Jur. N. S. 210; 9 W. R. 270; 121 E. R. 553.

—————.]—*See, also*, MAGISTRATES, Vol. XXXIII., p. 445, No. 1550.



*Sect. 3.—Removal orders: Sub-sect. 5, B. (i), & C. Part VII. Sect. 1: Sub-sects. 1 & 2.]*

*Where order abandoned by respondents.]—See MAGISTRATES, Vol. XXXIII., p. 405, Nos. 1155, 1156; Poor Law Act, 1927 (c. 14), s. 126 (2).*

*1605. Costs of maintenance pending appeal.]—Where an order of removal was quashed at sessions, upon appeal, & the justices refused to grant the costs incurred by applt. parish, between the time of the removal of the pauper & the hearing of the appeal, this ct. granted a *mandamus* against them.—R. v. MONMOUTHSHIRE JJ. (1843), 1 Dow. & L. 145; 12 L. J. M. C. 126; 1 L. T. O. S. 292; 7 J. P. 628; 7 Jur. 944.*

*Annotation:—Mentd. R. v. London JJ., [1895] 1 Q. B. 616.*

*—.]—See, also, MAGISTRATES, Vol. XXXIII., p. 436, No. 1455.*

*See, further, MAGISTRATES, Vol. XXXIII., pp. 390, 392, 398, 405, 406, Nos. 1008, 1009, 1033, 1080, 1081, 1157, 1161, 1163.*

### C. By Special Case.

*See Quarter Sessions Act, 1849 (c. 45), s. 11.*

*1606. Right of justices to state.]—R. v. SUSSEX JJ. (1768); 2 Bott, 770.*

*Annotations:—Reid, R. v. Dickerson (1857), 3 Jur. N. S. 1076; R. v. Westmoreland JJ. (1868), L. R. 3 Q. B. 457.*

*See, also, CROWN PRACTICE, Vol. XVI., pp. 479, 480, Nos. 3609, 3610, 3614; MAGISTRATES, Vol. XXXIII., pp. 449, 451, 458, Nos. 1594, 1598, 1599, 1623, 1708.*

## Part VII.—Vagrancy.

### SECT. 1.—IDLE AND DISORDERLY PERSONS.

#### SUB-SECT. 1.—IN GENERAL.

*See Vagrancy Act, 1824 (c. 83), s. 3.*

*1607. General rule.]—A person must be idle as well as disorderly to be committed for a vagrant.—R. v. MILLER (1738), 2 Stra. 1103; 93 E. R. 1059.*

#### SUB-SECT. 2.—NEGLECT TO PROVIDE MAINTENANCE.

*1608. Neglect to maintain wife—Wife guilty of adultery—Husband also guilty.]—A man is not liable to the penalty of Vagrancy Act, 1824 (c. 83), s. 3, for neglecting & refusing to maintain his wife, who has left him & committed adultery; although he himself has been guilty of adultery since her departure.—R. v. FLINTAN (1830), 1 B. & Ad. 227; 9 L. J. O. S. M. C. 33; 109 E. R. 771.*

*Annotations:—Apld. Culley v. Charman (1881), 7 Q. B. D. 89. Consd. Mitchell v. Torrington Union (1897), 76 L. T. 724. Apld. Jones v. Newtown & Llandiloos Union, [1920] 3 K. B. 381; Selby v. Atkins (1926), 135 L. T. 45. Reid, Thomas v. Alsop (1870), 21 L. T. 715; Jones v. Davies,*

*[1901] 1 K. B. 118. Mentd. Seaver v. Seaver (1846), 2 Sw. & Tr. 665; Hope v. Hope (1858), 1 Sw. & Tr. 94; Cooper v. Lloyd (1859), 6 C. B. N. S. 519; Wilson v. Glossop (1887), 19 Q. B. D. 379; Stimpson v. Wood (1888), 57 L. J. Q. B. 484; Brooking-Phillips v. Brooking-Phillips, [1913] P. 80; Wickens v. Wickens (No. 2), [1918] P. 282; Durnford v. Baker, [1924] 2 K. B. 587.*

*See Vagrancy Act, 1824 (c. 83), s. 3; Poor Law (Amendment) Act, 1849 (c. 103), s. 3.*

*—.]—See, also, HUSBAND & WIFE, Vol. XXVII., p. 202, No. 1741.*

*1609. —.— Bonâ fide belief of husband.]—*

*Resp. T was charged under Vagrancy Act, 1824 (c. 83), s. 3, for that he, being able to work & maintain himself & his wife & family, "wilfully refused or neglected" to do so. The magistrates found that he refused to maintain his wife because of the bonâ fide belief that she had committed adultery, & that he had offered under certain conditions to support his children. They dismissed the summons, holding that under these circumstances T., resp., had not "wilfully refused or neglected":—Held: the magistrates were right.—MORRIS v. EDMONDS (1897), 77 L. T. 56; 41 Sol. Jo. 698; 18 Cox, C. C. 627, D. C.*

*Annotation:—Consd. Biggs v. Burridge (1924), 89 J. P. 75.*

#### PART VII. SECT. 1, SUB-SECT. 1.

*1607 l. General rule.]—An otherwise respectable person who, in a public place, uses insulting language to another person & strikes him & thereby creates a crowd & obstructs the sidewalk is not necessarily a vagrant.—R. v. LAW (Man.) (1924), 42 Can. Crim. Cas. 123; [1924] 3 W. W. R. 239.—CAN.*

*n. Vagrancy Act—What is a "public place" within Act—Whether room in hotel.]—SWAN v. MCLELLAN (1865), 2 W. W. & A.B. (L.) 6.—AUS.*

*o. Shop.]—A shop when open to the public is a "public place" within Criminal Law Amendment Act, s. 467, & therefore a person may be convicted of using insulting words whereby a breach of the peace may be occasioned in a shop under the above Act, s. 6.—Ex p. HALLIDAY (1893), 14 N. S. W. L. R. 421; 10 N. S. W. N. 88.—AUS.*

*p. Cricket ground.]—TOOMEY v. WILLIAMS, Ex p. WILLIAMS (1898), 8 Q. L. J. 148.—AUS.*

*q. Abusive language—When an offence.]—Language used in a parlour of a public house by one person concerning another who is not present does not constitute an offence within the above Act, sect. 6.—Egan v. TOWNLEY (1872), 2 Q. S. C. R. 254.—AUS.*

*r. —.—.]—To constitute an offence under the above Act, sect. 8, it must be proved that either the threatening or abusive or insulting words or behaviour were used with intent to provoke a breach of the peace or that they actually caused a breach of the peace.—VIDLER v. NEWPORT (1906), 5 S. R. N. S. W. 686; 22 N. S. W. W. N. 161.—AUS.*

*t. Frequenting street for purpose of felony.]—Ex p. KINGSLEY (1906), 6 S. R. N. S. W. 380; 23 N. S. W. W. N. 143.—AUS.*

*a. Insufficient means of support—Professional card player.]—VALLENDER v. SLATER, [1926] S. A. S. R. 28.—AUS.*

*b. Associate of pick-pockets.]—R. v. COLLETTE (1905), 10 O. L. R. 718; 6 O. W. R. 746.—CAN.*

*c. Gambler.]—R. v. SHEEHAN (1908), 14 B. C. R. 13; 8 W. L. R. 605; 14 Can. Crim. Cas. 119.—CAN.*

*d. —.—.]—R. v. KOLOTYLA (Man.) (1911), 17 W. L. R. 398; 18 Can. Crim. Cas. 256.—CAN.*

*e. —.—.]—The words "who not having any 'visible' means of maintaining himself lives without employment" means without "visible lawful" means of support. A man unlawfully engaged in gambling or*

*begging, who is possessed of a few dollars collected from that source, is not to be treated as meeting the requirements of the statute as one who has an employment & is in possession of visible means of maintaining himself.—R. v. MUNROE (1911), 20 O. W. R. 735; 3 O. W. N. 377; 25 O. L. R. 223.—CAN.*

*1. Whether bye-law made inoperative.]—A municipal bye-law for the punishment of persons intoxicated on the public streets is not rendered inoperative by the above Act subsequently passed.—WINSLOW v. GALLAGHER (1888), 27 N. B. R. 25.—CAN.*

*g. Obstructing sidewalk with bicycle.]—R. v. CHAMPION (P. E. I.), [1928] 1 D. L. R. 326; 45 Can. Crim. Cas. 64.—CAN.*

*h. Imperial Vagrancy Act—Whether in force in New South Wales.]—The provisions of the above Act were never capable of being applied in the administration of justice in New South Wales, within 9 Geo. IV. c. 83, s. 24.—MITCHELL v. SCALES (1907), 5 C. L. R. 405.—AUS.*

#### PART VII. SECT. 1, SUB-SECT. 2.

*k. Neglect to maintain wife—Wife guilty of adultery.]—PHILLIPS v. SOUTH DUBLIN UNION, [1902] 2 I. R. 112.—IR.*

*l. Sufficiency of allegations.]*

**1610. — Legality of marriage disputed—Duty of magistrates to hear case.]**—On complaint against a party as a vagrant, for refusing to maintain his wife, the party charged, being called upon by the justices in petty sessions to show cause for his refusal, denied being married to the woman, & produced some evidence in support of such denial: & he threatened the magistrates with an action if they committed him. Complainants offered evidence of a Gretna Green marriage: but the justices refused to hear it, & dismissed the summons, saying that they would not, on this application, try a disputed marriage, alleged to have taken place out of the country, & that the parties ought to try it in the Ecclesiastical Ct.:—*Held*: the justices could not, under these circumstances, refuse to hear the case through; & a *mandamus* was granted, requiring them to hear the complaint.—*R. v. CUMBERLAND JJ.* (1836), 4 Ad. & El. 695; 111 E. R. 949.

*Annotations:—Reid, Jr. v. Broseley* (1837), 7 Ad. & El. 423; *R. v. Salop JJ.* (1837), 7 L. J. M. C. 3; *R. v. Marshall* (1843), 2 L. T. O. S. 169; *R. v. Blamhard* (1849), 13 Q. B. 318. *Mentel, R. v. Cantorbury* (Archbp.) (1848), 11 Q. B. 488; *R. v. Leicester Deputies of Freeman* (1850), 15 Q. B. 871; *R. v. Fawcett Durham JJ., Ex p. Hodson* (1868), 19 L. T. 396.

**1611. — Wife refusing to live with husband—No evidence of refusal to support.]**—Upon conviction of a man, under Vagrancy Act, 1824 (c. 83), s. 3, for wilfully refusing or neglecting to maintain his wife, a case was stated by the magistrates under Summary Jurisdiction Act, 1857 (c. 43), s. 2. The statement was that it appeared on the hearing that applt. on a former occasion, his wife having before that been relieved by the parish while living apart from him, had been summoned & had then promised to make her a weekly allowance, which he had since failed to do, & the wife had been supported by the parish since then; that, at the hearing on which the conviction appealed against took place, he offered to repay what the parish had paid, & to receive his wife; that evidence was given to the satisfaction of the magistrates that he had ill used his wife, who thereupon refused to live with him; that applt. undertook to treat her kindly; that the magistrates were satisfied that he had for a length of time neglected to support her & that the offer to receive her was only to screen himself from the consequences of the neglect:—*Held*: the conviction was wrong, for that, assuming the fact of ill usage sufficient to constitute a ground for the wife's refusal to live with applt., there was no evidence of a refusal to support her.—*FLANNAGAN v. BISHOP WEARMOUTH OVERSEERS* (1857), 8 E. & B. 451; 27 L. J. M. C. 46; 30 L. T. O. S. 117; 22 J. P. 464; 3 Jur. N. S. 1103; 120 E. R. 168; *sub nom. R. v. BISHOP WEARMOUTH OVERSEERS*, 6 W. R. 38.

*Annotations:—Distd. Thomas v. Alsop* (1870), L. R. 5 Q. B. 151; *Kershaw v. Kershaw* (1887), 51 J. P. 646.

**1612. — No notice of application for relief—Offer to recoup guardians.]**—E.'s wife having applied for relief, the guardians summoned E. under Vagrancy Act, 1824 (c. 83), s. 3. It was proved that E. was an able-bodied man, & able to maintain his family if he chose, but E. contended that he had got no notice of his wife's application for relief, & that this proceeding was instigated by spite, & that he had offered to recoup the guardians who refused to accept payment. The justices having dismissed the summons:—*Held*: there

being some evidence the judgment of the justices could not be interfered with.—*REEVE v. EASTWOOD* (1888), 53 J. P. 134, D. C.

—*See, also, HUSBAND & WIFE*, Vol. XXVII., pp. 75–77, Nos. 590–603.

**1613. Neglect to maintain child—Conditional offer made.]**—*MORRIS v. EDMONDS*, No. 1600, ante.

**1614. — Where separation order granted—& wife given custody of children.]**—*Resp.*, a married man with four children under sixteen years of age, was able wholly to maintain his family by work. By an order of a ct. of summary jurisdiction under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5, it was ordered that his wife should be no longer bound to cohabit with him, that she should have the legal custody of the children, & that he should pay to his wife the weekly sum of 7s. 6d. *Resp.* did not pay any of the weekly sums, & shortly afterwards two of his children under sixteen became chargeable to the union. Upon an information under Vagrancy Act, 1824 (c. 83), s. 3, charging him with having wilfully neglected & refused to maintain his family by work, whereby his two children became chargeable, the justices held that, owing to the existence of the order giving the wife the custody of the children & ordering *resp.* to pay her a weekly sum, they had no jurisdiction to convict *resp.*:—*Held*: the existence of the order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5, did not affect *resp.*'s legal obligation to maintain his children, & the order, being disobeyed, was no defence to the charge of wilfully neglecting & refusing to maintain his children.—*SHAFTESBURY UNION v. BROCKWAY*, [1913] 1 K. B. 159; 82 L. J. K. B. 222; 108 L. T. 336; 77 J. P. 120; 29 T. L. R. 144; 11 L. G. R. 176; 23 Cox, C. C. 318, D. C.

—**Paternity denied.]**—*See BANTARDY*, Vol. III., p. 363, No. 47.

—*See, also, INFANTS & CHILDREN*, Vol. XXVIII., pp. 216–250, Nos. 756–1062.

**1615. Neglect to provide self-maintenance—Illness due to drunkenness.]**—Where a person at the time of his becoming chargeable to a union is owing to illness unable to maintain himself, the fact that that illness was the result of drunkenness does not cause his inability to amount to a wilful refusal or neglect to maintain himself within the Vagrancy Act, 1824 (c. 83), s. 3.—*ST. SAVIOUR'S UNION v. BURBRIDGE*, [1900] 2 Q. B. 695; 69 L. J. Q. B. 886; 83 L. T. 317; 64 J. P. 725; 48 W. R. 685; 16 T. L. R. 532; 44 Sol. Jo. 675; 19 Cox, C. C. 573, D. C.

**1616. — Trade strike.]**—The classes of persons who are entitled to poor relief are still, notwithstanding subsequent legislation, the same as those mentioned in Poor Relief Act, 1601 (c. 2), s. 1. Able-bodied men who can, if they choose, obtain work which will enable them to maintain themselves, their wives & families, but who, by reason of a strike or otherwise, refuse to accept that work, are not entitled to relief, except that, if they become physically incapable of working, the guardians, may, to prevent them starving, give them temporary relief. But in that case the guardians ought to prosecute them under Vagrancy Act, 1824 (c. 83), s. 3, as "idle & disorderly persons."—*A.-G. v. MERTHYR TYDFIL UNION*, [1900] 1 Ch. 516; 69 L. J. Ch. 299; 82 L. T.

—*R. v. NASMITH* (1877), 42 U. C. R. 242.—*CAN.*

*m. Neglect to maintain family.]*—

One who being able to work actually works & earns money & is thus able to provide for his family, but wilfully refuses to do so is properly convicted

under Criminal Code, s. 238.—*R. v. MARIOTT* (1924), 67 N. S. R. 44; 41 Can. Crim. Cas. 333.—*CAN.*

**Sect. 1.—Idle and disorderly persons: Sub-sects. 2, 3, 4, 5 & 6.]**

662; 64 J. P. 276; 48 W. R. 403; 16 T. L. R. 251; 44 Sol. Jo. 294, C. A.

**Annotations.**—*Fold*. A.-G. v. Bedwellty Union (1900), 44 Sol. Jo. 328. *Apld.* A.-G. v. Poplar Union (1924), 40 T. L. R. 752. *Reid*. Poplar Union v. Martin (1904), 91 L. T. 550; A.-G. v. Tottenham U. D. C. (1909), 8 L. G. R. 95; A.-G. v. East Barnet Valley U. D. C. (1911), 75 J. P. 484; R. v. L. G. Board, *Ex p.* Arlidge, [1914] 1 K. B. 180; Lewisham Union v. Nice, [1924] 1 K. B. 618.

**1617. — Offer of work refused—Irrelevant conditions attached.]**—An able-bodied pauper was offered work at a farm colony, in return for which he was to receive board & lodging & a small weekly payment; the offer was subject to certain conditions (*inter alia*) that he would not only not enter any premises where intoxicating drink was sold, but would discourage others from doing so; that he would attend the meetings on Saturday nights of the particular body to which the colony belonged & special meetings fixed from time to time, & would attend some place of worship once on a Sunday. The pauper refused to sign an agreement embodying those terms & left the colony, & again became chargeable to the parish:—*Held*: in considering whether the refusal of the pauper to accept work was reasonable, regard must be had to the conditions upon which the work was offered; in order to constitute a wilful refusal or neglect within Vagrancy Act, 1824 (c. 83), s. 3, the conditions attached to the offer of work must be such as relate to the work itself or to the workman's conduct in its performance; the above-mentioned conditions, though not in themselves unreasonable conditions to attach to an offer of employment, were not such that a refusal to accept work on such conditions amounted to a wilful refusal or neglect on the part of the pauper to maintain himself, & he was therefore not liable to be convicted as an idle & disorderly person.—*POPLAR UNION v. MARTIN*, [1905] 1 K. B. 728; 74 L. J. K. B. 306; 92 L. T. 197; 69 J. P. 146; 53 W. R. 398; 21 T. L. R. 240; 49 Sol. Jo. 261; 3 L. G. R. 340; 20 Cox, C. C. 785, C. A.

**Annotation.**—*Apld.* Lewisham Union v. Nice, [1924] 1 K. B. 618.

**1618. — Wages lower than trade union rate.]**—On an appeal to quarter sessions by N. against his conviction under Vagrancy Act, 1824 (c. 83), s. 3, for wilfully refusing & neglecting to maintain himself & his family whereby he & they became chargeable to applt. union, it was proved that N. was able to work & was offered suitable work at a weekly wage of £2 6s.; that he worked at that wage for several days & then declined to do so any longer, as the rate of pay was less than the current trade union rate, namely, £3 2s. 8d.; & that in consequence of his refusal to work he was unable to maintain himself & his family, whereby they became chargeable to applt. union. In his evidence N. stated that he was anxious to earn his own living, & that he was willing to work for £2 6s. a week & keep his wife & family, but that he was informed by his trade union that he must not work for less than the trade union rate. Evidence was also given by a trade union official that if N. had continued to work for £2 6s. a week he would have been challenged by his union, would have had to give an explanation, & might have been reprimanded or fined or expelled from the union, which expulsion would make it difficult for him to get work in the future. On that evidence quarter sessions were satisfied that N. by continuing to work for £2 6s. a week would have been, in the circumstances, losing chances of bettering himself & would have materially hurt his chances

of employment in the future; they accordingly quashed the conviction:—*Held*: it was open to quarter sessions on the facts before them, to come to the conclusion they did.—*LEWISHAM UNION v. NICE*, [1924] 1 K. B. 618; 93 L. J. K. B. 469; 88 J. P. 66; 22 L. G. R. 235; *sub nom.* NICE v. LEWISHAM UNION, 131 L. T. 22; 40 T. L. R. 270; 68 Sol. Jo. 520; 27 Cox, C. C. 606, D. C.

**1619. Evidence—Whether wife competent witness.]**—Upon an information, under Vagrancy Act, 1824 (c. 83), s. 3, against a person able to maintain his wife & children, for neglecting & refusing to do so, whereby she & they became chargeable to a union, the wife of accused is not a competent witness against him.—*REEVE v. WOOD* (1864), 5 B. & S. 364; 5 New Rep. 173; 34 L. J. M. C. 15; 11 L. T. 449; 29 J. P. 214; 11 Jur. N. S. 201; 13 W. R. 154; 10 Cox, C. C. 58; 122 E. R. 867.

**Annotations.**—*Apld.* R. v. London (Lord Mayor) (1886), 16 Q. B. D. 772. *Reid*. Public Prosecutions Director v. Blady (1912), 106 L. T. 302.

—*See, now*, CRIMINAL EVIDENCE ACT, 1898 (c. 36), s. 4 (1), sched.

**1620. — Whether necessary to prove defendant idle.]**—Under Vagrancy Act, 1824 (c. 83), a husband who being able, neglects to maintain his wife & is summoned before justices, is not permitted to set up as a defence that he is in constant work, & so not idle; & prosecutor is not bound to prove that deft. is idle & refuses to work.—*CARPENTER v. STANLEY* (1868), 33 J. P. 37.

**Annotation.**—*Reid*. Poplar Union v. Martin, [1905] 1 K. B. 728.

**1621. — Evidence of means or ability to work.]**—C., a widower, took lodgings for himself & child & paid for the same up to Jan., but then left the lodgings & paid nothing afterwards up to Sept., when the child was sent to the workhouse, & C. was summoned under Vagrancy Act, 1824 (c. 83), s. 3. C. was an able-bodied man, but no evidence was given that he had got work to do or ever refused work:—*Held*: the justices were right in dismissing the information, & were not bound to convict.—*HOSEGOOD v. CAMPS* (1889), 53 J. P. 612; 5 T. L. R. 222, D. C.

**1622. — Of intention to neglect—Necessity for.]**—*MORRIS v. EDMONDS*, No. 1609, *ante*.

**1623. — Ignorance of liability to maintain.]**—It is no defence to a charge of "wilfully refusing & neglecting to maintain" a wife & family, whereby they have become chargeable to the common fund of a union, that the husband *bonâ fide* but erroneously believed that he was not legally bound to maintain them in the circumstances. *Mens rea* is immaterial.—*BIGGS v. BURRIDGE* (1924), 89 J. P. 75; 22 L. G. R. 555, D. C.

**SUB-SECT. 3.—DISORDERLY PAUPERS.**

*See Pauper Inmates Discharge & Regulation Act*, 1871 (c. 108), s. 7; *Poor Law Act*, 1927 (c. 14), ss. 233–235.

**1624. Misbehaviour—What may amount to.]**—A refusal by a pauper when outside a workhouse to obey a lawful order to go to another workhouse is not "misbehaviour" within Poor Relief Act, 1815 (c. 137), s. 5.—*MILE END UNION v. SIMS*, [1905] 2 K. B. 200; 74 L. J. K. B. 647; 92 L. T. 238; 69 J. P. 145; 21 T. L. R. 241; 49 Sol. Jo. 261; 3 L. G. R. 349; 20 Cox, C. C. 807, D. C.

**Annotation.**—*Consd.* Holland v. Peacock, [1912] 1 K. B. 154.

**1625. — Unlawful sexual intercourse between two paupers in a workhouse constitutes "misbehaviour" within Poor Relief Act, 1815 (c. 137), s. 5.**—*HOLLAND v. PEACOCK*, [1912] 1

K. B. 154; 81 L. J. K. B. 256; 105 L. T. 957; 76 J. P. 68; 10 L. G. R. 123; 22 Cox, C. C. 636, D. C.

*Annotation*.—*Mentl. Retail Dairy Co. v. Clarke*, [1912] 2 K. B. 388.

**1626. Refusal to work—Task irregularly allotted.**—Among the tasks of work prescribed by the General Order of the Local Government Board, dated Dec. 18, 1882, for male casual paupers detained for more than one night, is the following task: For each entire day of detention the breaking of 7 cwt. of stone, or such other quantity not less than 5 cwt. nor more than 13 cwt. as the guardians, having regard to the nature of the stone, may prescribe; the stone to be broken to such a size as the guardians, having regard to the nature thereof, may prescribe:—*Held*: this task of work does not include the task of pounding a bushel of stones of the estimated weight of 1 cwt., & the conviction of a casual pauper for refusing to perform such a task must be quashed accordingly.—*R. v. RADDELEY JJ.*, *Ex p. MOORE* (1906), 70 J. P. 346; 50 Sol. Jo. 377, D. C.

#### SUB-SECT. 4.—BEGGARS.

*See Vagrancy Act, 1824 (c. 83), s. 3.*

**1627. General rule.**—Under that Act (Vagrancy Act) a person begging may be convicted of being an idle & disorderly person; if convicted again of the same offence he may be convicted of being a rogue & vagabond, & if convicted again of the same offence he may be convicted of being an incorrigible rogue (*DARLING, J.*).—*R. v. EDWARDS* (1909), 73 J. P. 287; 2 Cr. App. Rep. 79, C. C. A. *Annotations*.—*Held*. *R. v. O'Brien* (1909), 2 Cr. App. Rep. 193; *R. v. Cooper* (1910), 5 Cr. App. Rep. 273; *R. v. Harrison* (1913), 9 Cr. App. Rep. 145.

**1628. Workman on strike soliciting subscriptions.**—Colliers "on strike" who were householders in a colliery district, & had wives & families, went from house to house in a street of a town four miles distance with a waggon inscribed "Children's Bread Waggon," & begged for assistance in money or kind. They were not disorderly. Having been convicted under Vagrancy Act, 1824 (c. 83), s. 3, which enacts that every person wandering abroad in any public highway to beg or gather alms shall be deemed an idle & disorderly person:—*Held*: as it was not their habit & mode of life to wander abroad & beg, they were not within the meaning of the Act, & the conviction was wrong.—*POINTON v. HILL* (1884), 12 Q. B. D. 306; 53 L. J. M. C. 62; 50 L. T. 268; 48 J. P. 341; 32 W. R. 478; 15 Cox, C. C. 461, D. C. *Annotation*.—*Consd. Mathers v. Penfold*, [1915] 1 K. B. 514.

**1629.**—*Resp.* went up to several persons in succession in St. James's Square, Westminster, & the immediate neighbourhood, & asked them to buy some tickets which he then had in his possession at the same time asking them to assist him as he was out of work through the strike hereinafter mentioned. In no case did any of the persons solicited buy any of the tickets or give *resp.* any money. There was a dispute in the building trade in consequence of which *resp.* who was a member of the Shamrock branch of the United Order of General Labourers, an affiliated

union under the Federation of Building Trade Unions, was out of work. The Shamrock branch had organised a collection of funds to relieve their members who were out of work & their families, & in order to check the collectors the system of tickets was instituted. *Resp.* had possession of the tickets in pursuance of this scheme & was fully authorised by the branch to collect subscriptions. The money so collected was divided equally amongst certain members of the Shamrock branch who were out of work, including *resp.* quite irrespective of the fact that some collected & some did not:—*Held*: *resp.* was not begging within Vagrancy Act, 1824 (c. 83), s. 3, inasmuch as a person who is found in the street making or assisting to make a *bonâ fide* collection for a charitable object is not within either the mischief or the language of the statute.

In order to establish that a person has committed an offence within the sect, it is not necessary to prove that he has before the particular occasion been in the habit of begging, nor that he intends in the future to follow the habit of begging. He may adopt the calling for one day only & may by his conduct on the particular occasion complained of so behave himself as to afford evidence, either by the nature of his request, the persistence or importunity of his manner, the whining tone adopted, or the deceptive devices employed, upon which a magistrate may be satisfied that the act is not merely an isolated act, but is such an act of begging, within the meaning of the statute, as to prove that he placed himself in a public place, etc., to beg or gather alms.—*MATHERS v. PENFOLD* [1915] 1 K. B. 514; 84 L. J. K. B. 627; 112 L. T. 726; 79 J. P. 225; 31 T. L. R. 108; 59 Sol. Jo. 235; 13 L. G. R. 359; 24 Cox, C. C. 642, D. C.

*Procuring child to beg.*—*See INFANTS*, Vol. XXVIII., p. 350, No. 2197.

#### SUB-SECT. 5.—PEDLARS.

*See Vagrancy Act, 1824 (c. 83), s. 3.*

**1630. Hawker—Barter of goods.**—A man who hawks about goods from house to house & barter them for other goods, though he takes no payment in money, is, if he have no licence as a hawker, under 50 Geo. 3, c. 41, s. 6, a petty chapman or pedlar under Vagrancy Act, 1824 (c. 83), s. 3, & is liable to be convicted as a vagrant under Vagrancy Act, 1824 (c. 83), s. 3.—*DRUCE v. GARR* (1858), 31 L. T. O. S. 98; 6 W. R. 497; 22 J. P. Jo. 319.

#### SUB-SECT. 6.—PROSTITUTES.

*See Vagrancy Act, 1824 (c. 83), s. 3.*

**1631. Indecent behaviour—Question of fact.**—*C.*, a prostitute, was convicted under Vagrancy Act, 1824 (c. 83), s. 5, for unlawfully in a public street behaving in a riotous & indecent manner. On appeal quarter sessions held *C.* had not been so guilty, but stated a case asking if, under the circumstances, she was guilty:—*Held*: it being a mere question of fact which quarter sessions themselves found in favour of *C.*, there was no point of law on which a case could be stated.—

#### PART VII. SECT. 1, SUB-SECT. 8.

*n. Failing to give account of self—On being charged.*—*R. v. LEVEQUE* (1870), 30 U. C. R. 509.—CAN.

*o.* ————*R. v. HARRIS*

(Y. T.) (1908), 8 W. L. R. 633; 13 Can. Crim. Cas. 393.—CAN.

*p.* ————*R. v. PEPPER* (1908), 12 W. L. R. 58; 15 Can. Crim. Cas. 314; 19 Man. L. R. 209.—CAN.

*q.* ————*R. v. JOHNSON*

(1912), 21 W. L. R. 900; 22 Man. L. R. 426; 5 D. L. R. 523.—CAN.

*r. No visible means of maintaining herself.*—*R. v. CYN* (Alta.), [1917] 3 W. W. R. 849.—CAN.



informed by the master that he could not go without them. Before leaving he told the master that he should send his children back, & on the evening of the same day the children returned alone to the workhouse & delivered to the master a letter written by resp. in which he gave an address about twenty-one miles away in another union & parish, & stated that he was sending his children back, that he was not running away, & would attend if his attendance was required. As the children were destitute they were re-admitted & became chargeable to the union. Justices having dismissed an information against resp. under Vagrancy Act, 1824 (c. 83), s. 4, for "running away & leaving his children chargeable to the parish":—*Held*: the question being a question of fact & the justices having found that there was no "running away" within Vagrancy Act, 1824 (c. 83), s. 4, the ct. could not say that the justices were wrong in law in so holding.—*PALIN v. BUCKLAND* (1911), 105 L. T. 197; 75 J. P. 362; 9 L. G. R. 544; 22 Cox, C. C. 545, D. C.

**1646. Institution of proceedings for prosecution—Limitation of time for.**—Where a man runs away from his wife & children, & they do not become chargeable to the parish until some time after such desertion, the offence, under Vagrancy Act, 1824 (c. 83), s. 4, is not complete until such chargeability arises, & therefore the six months limited by Summary Jurisdiction Act, 1848 (c. 43), s. 11, for laying the information, is to be reckoned from the latter event.—*REEVE v. YEATES* (1862), 1 H. & C. 435; 31 L. J. M. C. 241; 26 J. P. 808; 8 Jur. N. S. 751; 10 W. R. 779; 158 E. R. 955. *Annotations*—*Consd. Ellis v. Ellis*, [1896] P. 251. *Reid. Heard v. Heard*, [1896] P. 188.

**1647. ———.**—The period of two years, within which proceedings can be taken, as provided by Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 19, for running away & leaving wife or child chargeable, or whereby they shall become chargeable, to any union or parish, begins to run when the person charged runs away & leaves the wife or child chargeable.—*ASHLEY v. BLAKER* (1909), 101 L. T. 682; 73 J. P. 495; 8 L. G. R. 1; 22 Cox, C. C. 208, D. C.

**1648. ——— Whether consent of guardians necessary.**—Where a magistrate refused to hear a case against a man who ran away, leaving his wife & children chargeable to the parish, on the ground that the proceeding was instituted by the assistant overseer without authority from the board of guardians—the ct. directed the case to be remitted for rehearing, but refused to allow costs, though the magistrate acted upon his sole opinion, & contrary to the practice of the board.—*R. v. MIREHOUSE* (1863), 1 New Rep. 371; 32 L. J. M. C. 90; 7 L. T. 721; 27 J. P. 88; 11 W. R. 310.

**1649. ——— After release from prison—Where chargeability remains.**—A person who has been convicted & imprisoned under Vagrancy Act, 1824 (c. 83), s. 4, & Divided Parishes & Poor Law (Amendment) Act, 1876 (c. 61), s. 19, for running away & leaving his children whereby they have become chargeable to the parish, may be proceeded against & convicted a second time for running away & leaving his children chargeable, unless on his release from prison he takes his children out of the workhouse & removes their chargeability, as the leaving his children in the workhouse chargeable to the parish after his release from prison constitutes a fresh substantive offence, for which he may be punished a second time; & he may be convicted for this fresh offence upon an information which charges him with running away & leaving his children, "whereby they have

become & are now actually chargeable to the parish" as the defect in the form of the information by reason of the children being already chargeable can be cured by Summary Jurisdiction Act, 1848 (c. 43), s. 1.—*BANNISTER v. SULLIVAN* (1904), 91 L. T. 380; 68 J. P. 390; 2 L. G. R. 874; 20 Cox, C. C. 685, D. C.

*Annotation* :—*Reid. Ashley v. Blaker* (1909), 101 L. T. 682.

#### SUB-SECT. 2.—BEGGARS.

*See Vagrancy Act, 1824 (c. 83), s. 4.*

**1650. Second conviction for begging.**—*R. v. EDWARDS*, No. 1627, *ante*.

*See, also, CRIMINAL LAW*, Vol. XV., p. 996, No. 11,155.

#### SUB-SECT. 3.—EXPOSING THE PERSON.

*See Vagrancy Act, 1824 (c. 83), s. 4; CRIMINAL LAW*, Vol. XV., p. 747, Nos. 8000–8062.

#### SUB-SECT. 4.—LIVING ON EARNINGS OF PROSTITUTION.

*See CRIMINAL LAW*, Vol. XIV., pp. 451, No. 4764; Vol. XV., pp. 851, 852, Nos. 9347–9351.

#### SUB-SECT. 5.—SOLICITING BY MALE PERSON.

*See Vagrancy Act, 1898 (c. 93), s. 1 (1); CRIMINAL LAW*, Vol. XV., p. 752, No. 8108.

#### SUB-SECT. 6.—FORTUNE TELLING.

*See Vagrancy Act, 1824 (c. 83), s. 4; CRIMINAL LAW*, Vol. XV., pp. 1074–1076, Nos. 12,163–12,171; SUPP. II., p. 378, Nos. 12,169a, 12,169b.

#### SUB-SECT. 7.—SUSPECTED PERSONS.

*See Vagrancy Act, 1824 (c. 83), s. 4.*

**1651. In place of public resort—Public highway—Intention to commit felony.**—(1) Under Vagrancy Act, 1824 (c. 83), s. 4, a person is well convicted of being a rogue & vagabond, if the conviction state that he, "being a reputed thief, did frequent the public highway," at, etc., "with intent to commit felony." It is not essential to the offence that the highway should lead to any river, canal or navigable stream, dock or basin, quay, wharf or warehouse, or that it should be adjacent to any place of public resort, or avenue thereto.

(2) The conviction need not charge deft. with having frequented the highway with intent to commit felony there.—*R. v. BROWN* (1852), 17 Q. B. 838; 16 Jur. 101; 117 E. R. 1500; *sub nom. Ex p. BROWN*, 21 L. J. M. C. 113; 16 J. P. 69; *sub nom. Re BROWN*, 18 L. T. O. S. 238.

*Annotations* :—*As to* (1) *Consd. Re Jones* (1852), 7 Exch. 586. *Obtd. Re Timson* (1870), L. R. 5 Exch. 257. *Consd. Clark v. R.* (1884), 14 Q. B. D. 92. *As to* (2) *Reid. Clark v. R.* (1884), 14 Q. B. D. 92.

**1652. ———.**—Vagrancy Act, 1824 (c. 83), s. 4, does not render a suspected person frequenting a street, with intent to commit felony, liable to punishment, unless the street leads to some river, canal, etc., or is itself a place of public resort, or is adjacent to a place of public resort.

**Sect. 2.—Rogues and vagabonds: Sub-sects. 7, 8 & 9.  
Sects. 3 & 4.]**

Therefore, where a commitment stated that prisoner, being a suspected person, did on, etc., unlawfully frequent a certain street, to wit, Regent Street, with intent to commit felony:—*Held*: (1) the commitment was bad; (2) it was no objection to the commitment that it did not state that prisoner was in the street with intent to commit felony there.—*Re JONES* (1852), 7 Exch. 586; 16 Jur. 801; *sub nom. Ex p. JONES*, 21 L. J. M. C. 116; 16 J. P. 298; *sub nom. R. v. JONES*, 19 L. T. O. S. 94.

*Annotations*.—*As to* (1) *Distd. Ex p. Cross* (1857), 1 C. B. N. S. 573. *Reid. Ex p. Cross* (1857), 21 J. P. 407; *Re Timson* (1870), L. R. 5 Exch. 257; *Clark v. R.* (1884), 14 Q. B. D. 92. *As to* (2) *Reid. Clark v. R.* (1884), 14 Q. B. D. 92. *Generally, Mentd. Ex p. Freestone* (1856), 25 L. J. M. C. 121.

**1653.** — [—]—A public highway is not necessarily a "place of public resort," within the meaning of Vagrancy Act, 1824 (c. 83), s. 4.

G. was committed to gaol by justices, under a warrant of commitment, which stated him to have been convicted under Vagrancy Act, 1824 (c. 83), s. 4, as "a rogue & vagabond, for that he, G., being a suspected person, did frequent a certain public highway . . . with intent to commit a felony":—*Held*: the commitment was bad, for not showing that the highway led or adjoined to any "river, canal, etc.," or to any "place of public resort," or that it was itself a place of public resort.—*Re TIMSON* (1870), L. R. 5 Exch. 257; *sub nom. Ex p. Tinson*, 39 L. J. M. C. 129; 18 W. R. 840; *sub nom. Tinson's Case*, 22 L. T. 614.

*Annotation*.—*Reid. Clark v. R.* (1884), 14 Q. B. D. 92.

**1654.** — **Pleasure steamboat.**—*The Eagle* steamboat, as set out in the conviction, cannot be said to be "a place of public resort" within Vagrancy Act, 1824 (c. 83) (WIGHTMAN, J.).—*R. v. TAYLOR & JONES* (1857), 21 J. P. 488.

**1655.** — **Railway platform.**—A commitment under Vagrancy Act, 1824 (c. 83), s. 4, stated that prisoner being a suspected person, on, etc., at the railway station in the parish of, etc., the same being at the time a place of public resort, did frequent the platform of the station with intent to commit felony:—*Held*: sufficient.—*Re DAVIS* (1857), 2 H. & N. 149; 157 E. R. 62; *sub nom. Ex p. DAVIS*, 26 L. J. M. C. 178; 21 J. P. 280; 5 W. R. 522.

*Annotation*.—*Reid. Re Timson* (1870), L. R. 5 Exch. 257.

**1656.** — **Private house & garden—Sale by public auction in progress.**—A private house & garden where a sale by public auction takes place is for the time being "a place of public resort" within Vagrancy Act, 1824 (c. 83), s. 4.—*SEWELL v. TAYLOR* (1859), 7 C. B. N. S. 160; 29 L. J. M. C. 50; 1 L. T. 37; 23 J. P. 792; 8 W. R. 26; 141 E. R. 776; *sub nom. Ex p. SEWELL*, 6 Jur. N. S. 582.

**1657. "Frequenting"—Conviction of being "found" in public place.**—Vagrancy Act, 1824 (c. 83), s. 4, renders liable to conviction as a rogue & vagabond "every suspected person or reputed thief frequenting any river, etc., or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony." Prisoner was convicted "for that he T. on Dec. 24 instant, being a suspected person & reputed thief frequenting the public streets & places of & in the city, then & there was found in R. Place being a public thoroughfare, & one of the places of public resort of & in the city, with intent feloniously to steal," etc.:—*Held*: a commitment in these terms was good, although it alleged that

he was "found" in R. Place, & not that he "did frequent" it.—*Re CROSS* (1857), 1 H. & N. 651; 26 L. J. M. C. 23; 28 L. T. O. S. 257; 21 J. P. 87; 5 W. R. 307; *sub nom. Ex p. Cross*, 3 Jur. N. S. 320; *subsequent proceedings*, 1 C. B. N. S. 573.

*Annotation*.—*Consd. Clark v. R.* (1884), 14 Q. B. D. 92.

**1658.** — **No evidence of previous visits.**—Where a reputed thief was convicted, under Vagrancy Act, 1824 (c. 83), s. 4, of unlawfully frequenting a certain street with intent to commit a felony, & there was no evidence of his having been previously seen in that street or in any street adjacent thereto:—*Held*: the conviction was bad.—*CLARK v. R.* (1884), 14 Q. B. D. 92; 52 L. T. 136; 49 J. P. 246; 15 Cox, C. C. 666; *sub nom. R. v. CLARK*, 54 L. J. M. C. 66; 33 W. R. 226; 1 T. L. R. 109, D. C.

*Annotation*.—*Reid. Apothecaries Co. v. Jones*, [1893] 1 Q. B. 89.

**1659.** — **Sufficiency of evidence.**—A person may be convicted as a rogue & vagabond under Vagrancy Act, 1824 (c. 83), s. 4, on a charge of frequenting a public place for the purpose of committing a felony, without its being shown that he has been previously convicted, or that he has been a suspected person or reputed thief or has been known to have a bad character before the day on which the incidents take place which lead to his arrest.—*HARTLEY v. ELLNOR* (1917), 86 L. J. K. B. 938; 117 L. T. 304; 81 J. P. 201; 15 L. G. R. 775; 26 Cox, C. C. 10, D. C.

**1660. On private property—For immoral purpose.**—A man found trespassing in a private inclosure with a woman with intent to commit fornication is not liable to be convicted under Vagrancy Act, 1824 (c. 83), s. 4, the "unlawful purpose" there mentioned being not a merely immoral purpose but a purpose to commit some definite criminal offence.—*HAYES v. STEVENSON* (1860), 3 L. T. 296; 25 J. P. 39; 9 W. R. 53.

**1661.** — **Felonious intent—Variation in conviction.**—Where an information, laid under Vagrancy Act, 1824 (c. 83), s. 4, charged defts. with being in the prosecutor's dwelling-house "for an unlawful purpose, to wit, for the purpose of feloniously taking his provisions," & the justices found that defts. were there "for an unlawful purpose, to wit, for the purpose of taking his provisions without his consent":—*Held*: the conviction was bad.—*KIRKIN v. JENKINS* (1863), 2 New Rep. 64; 32 L. J. M. C. 140; 9 Jur. N. S. 1013.

— **Arrest on different premises—On another charge.**—Appls. met by design in a train going from London to Southampton, & having met a man named E. in the train they went with him to a hotel at Southampton & engaged two rooms under false names, & E. also engaged a room for himself, & a chambermaid subsequently found the three men in the room engaged by E., & she supplied them with drinks there. Appls., however, did not sleep at the hotel, but for the purpose of concealing their whereabouts they went to another hotel two miles away, where one of them paid for drinks with a £5 note, & appls. stayed the night at this other hotel. Next day a chambermaid found dice on the floor of the room engaged & occupied by E. at the first-named hotel, & appls. were arrested at Bournemouth, & a £5 note & 150 dollars in gold were found on one of them, & they were charged with stealing two 100 dollar bills & other money, the property of E. The money had not been handed over by E. in respect of gaming or other debts, nor was any such money due. Applt. on whom the money



was found offered the detective £10 to square the matter. Whilst applts. were in custody on the above charge of felony an information was preferred against them under Vagrancy Act, 1824 (c. 83), s. 4, charging them with being found on certain premises, namely, the first hotel above mentioned, for an unlawful purpose, & the justices convicted them under this sect., being of opinion that applts. travelled to Southampton & waited about the hotel for the purpose of coming into contact with passengers whom they knew to be leaving for America, & that their purpose in so doing was unlawfully to obtain goods or money from such passengers by fraud or theft:—*Held*: though actual arrest upon the premises is not necessary in order to constitute the offence of being found on the premises for an unlawful purpose, yet the conviction must be quashed, on the ground (1) (LORD ALVERSTONE, C.J.) originally applts. were not arrested & brought before the justices on suspicion of an offence under the sect.; (2) (BRAY & BANKES, JJ.) there was no evidence that applts. were discovered on the premises doing acts constituting an unlawful purpose.—*MORAN v. JONES* (1911), 104 L. T. 921; 75 J. P. 411; 27 T. L. R. 421; 22 Cox, C. C. 474, D. C.

#### SUB-SECT. 8.—GAMBLING IN PUBLIC PLACE.

See Vagrant Act Amendment Act, 1873 (c. 38), s. 3; GAMING & WAGERING, Vol. XXV., pp. 434, 435, Nos. 320–325.

#### SUB-SECT. 9.—INDECENT EXHIBITIONS.

See CRIMINAL LAW, Vol. XV., pp. 747, 748, Nos. 8063–8067.

### SECT. 3.—INCORRIGIBLE ROGUES.

See Vagrancy Act, 1834 (c. 83), ss. 5, 10.

**1663. Examination in presence of prisoner—Proof of conviction—Committal for sentence.**—Where prisoner is convicted at petty sessions as an incorrigible rogue & committed to quarter sessions for sentence, it is essential that the “examination into the circumstances of the case” required by Vagrancy Act, 1824 (c. 83), s. 10, should take place in the presence & hearing of prisoner so committed to quarter sessions for sentence. The proper method of proving the conviction at petty sessions is to call a witness, who, with the certificate of conviction before him, can identify prisoner as the person referred to in such certificate.—*R. v. COPE* (1925), 94 L. J. K. B. 662; 132 L. T. 800; 89 J. P. 100; 41 T. L. R. 418; 27 Cox, C. C. 778; 18 Cr. App. Rep. 181, C. C. A.

See, also, CRIMINAL LAW, Vol. XIV., pp. 130, 131, 469, 470, 479, 503, Nos. 1030, 1031, 1036, 5015–5018, 5221–5223, 5534–5536; SUPP. II., p. 369, No. 5536a.

### SECT. 4.—PRACTICE.

See Vagrancy Acts, 1824 (c. 83), ss. 6, 8, 9, 11, 13, & 1838 (c. 38), s. 1.

**Arrest.**—See CRIMINAL LAW, Vol. XIV., pp. 185, 186, No. 1647.

**Right to trial by jury.**—See CRIMINAL LAW, Vol. XIV., p. 131, Nos. 1036, 1037.

**Proof of previous conviction—Certified copy of record.**—See CRIMINAL LAW, Vol. XIV., p. 498, No. 5485.

**Payment of fees—Whether private prosecutor liable.**—See CRIMINAL LAW, Vol. XXXIII., p. 373, No. 815.

**1664. Form of conviction.**—In a conviction under the Vagrancy Act, 1824 (c. 83), s. 3, the omission of the word “part” in setting out the title of the Act is not a fatal variance, though sect. 17 gives a form of conviction requiring the title to be inserted. The form sets out that deft. was convicted for that he, etc., adding “here state the offence proved”:—*Held*: unnecessary to state whether the offence was proved by view, confession, or witnesses; though Vagrancy Act, 1824 (c. 83), s. 3, gives the justice power to convict only on view, confession, or the oath of a witness. It is sufficient in such conviction to state that deft. wilfully refused, etc. to maintain his family, being able to do so, whereby A. N. his wife, whom he was bound to maintain, became chargeable, etc., without alleging more directly a refusal to maintain his wife.—*NIXON v. NANNEX* (1841), 1 Q. B. 747; 1 Gal. & Dav. 370; 10 L. J. M. C. 134; 6 Jur. 389; 113 E. R. 1317.

**1665. Notice of appeal—Sufficiency of.**—A notice of appeal against a conviction under Vagrancy Act, 1824 (c. 83), s. 4, of a party as a rogue & vagabond, for obscenely exposing his person in a place of public resort, with intent to insult a female, stating as the ground of such appeal, that applt. was not guilty of the offence, is sufficient.—*R. v. NEWCASTLE-UPON-TYNE JJ.* (1831), 1 B. & Ad. 933; 9 L. J. O. S. M. C. 117; 109 E. R. 1033.

*Annotation*:—*Reid. R. v. St. Gillis, Colchester* (1848), 12 J. P. 645.

**1666. Appeal abandoned—Warrant for committal—By whom issued.**—*Ex p. MOORE* (1837), Will. Woll. & Dav. 72; 1 Jur. 135.

**1667. Recognition for prosecution of appeal.**—*Ex p.* — (1851), 15 J. P. Jo. 416.

**1668. Costs of appeal.**—Upon an appeal to quarter sessions against the conviction of applt., as a rogue & a vagabond under Vagrancy Act, 1824 (c. 83), the sessions have power to give costs against the prosecutor; & the justices who have convicted applt., & who do not appear to support the conviction, are not the parties against whom an order for costs can be made.—*R. v. PURDEY* (1864), 5 B. & S. 909; 5 New Rep. 76; 34 L. J. M. C. 1; 11 L. T. 309; 29 J. P. 132; 11 Jur. N. S. 153; 13 W. R. 75; 122 E. R. 1069.

*Annotations*:—*Mentl. Garnett v. Backhouse* (1868), L. R. 3 Q. B. 499; *R. v. London JJ.*, [1895] 1 Q. B. 616; *R. v. Kent JJ.*, [1896] 2 Q. B. 1; *R. v. Staffordshire JJ. & Longhurst* (1898), 62 J. P. 741.

— See, also, MAGISTRATES, Vol. XXXIII., p. 381, No. 904.

#### PART VII. SECT. 4.

**t. Questioning accused—Necessity for disclosure of authority.**—An officer questioning accused as to what he is

doing in a certain house should first disclose his authority & then expressly ask accused to give an account of himself.—*R. v. IRGAN* (1908), 14 B. C. R. 12; 8 W. L. R. 525; 14

Can. Crim. Cas. 106.—CAN.

**a. Technical error in statute.**—*R. v. ROYAL (B. C.)* (1925), 44 Can. Crim. Cas. 317; [1925] 3 W. W. R. 366.—CAN.

## Part VIII.—Old Age Pensions.

*See* Old Age Pensions Acts, 1908 (c. 40), 1911 (c. 16); Widows', Orphans' & Old Age Contributory Pensions Act, 1925 (c. 70),

**1669. Award invalid—Qualifying age not attained—Power of central authority to cancel.]—**Appct. for an old age pension who had not in fact attained the age of seventy was awarded a pension by the local pension committee & was paid the pension. No appeal against the award was brought in the manner prescribed by the Old Age Pensions Act, 1908 (c. 16). Afterwards new facts relating to the age of the pensioner came to the knowledge of the pension officer, who thereupon raised a question in the manner prescribed by Old Age Pensions Act, 1908 (c. 16), to the effect that the pensioner was not entitled to the pension as she was not yet seventy. The local pension committee decided to continue the pension, & the pension officer appealed to the central pension authority, who deprived the pensioner of the pension:—*Held*: the original decision of the local pension committee was invalid, as appct. had not fulfilled the statutory condition as to age, & notwithstanding Old Age Pensions Act, 1908 (c. 16), s. 7 (2), which enacts that "the decision of the local pension committee on any claim or question which is not referred to the central pension authority . . . shall be final & conclusive," it was competent for the pension officer to raise the question & for the central pension authority to deprive the pensioner of the pension on the ground of her real age.—*MURPHY v. R.*, [1911] A. C. 401; 80 L. J. P. C. 121; 75 J. P. 417; 27 T. L. R. 453; 55 Sol. Jo. 518; 9 L. G. R. 675; *sub nom.* *MURPHY v. A.-G. FOR IRELAND*, 104 L. T. 788, H. L.

**1670. Qualification by residence.]—**The ct. does not think that this consultative case requires us to hazard a definition of "resident," but we are impressed by the contrast between this term & "absent" in Widows', Orphans' & Old Age Contributory Pensions Act, 1925 (c. 70), s. 22. The contrast is not between "absence" & "presence," but between "absence" & "residence,"

which need not imply actual physical presence (*LORD HEWART, C.J.*).—*WEBSTER v. MINISTER OF HEALTH* (1926), 43 T. L. R. 36, D. C.

**1671. False statements—By husband & wife—Information against both.]—**One information may be preferred against husband & wife charging them with knowingly making a false representation contrary to the provisions of Old Age Pensions Act, 1908 (c. 40), s. 9 (1).—*MACPHAIL v. JONES*, [1914] 3 K. B. 239; 83 L. J. K. B. 1185; 111 L. T. 547; 78 J. P. 367; 30 T. L. R. 542; 12 L. G. R. 1237; 24 Cox, C. C. 373, D. C.

**1672. — Relevancy of.]—**(1) By Old Age Pensions Act, 1908 (c. 40), s. 9, "if for the purpose of obtaining or continuing an old age pension under this Act, either for himself or for any other person . . . any person knowingly makes any false statement or false representation" he commits an offence:—*Held*: an offence is committed only if the false statement is directly or indirectly relevant to the right to receive or continue to receive an old age pension.

(2) A person, for the purpose of continuing an old age pension for himself, made a statement to a pension officer that he had not been in the workhouse since he first received an old age pension & that he was not disqualified for receiving or continuing to receive an old age pension. He had in fact come out of the workhouse on the preceding day:—*Held*: the false statement was directly relevant to the right of the person to continue to receive an old age pension, inasmuch as Old Age Pensions Act, 1911 (c. 16), s. 6 (4), provides that the payment of a pension shall be discontinued where the disqualification has ceased less than three weeks before the time when the question is raised as to the disqualification of the person to receive an old age pension, & therefore he had committed an offence under Old Age Pensions Act, 1911 (c. 16).—*HOLDER v. MCCARTHY*, [1918] 2 K. B. 309; 87 L. J. K. B. 878; 119 L. T. 185; 82 J. P. 271; 16 L. G. R. 619; 28 Cox, C. C. 314, D. C.

*See, also, WORK & LABOUR.*

## PORT AND PORT DUES.

*See* CONSTITUTIONAL LAW; SHIPPING AND NAVIGATION; WATERS AND WATERCOURSES.

## PORT OF LONDON.

*See* METROPOLIS; WATERS AND WATERCOURSES.

## PORTIONS.

*See* EQUITY; INFANTS AND CHILDREN; SETTLEMENTS; WILLS.

## PORTS AND HARBOURS.

*See* SHIPPING AND NAVIGATION ; WATERS AND WATERCOURSES.

## POSSESSION.

*See* DISTRESS ; LANDLORD AND TENANT ; LIEN ; MORTGAGE ; PERSONAL PROPERTY ; REAL PROPERTY AND CHATTELS REAL ; RECEIVERS ; SALE OF LAND ; SHERIFFS AND BAILIFFS ; TROVER AND DETINUE ; AND TITLES *passim*.

## POSSESSORY TITLE.

*See* LIMITATION OF ACTIONS ; SALE OF LAND.

## POSTHUMOUS CHILDREN.

*See* DESCENT AND DISTRIBUTION ; PERPETUITIES ; SETTLEMENTS ; WILLS.

## POST-NUPTIAL SETTLEMENTS.

*See* BANKRUPTCY AND INSOLVENCY ; FRAUDULENT AND VOIDABLE CONVEYANCES ;  
SETTLEMENTS.

## POST-OBIT BONDS.

*See* BONDS.

# POST OFFICE.

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## Part I.—In General.

*See, generally,* Post Office Act, 1908 (c. 48).  
**Control of telephones.**—*See* Telephone Transfer Acts, 1911 (c. 26), & 1911 (c. 56); & *generally,*

TELEGRAPHS & TELEPHONES.

**Savings banks.**—*See* BANKERS & BANKING, Vol. III., pp. 137, 138, Nos. 111, 112.

## Part II.—Constitution.

## SECT. 1.—POSTMASTER-GENERAL.

*See* Post Office Act, 1908 (c. 48), s. 33.

**1. Corporate nature of office.**—(1) The Postmaster-General is not liable in his official capacity, as head of the telegraph department of the Post Office, for wrongful acts done by his subordinates in carrying on the business of the department.

(2) It becomes of importance to see where this incorporation originated. It is found first in the Act of 1840 [3 & 4 Vict., c. 90] s. 67, not an Act incorporating, if that expression is allowable, or quasi-incorporating the Postmaster-General for all purposes, but merely constituting him a corp., or a quasi-corp., for the purpose of securing continuity of title. The Postmaster-General has vested in him property for the purpose of his position as Postmaster-General . . . & therefore, the sect. of the Act [3 & 4 Vict., c. 90, s. 67] was passed with a view to securing automatically the transmission of the right to property. That is the whole purpose of that sect. of the Act of Parliament, & the whole object of the quasi-incorporation of the Postmaster-General (MATHEW, L.J.).—*BAINBRIDGE v. POSTMASTER-GENERAL*, [1906] 1 K. B. 178; 75 L. J. K. B. 366; 94 L. T. 120; 54 W. R. 221; 22 T. L. R. 70, C. A.

*Annotation:—As to* (1) *Consid. Koper v. Public Works Comrs.*, [1915] 1 K. B. 45.

**Appointment of assistant Postmaster-General.**—*See* Assistant Postmaster-General Act, 1909 (c. 14), s. 1.

## SECT. 2.—OFFICERS AND SERVANTS.

*See* Post Office Act, 1908 (c. 48), ss. 35, 42–44.

**2. Liability for default.**—*Postmaster-General Immune.*—*BAINBRIDGE v. POSTMASTER-GENERAL*, No. 1, *ante*.

**3. — Loss of postal packet.**—The head of a public office under Govt. with power to appoint & remove the servants of the office who are to be paid by, & give at his discretion security to Govt.

is not responsible to an individual for a loss occasioned by the default of such servants. The servant who is guilty of the default is. The Postmaster-General is not answerable for a packet delivered to the receiver at the post office & lost out of the office. But the receiver is.—*LANE v. COTTON* (1701), 1 Ld. Raym. 646; 11 Mod. Rep. 12; 12 Mod. Rep. 472; Carth. 487; Holt, K. B. 582; 1 Salk. 17; 1 Com. 100; 91 E. R. 1332.

*Annotations:—Feld.* *Whitfield v. Le Despencer* (1778), 2 Cowp. 754. *Consid.* *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178. *Feld.* *Duncan v. Findlater* (1830), 6 Cl. & Fin. 894; *Johnson v. Mid. Ry.* (1849), 4 Exch. 367; *Hearn v. L. & S. W. Ry.* (1855), 24 L. J. Ex. 180; *R. v. Gibbs* (1855), 6 Cox, C. C. 455; *Bennett v. Bayes* (1860), 5 H. & N. 391; *R. v. Treasury Lords Comrs.* (1872), 41 L. J. Q. B. 178; *Clarke v. West Ham Corp.*, [1909] 2 K. B. 858; *Bainfield v. Goole & Sheffield Transport Co.*, [1910] 2 K. B. 94; *G. N. Ry. v. L. & P. Transport & Depository*, [1922] 2 K. B. 742. *Mentd.* *R. v. Cotton* (1751), Park, 112; *Perkins v. Smith* (1752), Say, 40; *Nicholson v. Mounsey & Symes* (1812), 15 East, 384; *Laugher v. Pointer* (1826), 5 B. & C. 547; *Muspratt v. Gregory* (1836), 1 M. & W. 633; *Woods v. Pinnis* (1852), 16 Jur. 936; *R. v. Kay* (1857), 26 L. J. M. C. 119; *Mersey Dock Trustees v. Gibbs* (1866), L. R. 1 H. L. 93.

**4. — Theft of posted bank note.**—*By sorter.*—Case does not lie against the Postmaster-General, for a bank note stolen by one of the sorters out of a letter delivered into the post office.—*WHITFIELD v. LE DESPENCER (LORD)* (1778), 2 Cowp. 754; 98 E. R. 1344.

*Annotations:—Consid.* *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178. *Feld.* *Tobin v. R.* (1864), 16 C. B. N. S. 310. *Mentd.* *Mersey Docks Trustees v. Gibbs* (1866), 11 H. L. Cas. 686.

**5. — Customer undercharged for telegram.**—*Right to recover full charge.*—Where a certain sum is charged for a telegram & deft. is afterwards called upon to pay an increased sum:—*Held*: deft. is bound to pay the amount so claimed, the Postmaster-General being in no way estopped from suing, & not being bound by inaccurate representation made by a clerk in his employ.—*POSTMASTER-GENERAL v. GREEN* (1887), 51 J. P. 582; 3 T. L. R. 780, C. A.

**Offences.**—*See* Part V., *post*.

**Exemption from jury service.**—*See* JURIES, Vol. XXX., p. 213, No. 5.

## PART II. SECT. 1.

**a. Discretionary powers.**—Discretion of Postmaster-General in refusing to carry certain mail matter, exercised under statute, cannot be interfered with by the cts.—*R. v. ARNDEL* (1906), 3 C. L. R. 557.—*AUS.*

**b. Authority to bind Crown.**—An action will not lie against the Crown for breach of a contract for carrying mails made by parol by the Postmaster-General & accepted by the contractor by letter notwithstanding it was partly performed, as, if a permanent contract, being for a larger sum than \$1,000, it could not be made without the authority of an Order in Council, & if temporary it was revocable at the will of the Postmaster-General.—*HUMPHREY v. R.* (1892), 20 S. C. R. 591.—*CAN.*

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## PART II. SECT. 2.

**c. Removal.**—At the time of the establishment of the Commonwealth, B. was an officer in the postal department of the Province of South Australia, & when the department was taken over by the Commonwealth he was transferred with it, & afterwards continued in the service of the Commonwealth. The Board of Comrs. having, after report from the chief officer & after investigation into the circumstances, purported to remove B. from the service, on the ground that he appeared to the Board & the chief officer to be incapacitated for the performance of his duty efficiently:—*Held*: B. was lawfully removed from office.—*BRADSHAW v. COMMONWEALTH* (1925), 31 Argus, L. R. 441.—*AUS.*

**d. Postmaster's bond.**—*Action by*

*Crown.*—*R. v. McPHERSON* (1864), 15 C. P. 17.—*CAN.*

**e. —**—*Post Office Act*, 1867, s. 89 (D), does not take away from the Crown the remedy by extent upon a bond given by a postmaster.—*R. v. McNABB* (1870), 30 U. C. R. 479.—*CAN.*

**f. — Discharge of surety.**—*R. v. PRINGLE* (1872), 32 U. C. R. 308.—*CAN.*

**g. —**—*R. v. BLACK* (1899), 6 Exch. C. R. 236; *affd.* 29 S. C. R. 693.—*CAN.*

**h. — Guarantee against larceny.**—*Loss due to forgery—Sureties not liable.*—*POSTMASTER-GENERAL v. MCCOLL* (1880), 31 C. P. 364.—*CAN.*

**k. Special officer.**—In the course of casual conversations with the

B B

*Sect. 2.—Officers and servants. Part III. Sects. 1, 2, 3, 4 & 5: Sub-sects. 1 & 2.]*

**6. Right to possession of firearms—Without certificate—For transmission purposes—Or by authority of superiors.]—Firearms Act, 1920 (c. 43), s. 1 (8) (f), enables an officer of the post office to have in his possession or carry a firearm**

without a certificate only when he has a firearm in his possession for the purpose of its transmission through the post, or when he is authorised by his superiors to carry a firearm.—*DICKINSON v. BAINBRIDGE*, [1922] 1 K. B. 423; 91 L. J. K. B. 329; 126 L. T. 334; 86 J. P. 8; 38 T. L. R. 50; 66 Sol. Jo. 196; 20 L. G. R. 83; 27 Cox, C. C. 143, D. C.

## Part III.—Conveyance of Mails.

### SECT. 1.—POSTING.

**7. Method of posting—Delivery to servant of post office—Letter containing money.]—A person remitting money by the post should deliver the letter at the general post office, or a receiving house appointed by that office, & not to a bell man in the street.—*HAWKINS v. RUTT* (1793), Peake, 248; 170 E. R. 145, N. P.**

*Annotation:—Distd. Skilbeck v. Garbett* (1845), 7 Q. B. 848.

**8. ———.]—*PACK v. ALEXANDER* (1833), 3 Moo. & S. 789.**

*Annotation:—Reid. Flower v. Newton* (1847), 11 Jur. 875.

**Rates of postage.]—See Post Office Act, 1908 (c. 48), ss. 1–3, 7–11; Post Office & Telegraph Act, 1920 (c. 40).**

**9. ——— Envelopes bearing halfpenny stamp—Right to open.]—Resp. sent a letter to his wife containing words alleged to be a libel on their children, plffs. This was inclosed in an open envelope, bearing a halfpenny stamp, addressed to her in her maiden name, & sent through the post. It was opened by the wife's butler out of curiosity, & he read the letter:—*Held*: (1) there was no evidence of publication to him by resp., as his act was unauthorised, & could not reasonably be anticipated by resp.; (2) although the postal authorities had the right to examine the contents of envelopes under a halfpenny stamp, a presumption that they had in fact done so did not arise, & evidence to show that they had done so in fact would be necessary to show publication to them.—*HUTH v. HUTH*, [1915] 3 K. B. 32; 84 L. J. K. B. 1807; 113 L. T. 145; 31 T. L. R. 350, C. A.**

*Annotation:—Mentd. Roff v. British & French Chemical Manufacturing Co. & Gibson*, [1918] 2 K. B. 677.

**Exemption from payment of postage.]—See Post Office Act, 1908 (c. 48), ss. 5 & 6.**

**Legal effect of posting.]—See Part X., post.**

### SECT. 2.—DELIVERY.

**10. Delivery of letter—Action to enforce.]—Case against a postmaster for not delivering a**

letter when requested.—*EDWARDS v. DICKENSON* (1691), 12 Mod. Rep. 6; 88 E. R. 1128.

**11. Delivery at official rate—Additional charge irregular.]—Postmasters in country towns cannot charge extra for the delivery of letters.—*BARNES v. FOLEY* (1768), 4 Burr. 2149; 1 Wm. Bl. 643; 98 E. R. 120.**

*Annotations:—Foll. Rowning v. Goodchild* (1773), 2 Wm. Bl. 906. *Reid. Stock v. Harris* (1771), 5 Burr. 2709; *Smith v. Powdich* (1774), 1 Cowp. 182.

**12. ———.]—Letters must be delivered in post towns at the rate of postage only.—*STOCK v. HARRIS* (1771), 5 Burr. 2709; 98 E. R. 422.**

*Annotations:—Reid. Rowning v. Goodchild* (1773), 2 Wm. Bl. 906; *Smith v. Powdich* (1774), 1 Cowp. 182.

**13. ———.]—*ROWNING v. GOODCHILD*, No. 72, post.**

**14. ———.]—A postmaster is bound to deliver all letters to the several inhabitants within a post town or place at their respective places of abode, at the rate of postage only as established by Act of Parliament.—*SMITH v. POWDICH* (1774), 1 Cowp. 182; 98 E. R. 1033.**

**15. ———.]—Postmaster cannot detain a letter on demand of anything for the delivery of the same beyond the Act of Parliament.—*SMITH v. DENNIS (OR DENNISON)* (1774), 10ff, 753; 98 E. R. 901.**

**Detention & secreting of mails.]—See Part V., Sects. 2 & 4, post.**

**Legal effect of delivery.]—See Part X., post.**

**Property in letters received.]—See COPYRIGHT, Vol. XIII., p. 200, Nos. 355–360.**

### SECT. 3.—RETURN WHEN UNDELIVERED.

*See Post Office Act, 1908 (c. 48), s. 56.*

**16. Letter not returned—Delivery presumed.]—The ct. will make a vesting order under Trustee Act, 1893 (c. 53), s. 35 (1) (ii) (d), where the trustee does not appear on the petition, provided an affidavit is filed stating that the petition has been served on the trustee, & also that the request, in writing, addressed & sent to him in accordance**

Postmaster-General, who was considering improvements in the administration of his department, L. suggested that the system followed in France of collecting subscription to newspapers through postmasters be adopted in Canada, stating that he was leaving shortly for France on personal business & could look into the matter & report to him. Before leaving, to accredit him with the French postal authorities, he wrote to the Minister asking to be appointed special officer for the above purpose, who replied: "You are by these presents authorised to act as such special officer, etc." No mention was made of any payment or remuneration for such services:—*Held*: the special officer was not an officer or servant within R. S. C., 1906, s. 9.—*LEFEVRE v. R.*, [1923] Exch. C. R.

115.—CAN.

### PART III. SECT. 1.

**1. Method of posting.]—Defts. contracted with an assoc. to transmit to every voter in British Columbia a certain circular of a political nature. They made up a number of parcels for various city centres & sent them by express, consigned to the express co.'s agents in the respective places, with instructions to mail in the local post offices. The local or drop letter postal rate of one cent on each letter was affixed:—*Held*: this procedure of reaching the addressees was an infringement of the rights of the Postmaster-General under the Post Office Act.—*R. v. BAXTER & JOHNSON* (1911), 16 B. C. R. 6; 18 Can. Crim. Cas. 340.—CAN.**

*m. Rates of postage.]—Postage on a letter carried by inland navigation from one post town to another, was chargeable under 11 Anne, c. 10, & 5 Geo. 3, c. 25, according to the distance the letter was actually carried, & not according to the distance by the post road between the two places.—*DICKSON v. CROOKS* (1830), Dra. 125.—CAN.*

### PART III. SECT. 2.

**n. What amounts to.]—*Qu.*: whether the deposit of a letter by the postal authorities in a private letter-box does or does not amount to such a delivery as to shift the risk of its loss from the sender to the addressee.—*FOWLER (D. & J.), LTD. v. FRENCH*, [1914] S. A. L. R. 254.—AUS.**

with the terms of such sect. has not been returned by the Post Office.—*Re STRUVE'S TRUSTS* (1912), 56 Sol. Jo. 551.

#### SECT. 4.—TRANSMISSION OF CONTRABAND AND OBSCENE MATTER.

See Post Office Act, 1908 (c. 48), ss. 16, 17, 18.

**17. Transmission of obscene matter—Advertisement in newspaper.**—Deft. inserted in a newspaper of which he was the editor advertisements which, though not obscene in themselves, related, as he knew, to the sale of obscene books & photographs. A police officer wrote to the addresses given in the advertisements, & received in return from the advertisers, who were foreigners resident abroad, obscene books & photographs. Deft. was tried on an indictment charging him with causing & procuring obscene books & photographs to be sold & published & to be sent by post contrary to the Post Office (Protection) Act, 1884 (c. 76), s. 4. Deft. was convicted:—*Held*: the conviction was right.—*R. v. DE MARNY*, [1907] 1 K. B. 388; 76 L. J. K. B. 210; 96 L. T. 159; 71 J. P. 14; 23 T. L. R. 221; 51 Sol. Jo. 146; 21 Cox, C. C. 371, C. C. R.

*Annotations*:—*Mentl. Cook v. Stockwell* (1915), 84 L. J. K. B. 2187; *Gould v. Houghton*, [1921] 1 K. B. 509.

—[See, also, CRIMINAL LAW, Vol. XV., p. 749, Nos. 8079, 8080.]

#### SECT. 5.—TRANSPORT.

##### SUB-SECT. 1.—IN GENERAL.

See Post Office Act, 1908 (c. 48), ss. 14 & 34.

**18. By common carrier—Letter relating to subject-matter carried.**—A parcel, containing bank notes, stamps, & a letter, were sent by a common carrier from one stamp distributor to another. In an action against the carrier:—*Held*: the circumstance of the letter accompanying the stamps was *prima facie* evidence that it related to them, so as to bring the case within the proviso of 42 Geo. 3, c. 81, s. 6, & deft. not having proved the letter to relate to any other subject-matter, was liable for the value of the parcel.—*BENNETT v. CLOUGH* (1818), 1 B. & Ald. 461; 106 E. R. 109.

*Annotation*:—*Consd. Sissons v. Dixon* (1826), 5 B. & C. 758.

**19. By delivery company—On behalf of shareholder—Business circular.**—Applts. were a co. formed in London, called "The Circular Delivery Co., Ltd.," the purpose being "to deliver for or on behalf of its shareholders & members circulars, newspapers, etc." One J., who was a shareholder, delivered a business circular to the offices of the co., in an envelope, to be delivered according to its address, Messrs. Newell & Son, 5, Eccleston Street, N.W. The co. caused it to be delivered accordingly at its address:—*Held*: this was a violation of 7 Will. 4 & 1 Vict. c. 33.—*CIRCULAR DELIVERY CO., LTD. v. CLARE* (1869), 20 L. T. 701; 34 J. P. 5.

##### SUB-SECT. 2.—BY RAIL.

Railways (Conveyance of Mails) Act, 1838 (c. 98); Post Office (Parcels) Acts, 1882 (c. 74), 1922 (c. 49); Conveyance of Mails Act, 1893

(c. 38); Post Office & Telegraph Act, 1920 (c. 40); & generally, RAILWAYS.

**20. Right of Postmaster-General to control trains—Stopping places.**—In a lease by a railway co. of their refreshment rooms at S. the co. covenanted with the lessee that all trains carrying passengers not being goods trains or trains to be sent express or for special purposes, & except trains not under the control of the co., which should pass the S. station either up or down, should, save in case of emergency or unusual delay arising from accidents, stop there for refreshment of passengers for a reasonable period of about ten minutes, & that as far as the co. could influence the same, trains not under their control should be induced to stop for the like purpose. The Postmaster-General having in the exercise of his power required that trains carrying mails should not stop at S. more than five minutes:—*Held*: (1) those trains were not, as regards stopping, under the control of the co.; (2) the co. were not by their covenant prohibited from carrying passengers by such trains.—*PHILLIPS v. GREAT WESTERN RY. CO.* (1872), 7 Ch. App. 409; 41 L. J. Ch. 614; 26 L. T. 532; 20 W. R. 562, L. C. & L. JJ.

**21. Whether passengers may use trains.**—*PHILLIPS v. GREAT WESTERN RY. CO.*, No. 20, ante.

**22. Security bond—Form of bond.**—(1) Upon forfeiture of a bond to the Crown for conveyance of the mails by a railway co., a plea that the co. was prevented from performing their obligation by the neglect or default of a servant of the post office would be a good defence at law.

Accordingly, under Railways (Conveyance of Mails) Act, 1838 (c. 98), s. 13, a railway co. was ordered to execute a bond without any proviso protecting them against such an event.

(2) Form of bond to be given by railway cos. under that sect.—*A.-G. v. LONDON & NORTH WESTERN RY. CO.* (1859), John. 28; 70 E. R. 326.

**23. — Forfeiture of bond.**—*A.-G. v. LONDON & NORTH WESTERN RY. CO.*, No. 22, ante.

**24. Injury to officer accompanying mails—Liability of railway company.**—Declaration, in case, alleged that defts. were the proprietors of the L. & N. W. Ry. co. & of certain carriages, etc., used by them on the same; that the mails from L. to T., among others, had been required to be, & were, carried by defts. in & on the railway, pursuant to Railways (Conveyance of Mails) Act, 1838 (c. 98): that pltf. was an officer of the post office whom the Postmaster-General had reasonably required defts. to carry & convey in & upon the carriage conveying the mails, & defts. were then carrying & conveying pltf., as such officer, in a carriage of defts. on the railway, in which carriage the mails were, & pltf., then being such officer & as such officer, was lawfully in the carriage; & thereupon it became the duty of defts. to use proper care & skill in carrying & conveying pltf.: yet defts. did not use due & proper care & skill in carrying & conveying pltf., but neglected so to do; & took so little care, & so negligently & unskillfully conducted themselves in & about the carrying & conveying pltf., & in conducting, etc., the carriage in which he then was, & the engine & other carriages on the railway, that the carriage received

#### PART III. SECT. 5, SUB-SECT. 2.

**o. Right of Postmaster-General to control trains.**—A railway co. is not bound to carry a mail guard with bags at the same rate as an ordinary

passenger, & before the Postmaster-General can compel a railway co. to carry such mail bags, a privy must exist between them by the execution of a special contract.—*R. v. IRISH*

*SOUTH-EASTERN RY. CO.* (1850), 1 I. C. L. R. 29.—*IR.*

**p. — Hours of departure.**—The Postmaster-General, who is empowered by Conveyance of Mails Act,



**Sect. 5.—Transport: Sub-sects. 2, 3 & 4.]**

a concussion, whereby pltf. was injured, etc. (allegation of special damage):—*Held*: by Railways (Conveyance of Mails) Act, 1838 (c. 98), a duty was imposed on defts. to use proper care & skill in conveying pltf., as alleged in the declaration, & they were liable to pltf. in an action on the case for injury sustained by him through their neglect to use such care & skill.—*COLLETT v. LONDON & NORTH WESTERN RY. CO.* (1851), 16 Q. B. 984; 20 L. J. Q. B. 411; 17 L. T. O. S. 123; 15 Jur. 1053; 117 E. R. 1158.

*Annotations*:—*Expld. East Indian Ry. v. Kalidas Mukerjee*, [1901] A. C. 396. *Mentd. Alton v. Mid. Ry.* (1865), 19 C. B. N. S. 213.

**25. Facilities for receipt & delivery—Duty to provide.]**—Under Post Office (Parcels) Act, 1882 (c. 74), any railway co. named in sched. I. of the Act is bound to accept from & to deliver to the postal authorities receptacles containing postal packets at any station where such receptacles are tendered or applied for, notwithstanding that such receptacles contain postal packets which are ultimately destined for stations other than that at which such receptacles were first delivered. The same station may be both an “outwards” & an “inwards” station within Post Office (Parcels) Act, 1882 (c. 74), s. 3 (2), in relation to a postal parcel received at one station for sorting purposes, & forwarded again from the same station to its ultimate destination.—*R. v. LONDON & NORTH WESTERN RY. CO. & GREAT WESTERN RY. CO.* (1896), 65 L. J. Q. B. 516; 74 L. T. 624, D. C.

**26. Remuneration—Apportionment meeting.]**—*HIGHLAND RY. CO. v. SMART* (1895), 11 T. L. R. 305.

**27. Remuneration—Ordinary trains.]**—For the carriage of mails by the co.’s regular trains the payment by the Postmaster-General should be that which the co. could charge to ordinary traders for similar services, subject to such considerations as between two traders would justify a discrimination in favour of one over the other. Considering how large an element of cash is constituted by the terminal services, & taking into account the quantity & regularity of the traffic, I think that a reduction of one-third upon the parcels rates should be made in favour of the Postmaster-General. The carriage of mails by trains which the co. would not run for its own purposes at all must be treated differently. The co. is entitled to be paid for the cost of working these trains, & a reasonable profit on that cost, less the amount of receipts derived from the conveyance of other traffic carried (*WRIGHT, J.*).—*WATERFORD, LIMERICK & WESTERN RY. CO. & POSTMASTER-GENERAL* (1900), 17 T. L. R. 78; 11 Ry. & Can. Tr. Cas. 77.

**28. ———.]**—Upon an application to determine the amount of the remuneration to be paid *per annum* by the Postmaster-General to the G. N. Ry. co. (Ireland) for the conveyance of mails on their railway:—*Held*: (1) to arrive at a “reasonable remuneration” to be paid for the conveyance of mail bags, the railway co.’s ordinary scale of rates as published in its time tables should be adopted, less 25 per cent. in respect of terminal services performed in the case of similar traffic for ordinary traders, but not performed in the case

of mails, & less 10 per cent. in respect of the quantity & regularity of the mails & the facility & economy with which they are handled as compared with traders’ parcels. (2) In respect of “Notice” trains, *i.e.* statutory trains run compulsorily by the railway co., & absolutely under the control of the Postmaster-General, but carrying also ordinary passengers & parcels, the proper principle upon which the railway co.’s remuneration should be based was to ascertain the cost of running each train, to add (a) a fair & reasonable profit, & (b) an additional sum in consequence of the running of those trains fettering the co.’s freedom in the working of their system, & against the sum thus ascertained to credit the Postmaster-General with the annual earnings of each train, & where those earnings fell short of the sum of the three items on the debit side, the difference should be paid by the Postmaster-General.—*GREAT NORTHERN RY. CO. (IRELAND) v. H.M.’s POSTMASTER-GENERAL* (1909), 25 T. L. R. 511; 13 Ry. & Can. Tr. Cas. 290.

*Annotation*:—*Generally, Consd. S. E. & C. Ry.’s Managing Committee v. Postmaster-General* (1911), 14 Ry. & Can. Tr. Cas. 216.

**29. ———.]**—(1) Upon an application to determine the amount of the remuneration to be paid *per annum* by the Postmaster-General to the G. W. Ry. co. for the conveyance of mails on their railway, & for the services performed & accommodation provided by them in connection therewith:—*Held*: to arrive at a “reasonable remuneration” to be paid to the railway co. for the conveyance of mail bags, the railway co.’s ordinary scale of rates for parcels should be applied less certain deductions to counterbalance expenses incurred by the railway co. in carrying parcels for the public, & not incurred in case of the mails, *viz.* 25 per cent. for terminal services, & 10 per cent. on account of the substantial difference between mail bags & parcels in the quantity of the bags, & the regularity with which they are supplied for conveyance.

(2) The railway co. claimed to be paid full passenger fares for servants of the post office travelling in the sorting carriages. The Postmaster-General objected to make any payment for the space occupied by the sorters in the carriage, on the ground that as the carriages are paid for the sorters at work in them should travel free of charge:—*Held*: the railway co. should be paid for the conveyance of sorters & other servants of the post office at season ticket rates.

(3) The railway co. claimed to charge for “rent” for sites of letter boxes at stations, & for conveyance of mails by omnibus:—*Held*: such matters were outside the question of conveyance of mails by train; but charges were authorised for the use of the co.’s premises by the post office staff, & for assistance in transferring mails rendered by the servants of the railway co.—*Re GREAT WESTERN RY. CO. & POSTMASTER-GENERAL* (1903), 19 T. L. R. 636; 12 Ry. & Can. Tr. Cas. 11.

*Annotation*:—*Generally, Re G. N. Ry. (Ireland) v. H.M.’s Postmaster-General* (1909), 25 T. L. R. 511.

**30. ——— “Notice” trains carrying passengers.]**—*GREAT NORTHERN RY. CO. (IRELAND) v. H.M.’s POSTMASTER-GENERAL*, No. 28, *ante*.

**31. ——— Special mail train.]**—*WATERFORD, LIMERICK & WESTERN RY. CO. & POSTMASTER-GENERAL*, No. 27, *ante*.

1838, upon service of twenty-five days’ notice, to require the conveyance & forwarding of the mails by a railway co. “at such hours or times in the day or night” as he should direct, is not restricted to the naming of fixed &

definite hours for the departure & running of mail trains, but is entitled to name variable times, by making the departure & running of the mail trains dependent on the time of the arrival of the mails in ordinary course of

through transit by rail & sea.—*R. v. GREAT NORTHERN RY. CO. OF IRELAND*, [1907] 2 I. R. 242.—*IR.*  
q. *Conveyance by tram.*—*CLOUGH VALLEY TRAMWAY CO., LTD. v. R.* (1892), 30 L. R. Ir. 316.—*IR.*

32. ———.]—*Re* GREAT WESTERN RY. CO. & POSTMASTER-GENERAL, No. 29, *ante*.

33. ——— Conveyance of postal servants—In sorting carriages.]—*Re* GREAT WESTERN RY. CO. & POSTMASTER-GENERAL, No. 29, *ante*.

34. ——— For assistance of railway servants.]—*Re* GREAT WESTERN RY. CO. & POSTMASTER-GENERAL, No. 29, *ante*.

35. ——— Use of railway premises—By post office staff.]—*Re* GREAT WESTERN RY. CO. & POSTMASTER-GENERAL, No. 29, *ante*.

36. ——— For omnibus service.]—*Re* GREAT WESTERN RY. CO. & POSTMASTER-GENERAL, No. 29, *ante*.

37. ——— Settlement of disputes.]—By Regulation of Railways Act, 1873 (c. 48), s. 19, reasonable remuneration is to be paid for such services, & by sect. 19 (2), "any difference between the Postmaster-General & any railway co. as to the amount of such remuneration, or as to any other question arising under this Act, shall be decided by arbn. in manner provided by Railways (Conveyance of Mails) Act, 1838 (c. 98), or at the option of such railway co. by the comrs."

Upon an application by the Postmaster-General to the comrs. for an injunction against the H. Ry. co. to compel them to carry the mails pursuant to Regulation of Railways Act, 1873 (c. 48), s. 18, it was objected by the co. that the comrs. had no jurisdiction, as the complaint came within the arbn. clause, & should be determined according to Railways (Conveyance of Mails) Act, 1838 (c. 98):—*Held*: this was not a "difference" within the meaning of sect. 19, & the words therein, "any other question," should be confined, by the preceding particular words, to questions of remuneration, compensation & the like.—*POSTMASTER-GENERAL v. HIGHLAND RY. CO.* (1874), 2 Ry. & Can. Tr. Cas. 34.

#### SUB-SECT. 3.—BY SHIP.

See Post Office Act, 1908 (c. 48), ss. 26–32.

38. Duty of master to carry mails.]—*A.-G. v. CUNARD S.S. CO.* (1886), 3 T. L. R. 262, D. C.

Contract to carry mails—Implied agreement for dock facilities.]—See *CONTRACT*, Vol. XII., p. 614, No. 5076.

Immunity from seizure.]—See *ADMIRALTY*, Vol. I., p. 110, No. 140.

Vessel as security for mariners' wages.]—See *ADMIRALTY*, Vol. I., p. 110, No. 133.

39. Stores ordered by master—Whether Postmaster-General liable.]—The owners of a post office packet are liable for stores ordered by the captain who is appointed by the Postmaster-General.—*STOKES v. CARNE* (1809), 2 Camp. 339; 170 E. R. 1177.

*Annotation*:—*Mentd.* *Frost v. Oliver* (1853), 2 E. & B. 301.

40. Liability for excessive speed of ship.]—*THE ROSE* (1843), 2 Wm. Rob. 1; 2 Notes of Cases, 101; 7 L. T. 166; 7 Jur. 381; 166 E. R. 656.

*Annotations*:—*Mentd.* *The Iron Duke* (1845), 2 Wm. Rob. 377; *Londonderry (Owners) v. Dolbadarn Castle (Owners)* (1845), 4 Notes of Cases, Supp. xxxi; *The Victoria* (1848), 6 Notes of Cases, 176; *Gjessing v. The Hansa* (1872), 26 L. T. 169; *The Norma* (1876), 35 L. T. 418.

41. Liability for loss through collision.]—A collision occurred between the steamships *M.* & *W.*, in consequence of which the *M.*, which was

carrying passengers & mails, sank & the greater portion of the mails were lost. The *W.* limited her liability under the provisions of Merchant Shipping Act, 1894 (c. 60), s. 502. At the reference before the registrar & merchants, the Postmaster-General claimed against the fund in ct., as bailee for the senders of registered letters & parcels lost by the collision, the estimated value of the same, although he was under no liability to the owners of them:—*Held*: as bailee in possession, he could recover damages for the loss of the goods irrespective of whether or not he was liable to the bailors.—*THE WINKFIELD*, [1902] P. 42; 71 L. J. P. 21; 85 L. T. 668; 50 W. R. 246; 18 T. L. R. 178; 46 Sol. Jo. 163; 9 Asp. M. L. C. 259, C. A.

*Annotations*:—*Mentd.* *Glenwood Lumber Co. v. Phillips*, [1904] A. C. 495; *Plassey Collieries Co. v. Partridge*, [1912], 81 L. J. K. B. 723; *Eastern Construction Co. v. National Trust Co. & Schmidt*, [1914] A. C. 197; *The Rosalind* (1920), 90 L. J. P. 126; *Elliott Steam Tug Co. v. Shipping Controller*, [1922] 1 K. B. 127; *G. N. Ry. v. L. E. P. Transport & Depository*, [1922] 2 K. B. 742; *The Joannis Vatis*, [1922] P. 92; *The Zelo*, [1922] P. 9; *Mersey Docks & Harbour Board v. Hay*, [1923] A. C. 345.

42. Remuneration for carriage of mails—Principles of assessment.]—Upon an application to determine the amount of the remuneration to be paid by the Postmaster-General for the conveyance of mails by the appcts.' steamships between Dover & Calais it was agreed between the parties that the principle laid down in the case of the *G. N. Ry. Co. (Ireland) v. H.M. Postmaster-General*, No. 28, *ante*, should be followed, whereby the cost of service should be first ascertained to which should be added a reasonable sum for profit plus a further amount fixed according to circumstances for compulsory working; the difference between this total & the actual earnings to be the sum payable by the Postmaster-General.

In 1894 a contract had been made between the parties for the annual sum of £25,000, which included the carriage of the Indian mails, to which £2,000 odd was attributable, & as to which a separate contract was subsequently made.

The contract was terminated as from Oct. 1908, after which date the decision of the ct. as to payment was to be retrospective. From 1910 the service was a compulsory one ordered by "notice" by the Postmaster-General. The mails had increased from seventy-eight thousand bags *per annum* in 1894 to two hundred & thirty-eight thousand bags *per annum* at the time of the hearing, & the parcel post receptacles from 14,000 to 64,000 during the like period:—*Held*: from Oct. 1908, to Oct. 1910, the remuneration should be at the rate of £27,000 *per annum*; & from Oct. 1910, onwards, on which date the service had become compulsory, the remuneration for the services, to be performed in the future by turbine steamers, should be £30,000 *per annum*.

The basis for fixing the remuneration which was applied by the ct. in *G. N. Railway Co. (Ireland) v. H.M. Postmaster-General*, No. 28, *ante*, is not to be regarded as an inflexible principle binding under all circumstances.—*SOUTH-EASTERN & CHATHAM RY. CO.'S MANAGING COMMITTEE v. POSTMASTER-GENERAL* (1911), 14 Ry. & Can. Tr. Cas. 216.

#### SUB-SECT. 4.—EXEMPTION FROM TOLLS.

See Post Office Act, 1908 (c. 48), s. 79.

43. Lighthouse tolls.]—At the time of passing 3 Geo. 2, c. 36, the post office packets were not

PART III. SECT. 5, SUB-SECT. 4.  
r. *Ferry tolls.*—Although post office officials, as servants of the Crown,

are entitled to be carried free over ferries properly so does not apply to

a ferry which a corp'n. is empowered by statute to establish & work, but is under no obligation to maintain.—A.-G. FOR IRELAND

*Sect. 5.—Transport: Sub-sect. 4. Parts IV. & V. Sects. 1, 2 & 3.]*

ships owned by the Crown:—*Held*: the exception of His Majesty's ships of war did not, by implication, render the King's other ships chargeable; &, therefore, post office packets, the property of

the Crown, were not subject to toll.—*SMITHETT v. BLYTHE* (1830), 1 B. & Ad. 509; 9 L. J. O. S. K. B. 39; 109 E. R. 878.

*Annotations*:—*Bald. Hornsey U. C. v. Hennell*, [1902] 2 K. B. 73; *Chare v. Hart* (1918), 88 L. J. K. B. 833.

*Road & bridge tolls.*—*See* HIGHWAYS, Vol. XXVI., p. 343, No. 719.

## Part IV.—Issue of Money and Postal Orders.

*See* Post Office Act, 1908 (c. 48), ss. 23–25, 58, 59.

*Payment by order—Payee misnamed.*—*See* CONTRACT, Vol. XII., p. 463, No. 3761.

*44. Effect of signature of payee.*—*Qu.*: whether the signature to a post office order

required to be made by the payee previously to the receipt of the money, is the signing of a receipt or of an order.—*R. v. ANSELL* (1860), 8 Cox, C.C. 409.

*See, also*, *BILLS OF EXCHANGE*, Vol. VI., pp. 24, 445, 446, Nos. 137, 2802.

## Part V.—Offences.

### SECT. 1.—THEFT.

*See* Post Office Act, 1908 (c. 48), ss. 50–69.

*45. Theft of letter—What amounts to.*—

(1) A person employed at a receiving house of the General Post Office, to clean boots, etc., & to assist in tying up the letter bag, is not a servant of the post office, within Land Tax Certificates Forgery Act, 1812 (c. 143), s. 2.

(2) A receiving house is not a post office within Land Tax Certificates Forgery Act, 1812 (c. 143), but it is "a place for the receipt of letters"; & the whole shop is to be considered as the "place for the receipt of letters," & not the mere letter box; & therefore, if a person take a letter & put it on the shop counter of the receiving house, or give it to one of the persons belonging to the shop there, that is putting the letter into the post.

In an indictment on Land Tax Certificates Forgery Act, 1812 (c. 143), it was alleged, that a letter was "to be delivered at T." The letter was addressed "T. house," which was a house in the parish of T.:—*Held*: sufficient.

(3) To constitute the offence of stealing a letter from a place for the receipt of letters under Land Tax Certificates Forgery Act, 1812 (c. 43), s. 3, it is essential that the letter should be carried out of the shop which was the place for the receipt of letters; &, therefore, if a person take a letter & steal its contents, without taking the letter out of the shop, that is not an offence within this sect. of the Act of Parliament.—*R. v. PEARSON* (1831), 4 C. & P. 572; 2 Man. & Ry. M. C. 520; *subsequent proceedings*, 5 C. & P. 121, C. C. R.

*46. — By postal servant.*—*R. v. BROWN* (1817), Russ. & Ry. 32, n.; 168 E. R. 668, C. C. R.

*47. — — — — —*—*R. v. GOODWIN* (1828), 1 Lew. C. C. 100, 212; 168 E. R. 975, 1016.

*48. — — — — — Factotum at receiving house.*—*R. v. PEARSON*, No. 45, *ante*.

—*See, also*, *CRIMINAL LAW*, Vol. XIV., pp. 98, 368, Nos. 695, 3900; Vol. XV., p. 887, No. 9745.

*49. Theft of letter containing money—By postal servant.*—A servant being sent with a letter, & a penny to prepay the postage at a receiving house, found the door shut; &, in consequence, put the penny inside the letter, & fastened it in by means of a pin, & then put the letter into the unpaid letter box. A messenger in the General Post Office stole this letter with the penny in it:—*Held*: he might be convicted of stealing a post letter containing money, although the money was not put into the letter for the purpose of being conveyed by means of it to the person to whom it was addressed.—*R. v. MENCE* (1841), Car. & M. 234.

*50. — — — — —*—A letter was brought by prosecutrix to a branch post office to be registered & posted. The postmistress being at the time busy, received the money, but laid aside the letter under a glass cover, saying that as soon as the business was over, she would complete the registration, & if prosecutrix would call again would give her a receipt. Letters were not usually put under the glass cover. In the interim, while the letter was under the glass cover, prisoner stole a bank note enclosed in the letter:—*Held*: a post letter.—*R. v. RODGERS* (1851), 15 J. P. 501; *sub nom. R. v. ROGERS*, 5 Cox, C. C. 203.

*51. — — — — —*—Prisoner, a letter carrier \*

*v. LONDONDERRY BRIDGE COMRS. & STEWART*, [1903] 1 I. R. 389.—*IR.*  
*t. — — — — —*—*GOUGH v. ASHTON*, 2 N. Z. Jur. 32.—*N.Z.*

*a. Harbour tolls.*—*NEW ZEALAND UNION SS. CO., LTD. v. WELLINGTON HARBOUR BOARD*, [1915] A. C. 622, P. C.—*N.Z.*

### PART IV.

*b. Revocation of authority to pay—Outbreak of war.*—Where a person who had received a foreign postal money order presented such order for payment after hostilities had broken

out with the country where the order had been purchased, & payment was refused:—*Held*: the outbreak of war had revoked the authority of the post office as agent of such foreign state to pay the amount of the order.—*COLLISON & Co. v. COLONIAL GOVERNMENT* (1900), 17 S. C. 186; 10 C. T. R. 249.—*S. AF.*

### PART V. SECT. 1.

*45 i. Theft of letter—What amounts to.*—*R. v. TREPANIER* (1901), Q. R. 10 K. B. 222.—*CAN.*

*45 ii. — — — — —*—A test letter

placed in a private letter-box for the purpose of detecting a thief is a post letter within Post Office Act, 1858. Such a letter is in the custody & under the control of the postmaster until taken out of the letter-box by the person to whom it is addressed, & is therefore the subject of larceny.—*R. v. KNIBBS*, 2 N. Z. Jur. N. S. 13.—*N.Z.*

*c. — — — — — Form of indictment.*—An information charging that M. being employed in carrying the mail between G. & M., & while so employed did feloniously steal a piece of paper enclosed in a letter sent by post & not laying the property in either in any one

from C. to T. on the day in question, brought the sealed bag containing the letters from C. & delivered it safely at the post office of T. to the postmaster, whose duty it was to sort the letters in time to make up the bags for the mails. Prisoner's duty was complete when he delivered the bags to the postmaster of T., but after the performance of his duty he was requested by the postmaster of T. to assist in the sorting, which he consented to do, & whilst so engaged contrived to steal one of the letters containing a shilling. Prisoner was indicted for stealing a post letter containing money :—*Held* : prisoner was employed under the post office in sorting the letters within Post Office (Offences) Act, 1837 (c. 36), s. 26.

We entertain no manner of doubt that prisoner falls within the term of "employed under the Post Office." . . . He was employed by the postmaster, who was employed by the Postmaster-General (POLLOCK, C.B.).—*R. v. REASON* (1853), *Dears. C. C.* 226; 2 *C. L. R.* 120; 23 *L. J. M. C.* 11; 22 *L. T. O. S.* 107; 17 *J. P.* 743; 17 *Jur.* 1014; 2 *W. R.* 54; 6 *Cox, C. C.* 227; 169 *E. R.* 705, *C. C. R.*

52. — Letter posted for purpose of detection.]—The president of a department in the Post Office put a half sovereign into a letter on which he wrote a fictitious address, & dropped the letter with the money in it into the letter box of a post office receiving house, where prisoner was employed in the service of the Post Office. Prisoner stole the letter & money :—*Held* : this was a stealing of a "post letter" containing money within Post Office (Offences) Act, 1837 (c. 36), s. 26; & this was not the less a "post letter" within that enactment, because it had a fictitious address.—*It. v. YOUNG* (1846), 2 *Car. & Kir.* 466; 1 *Den.* 194; 2 *Cox, C. C.* 142; 169 *E. R.* 208, *C. C. R.*

*Annotation* :—*Reid, It. v. Shepherd* (1856), 2 *Jur. N. S.* 96. —.]—*See, also, CRIMINAL LAW, Vol. XV., pp. 883, 884, Nos. 9694–9696.*

—.]—*See, also, CRIMINAL LAW, Vol. XV., pp. 882, 887, Nos. 9682, 9746.*

— *Restitution to Postmaster-General.*]—*See CRIMINAL LAW, Vol. XV., p. 619, No. 6484.*

53. — Not in course of transmission by post.]—A post office being at an inn, a person was sent to put a letter containing promissory notes into the post. He took it to the inn with money to prepay the postage; he did not put it into the letter box, but laid the letter, & the money upon it, upon a table in the passage of the inn, in which passage the letter box was, & he pointed out the letter to prisoner, who was a female servant at the inn, who said she would "give it to them." Prisoner, who was not authorised by the innkeeper, her master, to receive letters for him, stole the letter & its contents :—*Held* : this was not a "post letter" within the Post Office (Offences) Act, 1837 (c. 36), ss. 27, 28, & the stealing of the letter & its contents by prisoner was not an offence within either of those sects.—*It. v. HARLEY* (1843), 1 *Car. & Kir.* 89.

*Annotation* :—*Dist. R. v. Rodgers* (1851), 15 *J. P.* 501.

is bad.—*R. v. MORANDA* (1884), 3 *N. S. W. S. C. R. (L.)* 152.—*AUS.*

d. —.]—Prisoner was charged with stealing a one pound note, the property of H. The note was taken with a letter in which it had been put by H. from the post office when H. was postmaster. H. deposed that he placed the note & the letter in the box for the purpose only of testing the honesty of the prisoner & that the address of the letter was wholly fictitious. He added that it was not his intention to send the letter :—

54. *Theft of money from letter*—By postal servant.]—To steal a letter out of the post office containing money is not an offence within 7 Geo. 3, c. 50, if the offender be a servant of the post office.—*R. v. SKUTT* (1774), 1 *Leach*, 106; 168 *E. R.* 155.

—.]—*See, also, CRIMINAL LAW, Vol. XV., pp. 883, 884, 891, 908, 909, Nos. 9694–9696, 9782, 9988, 9997.*

—.]—*See, also, CRIMINAL LAW, Vol. XV., p. 877, No. 9626.*

55. *Theft of money.*]—S. delivered two £5 notes to Mrs. D., the wife of the postmaster of C. at which post office money orders were not granted, & asked her to send them by G. the letter carrier from C. to W., in order that he might get two £5 money orders at the W. post office. Mrs. D. gave these instructions to G. & put the notes by his desire into his bag. G. afterwards took the notes out of the bag, & pretended when he got to the W. post office that he had lost them. It was found by the jury that G. had no intention to steal the notes when they were given to him by Mrs. D. :—*Held* : this taking of the notes by G. was not a larceny, the notes not being in his possession in the course of his duty as a post office servant.—*R. v. GLASS* (1847), 2 *Car. & Kir.* 395; 1 *Den.* 215; 2 *Cox, C. C.* 236; 169 *E. R.* 217, *C. C. R.*

*Annotation* :—*Dist. R. v. Reason* (1853), 6 *Cox, C. C.* 227.

56. *Theft of mail bags.*]—The horse mail bags being left by the mail rider, after he had taken possession of them, for a temporary purpose for two minutes, were stolen during his absence, the case is within Land Tax Certificates Forgery Act, 1812 (c. 143), s. 3.—*R. v. ROBINSON* (1819), 2 *Stark.* 485; 171 *E. R.* 712.

## SECT. 2.—FRAUDULENT RETENTION OF POSTAL PACKETS.

*See Post Office Act, 1908 (c. 48), s. 53.*

57. *Secreting letters.*]—If a letter carrier secrete two letters sent by the post on different days, each letter containing half of the same bank note, it is a capital offence within 7 Geo. 3, c. 50, & he may be indicted "that he having the said two letters containing the said bank note, did secrete the said letters, etc."—*R. v. MOORE* (1792), 2 *Leach*, 575; 2 *East, P. C.* 582; 168 *E. R.* 390.

58. —.]—*R. v. SHARPE* (1826), 1 *Mood. C. C.* 125; 168 *E. R.* 1210, *C. C. R.*

—.]—*See, also, CRIMINAL LAW, Vol. XV., p. 887, No. 9746.*

## SECT. 3.—EMBEZZLEMENT BY OFFICERS OF POST OFFICE.

*See, generally, CRIMINAL LAW, Vol. XV., pp. 921–935, Nos. 10,141–10,313.*

*See Post Office Act, 1908 (c. 48), s. 55.*

59. *Proof of employment.*]—A person em-

*Held* : the property in the note was rightly laid in H.—*It. v. WILSON* (1865), 5 *N. S. W. S. C. R. (L.)* 15.—*AUS.*

e. —.]—In an indictment under 1 *Vict. c. 36, s. 28*, for stealing a letter from a post office :—*Held* : it is not necessary to state to whom the letter is addressed; describing it as "a certain post letter" is sufficient.—*R. v. CHRISTIE* (1842), 2 *Craw. & D.* 425.—*IR.*

## PART V. SECT. 2.

57 l. *Secreting letters.*]—The accused,

being in the employ of Govt. in the Post Office Department, while assisting in the sorting of letters, secreted two letters with the intention of handing them to the delivery poon, & sharing with him certain moneys payable upon them. He was charged under Indian Post Office Act, s. 48 :—*Held* : since the intention of the accused was not to prevent the delivery of the letters to the addressees, he was not guilty of the offence of secreting.—*R. v. VENKATASAMI* (1890), 1 *L. R.* 14 *Mad.* 229.—*IND.*

**Sect. 3.—Embezzlement by officers of post office.**  
**Sects. 4 & 5. Part VI.]**

played by the Post Office as a stamper or facer of letters, who embezzles letters for the purpose of defrauding the Post Office of the postage, is not within 7 Geo. 3, c. 50.—*R. v. SLOPER* (1772), 1 Leach, 81; 2 East, P. C. 583; 168 E. R. 143.

60. —.]—On an indictment for embezzlement against a letter carrier, charged under 2 Will. 4, c. 4, as a person employed in the public service of His Majesty, it is not necessary to prove his appointment as a letter carrier, but evidence of his having acted as such is sufficient. If the wife of the party to whom a letter is directed pays the postage of the letter, she is entitled to demand an overcharge made for it; & a refusal on the part of the letter carrier to account for it to her, is evidence of an embezzlement by him.—*R. v. BORRETT* (1833), 6 C. & P. 124.

61. —.]—On the trial of a person for embezzling a letter containing a bill of exchange, he being at the time employed under the Post Office, it is sufficient to prove that such person acted in the service of the Post Office, & it is not necessary to go into proof of his appointment.—*R. v. REES* (1834), 8 C. & P. 600.

62. —.]—It was proved that a post office letter carrier was in the daily habit of calling at the lodge of the G. Infirmary, & there receiving letters with a penny on each to prepay the postage; & that he took them, with the penny, to the G. post office; & that, during his illness, a person who had performed his duties did the like. There was no evidence of any appointment:—*Held*: in an indictment under 2 Will. 4, c. 4, s. 1, for embezzling some of the pence thus received, this was evidence to go to the jury, that the pence were received by prisoner by virtue of his employment as a letter carrier.—*R. v. TOWNSEND* (1841), 4 Car. & M. 178.

63. —.]—S., postmistress of G., received from A. a letter unsealed, but addressed to B., & with it £1 for a post-office order, 3d. for the postage on the order, 1d. for the postage, & 1d. for the person who got the order. S. gave the letter, unsealed, & the money to prisoner, who was the letter carrier from G. to L., telling him to get the order at L. & inclose it in the letter, & post the letter at L. Prisoner destroyed the letter, never procured the order, & kept the money:—*Held*: he was indictable under 7 Will. 4 & 1 Vict. c. 36, s. 26, for stealing, embezzling, & destroying a post letter, he being at the time in the employ of the Post Office.—*R. v. BICKERSTAFF* (1848), 2 Car. & Kir. 761.

64. —.]—*Qu.*: whether an apprentice to a chemist, who assists his master in making up the bags at the district post office conducted by him, is a person in the employ of the Post Office. Evidence that his master gave him a paper, & told him to go before the magistrate to take the oath & get the paper filled up; that he went away & soon afterwards returned & exhibited the paper, saying that he had been & had taken the oath is sufficient to prove him such servant.—*R. v. MILNER* (1850), 14 J. P. 440; 4 Cox, C. C. 275.

*Annotations*.—*Fidd.* *R. v. Simpson* (1850), 14 J. P. 440. *Reid.* *R. v. Reason* (1853), 23 L. J. M. C. 11.

65. —.]—*Qu.*: whether a porter in the employ of a grocer who conducts at his shop a

district post office, becomes, by assisting his master in sorting the letters & making up the bags, a person employed by the Post Office. Evidence that such porter went out with a paper, saying that he was going to take the oath, & that on his return he said he had taken it, is sufficient to prove him in such employ.—*R. v. SIMPSON* (1850), 14 J. P. 449; 4 Cox, C. C. 276.

*Annotation*.—*Reid.* *R. v. Reason* (1853), 23 L. J. M. C. 11.

66. —.]—(1) An indictment stating prisoner to have been employed in two branches of the Post Office, proof of his having been employed in either held sufficient.

(2) If the letter embezzled is described as having contained several notes, proof of its having contained any one of them is sufficient.—*R. v. ELLINS* (1810), Russ. & Ry. 188, C. C. R.

**SECT. 4.—OPENING AND DETENTION OF POSTAL PACKETS.**

*See* Post Office Act, 1908 (c. 48), s. 56.

67. **Opening of letter.**—*R. v. RUSSELL* (1701), 12 Mod. Rep. 514; 88 E. R. 1480.

68. —.]—*MARTIN v. FORD*, No. 73, *post*.

69. —.]—In an indictment under Post Office (Offences) Act, 1837 (c. 36), s. 25, for opening & delaying letters sent through the post office, there was no allegation that the letters were the property of the persons to whom they were directed, nor of the Postmaster-General:—*Held*: the indictment was good without this allegation, & prisoner was properly convicted of the offence with which he was charged.—*R. v. KILVINGTON* (1841), 5 J. P. 194.

— **False accusation against postmistress.**—

*See* CRIMINAL LAW, Vol. XIV., p. 351, No. 3691.

70. — **By person other than servant—Letters addressed to former manager of firm—On firm business.**—A. was manager of the Foreign Vineyard Assocn. of No. 190 Regent street. He parted from his employers & set up a business of the same kind at No. 203 Regent street. An *interim injunction* was granted against the Assocn. restraining them from opening, except in A.'s presence, letters simply addressed to A. No. 190 Regent street. But the Postmaster-General was held to be justified in refusing to forward to No. 203 the letters addressed to pltf. at No. 190.—*STAPLETON v. FOREIGN VINEYARD ASSOCN., LTD.* & H.M. POSTMASTER-GENERAL (1864), 4 New Rep. 317; 11 L. T. 77; 28 J. P. 612; 12 W. R. 976.

*Annotation*.—*Reid.* *Hermann Loog v. Bean* (1884), 20 Ch. D. 306.

71. — — — — —.]—B. was employed to manage one of L.'s branch offices for the sale of machines, & resided on the premises. He was dismissed by L., & on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, & that he did not hand them to L., but returned them to the senders. After his dismissal he went about among the customers, making oral statements reflecting on the solvency of L., & advised some of them not to pay L. for machines which had been supplied through himself. L. brought an action to restrain B. from making statements

**PART V. SECT. 4.**

671. **Opening of letter.**—The only person entitled, under 7 Will. 4, & 1 Vict. c. 36, s. 25, to open a letter, is the Postmaster-General, or an officer deputed by him for that express pur-

pose.—*R. v. HARDING* (1842), Arm. M. & O. 340.—*IR.*

6711. —.]—The object of Post Office Act, 1900, s. 90, is to prevent postal packets in course of transmission by post from being tampered with, &

the words "contrary to his duty" in the sect. refer to the legal duty of every person who is not authorised to open postal packets to refrain from doing so.—*R. v. McGEORGE* (1907), 26 N. Z. L. R. 741.—N.Z.

to the customers or any other person or persons that L. was about to stop payment, or was in difficulties or insolvent, & from in any manner slandering L. or injuring his reputation or business, & from giving notice to the post office to forward to B.'s residence letters addressed to him at L.'s office, & also asking that he might be ordered to withdraw the notice already given to the post office:—*Held*: deft. had no right to give a notice to the post office the effect of which would be to hand over to him letters of which it was probable that the greater part related only to L.'s business, & the case was one in which a mandatory injunction compelling deft. to withdraw his notice could properly be made, pltf. being put under an undertaking only to open the letters at certain specified times, with liberty for deft. to be present at the opening.—*HERMANN LOOG v. BEAN* (1884), 26 Ch. D. 306; 53 L. J. Ch. 1128; 51 L. T. 442; 48 J. P. 708; 32 W. R. 994, C. A.

*Annotations*:—*Mentd.* Liverpool Household Stores Assocn. v. Smith (1887), 37 Ch. D. 170; *Monson v. Tussauds*, *Monson v. Tussaud*, [1894] 1 Q. B. 671; *Puddephatt v. Leith*, [1916] 1 Ch. 200.

**72. Detention of letter.**—Action on the case for damages lies against a deputy postmaster for non-delivery of letters, gratis, in a country post-town.—*ROWING v. GOODCHILD* (1773), 3 Wils. 443; 2 Wm. Bl. 906; 5 Burr. 2716, n.; 95 E. R. 1147.

*Annotations*:—*Consd.* Smith v. Powditch (1774), 1 Cowp. 182. *Mentd.* *Hampden v. Macmullen* (1843), 3 Notes of Cases Supp. 1; *Couch v. Steel* (1854), 3 E. & B. 402.

**73.** —.—9 Ann. c. 11, s. 40, which inflicts a penalty of £20 on persons who willingly open, or detain letters, after they have been delivered at the post office, only extends to persons in the employment of the Post Office.—*MARTIN v. FORD* (1793), 5 Term Rep. 101; 101 E. R. 58.

**74.** —.—**Damage retrievable.**—If a postmaster has agreed to deliver letters in a particular mode, & by mistake does not deliver one for two

days, that letter containing a returned bill, he is not liable in damages for the amount of the bill, if pltf. could give notice of dishonour in time, if he sent a special messenger, though too late to do so by post.—*HORDERN v. DALTON* (1824), 1 C. & P. 181; 171 E. R. 1153, N. P.

**75.** —.—**Letter addressed to bankrupt—Delivered to assignee.**—Letters having arrived at a post office, addressed to a party who had become bkpt., the assignee, in that character, demanded them of the postmaster; & he, believing *bona fide* that the assignee was entitled to have them for the purposes of the commission, delivered them up; this having been the practice of the office, under similar circumstances, for more than thirty years:—*Held*: the postmaster was not liable under 9 Ann. c. 11, s. 40, for wittingly willingly, & knowingly detaining letters, & causing them to be detained & opened.—*MURIELLES v. BANNING* (1831), 2 B. & Ad. 909; 109 E. R. 1380; *sub nom.* *MURIELLES v. BANNING*, 1 L. J. K. B. 36.

#### SECT. 5.—OTHER OFFENCES.

*See* Post Office Act, 1908 (c. 48), ss. 50–69.

**Placing injurious substance in letter box.**—*See* CRIMINAL LAW, Vol. XV., pp. 1029, 1041, Nos. 11,588, 11,738.

**Obtaining postage fee by false pretence.**—*See* CRIMINAL LAW, Vol. XV., p. 1003, No. 11,239.

**Making fictitious stamp.**—*See* CRIMINAL LAW, Vol. XV., p. 1072, No. 12,133.

**Forgery by use of false postmark.**—*See* CRIMINAL LAW, Vol. XV., p. 1072, No. 12,137.

**Obtaining by fraud from post office official.**—*See* CRIMINAL LAW, Vol. XV., pp. 867, 873, 992, Nos. 9508, 9509, 9583–9585, 11,092.

**Forging of telegram.**—*See* CRIMINAL LAW, Vol. XV., p. 1060, No. 12,065.

## Part VI.—Legal Proceedings.

*See* Post Office Act, 1908 (c. 48), ss. 70–78; Indictment Act, 1915 (c. 90).

**76. Preliminary examination of postal servant accused—By authorised travelling clerk.**—Prisoner, who was an employee at a post office, was interviewed for some hours by a travelling clerk from the General Post Office, & after being cautioned, was questioned in connection with a criminal charge. The travelling clerk had power

to initiate criminal proceedings, & he had prisoner practically in custody during the whole of the interview. Upon the trial questions & the statements in answer made by prisoner at the interview were tendered in evidence & objected to. The judge refused to admit the whole interview, but allowed the earlier part to be given in evidence.—*R. v. KNIGHT* (1905), 21 T. L. R. 310.

**72 i. Detention of letter.**—An action will lie against a postmaster for not sending a letter, but pltf. in his declara-

tion must aver that the letter was his.—*CAMPBELL v. McPHERSON* (1840), 6 O. S. 34.—*CAN.*

**72 ii.** —.—*CAREY v. LAWLESS* (1856), 13 U. C. R. 285.—*CAN.*

## Part VII.—Management of Post Offices.

See Post Office Act, 1908 (c. 48), ss. 80, 81.

**Early closing.**—See Shops Act, 1912 (c. 3), s. 12, sched. III.

**77. Weights & Measures Act, 1878 (c. 49)—Application to post office weights.**—By sect. 25 of above Act, every person who uses or has in his possession for use for trade any scale which is false or unjust shall be liable to a fine; & by sect. 59 of above Act, where any scale is found in the possession of any person carrying on trade within above Act, or on the premises of any person which are used for trade, such person shall be deemed for the purposes of above Act, until the contrary is proved, to have such scale in his possession for use for trade. An information was

laid, under sect. 25 of above Act, against the master of a post office, who also traded as a baker upon the same premises, for having in his possession for use for trade an unjust scale. The scale belonged to the Post Office, & was the property of the Crown:—*Held*: the justices had no jurisdiction to hear & determine the matter of the information because the provisions of above Act did not apply to scales, which were the property of the Crown.—*R. v. KENT JJ.* (1889), 24 Q. B. D. 181; 59 L. J. M. C. 51; 54 J. P. 453; *sub nom. R. v. BROMLEY JJ.*, 62 L. T. 114; 38 W. R. 253; 17 Cox, C. C. 61; *sub nom. BROMLEY, KENT, JJ., Re NICHOLLS*, 6 T. L. R. 106, D. C.  
*Annotation*:—*Mentd.* *R. v. Longe, etc. JJ. & Cooke* (1897), 66 L. J. Q. B. 278.

## Part VIII.—Post Office Accounts.

See Post Office Act, 1908 (c. 48), s. 41.

**78. Moneys received on Post Office account—Deposited in bank—Priority of Postmaster-General—in winding up of bank.**—Letter receivers were in the habit with the sanction of the Postmaster-General of paying moneys received on account of the Post Office into a bank to their private account, together with their own moneys, & of drawing cheques both for their own purposes, & for payment to the Post Office. The bank had notice that their

customers were letter receivers & drew cheques for Post Office purposes. The bank having gone into liquidation:—*Held*: the Postmaster-General on behalf of the Crown was entitled to payment in priority over other creditors of the bank of the balance due upon the letter receiver's accounts in respect of Post Office moneys.—*Re WEST LONDON COMMERCIAL BANK* (1888), 38 Ch. D. 364; 57 L. J. Ch. 925; 59 L. T. 296; 4 T. L. R. 440.

## Part IX.—Post Office Property.

See Post Office Act, 1908 (c. 48), ss. 45–49.

**79. Vested in Postmaster-General.**—*BAINBRIDGE v. POSTMASTER-GENERAL*, No. 1, *ante*.

**80. Liability for rates—Houses leased for post offices.**—Houses, the property of a subject, were taken on lease by the Postmaster-General, & occupied as a post office, for the purposes of the Post Office Revenue:—*Held*: the premises, being occupied by the servants of the Crown for public purposes, no one was ratable in respect of the occupation of them.—*SMITH v. BIRMINGHAM UNION* (1857), 7 E. & B. 483; 3 Jur. N. S. 769; 19 E. R. 1326; *sub nom. R. v. SMITH*, 20 L. J. C. 105; 29 L. T. O. S. 76; 21 J. P. 694; 5 V. R. 490.

*Annotations*:—*Apld. Smith v. St. Michael, Cambridge Overseers* (1860), 3 E. & B. 383. *Refd. Mersey Docks v. Cameron, Jones v. Mersey Docks* (1865), 11 H. L. Cas. 443; Secretary of State for India v. St. Mary, Lambeth (1865), 6 New Rep. 101; Coomber v. Berks JJ. (1883), 9 App. Cas. 61; Bray v. Lancashire JJ. (1889), 22 Q. B. D. 484; Lewis v. Durham Union (1904), 90 L. T. 383. *Mentd.* *Rose v. Watson* (1894), 10 R. 255.

**81.**—A statute gave power to Postmaster-General to purchase property, & enacted

that the ratable value of land so purchased should be as at the date of purchase. He found part of the property was not needed, & let it to tenants:—*Held*: the property continued as before to be ratable only at the same amount.—*St. GABRIEL, FENCHURCH, OVERSEERS v. WILLIAMS* (1885), 16 Q. B. D. 649; 55 L. J. M. C. 14; 54 L. T. 270; 50 J. P. 533; 34 W. R. 256; 2 T. L. R. 138, D. C.

—**Telegraphic wires & works.**—See TELEGRAPHS & TELEPHONES.

**82. Covenant for use as post office—Use for issue of excise licences—Whether breach.**—By a lease in 1852, premises were demised to the Postmaster-General for one thousand years, at the rent of 1s., & the Postmaster-General covenanted that he & his successors would at all times during the term use the premises as a post office for the district, & would not use the premises for any other purpose. Ejectment having been brought on a proviso for re-entry for the breach of the above covenant, on the ground that the excise duties & licences for dogs, men servants, horses, etc., had been received & granted on the

### PART IX.

**1. Injury to public—Whether Crown liable.**—The Crown is under no legal duty or obligation to any one who goes to a post office building to post or get his letters, to repair or keep in a reasonably safe condition the walks & steps leading to such building.—*REPROHON v. R.* (1894), 4 Exch. C. R.

### 100.—CAN.

**g. Damage to post office property—Action by Postmaster-General—Costs.**—In proceedings taken by the Postmaster-General under Telegraph Act, 1878, s. 11, costs may be awarded against him, if unsuccessful.—*POSTMASTER-GENERAL v. GREAT SOUTHERN & WESTERN RY. CO.*, [1916] 1 I. R. 74.—*IR.*

**h.**—Where the Postmaster-General in his corporate capacity successfully applies for compensation under Malicious Injuries Code for injury to corporate property, the county ct. judge & the judge of assize may award him costs.—*POSTMASTER-GENERAL v. ANTRIM COUNTY COUNCIL*, [1922] 2 I. R. 12.—*IR.*



premises by the post office clerks :—*Held* : there had been no breach of the covenant.—*WADHAM v. POSTMASTER-GENERAL* (1871), L. R. 6 Q. B. 644 ; 40 L. J. Q. B. 310 ; 24 L. T. 545 ; 36 J. P. 148 ; 19 W. R. 1082.

*Annotation* :—*Mentd. Harman v. Ainslie* (1903), 72 L. J. K. B. 533.

**83. Money found in post office—Property of Postmaster-General.**—Suspicion being entertained against a letter carrier in the employ of the General Post Office, an assistant inspector wrote a letter, &, having inclosed in it a marked sovereign, sealed the letter, & took an opportunity, while the carrier's back was turned, to place it among a number of letters which he was engaged in sorting. The marked sovereign was afterwards found in the letter carrier's pocket. The sovereign was one of those which are occasionally found on

the floor of the post office, having dropped out of letters, & which are carried to a fund, which is under the direction of the Postmaster-General. The letter carrier being indicted for stealing a post letter containing a sovereign, & also for stealing a sovereign the property of the Postmaster-General :—*Held* : he could not be convicted under the circumstances, of the more serious offence of stealing a post letter containing money, but might be convicted of the simple larceny of the sovereign.

The sovereign is correctly described in the indictment, as the sovereign of the Postmaster-General—it was his sovereign against all the world except the owner of it (*PARKE, B.*).—*R. v. RATHBONE* (1841), Car. & M. 221 ; 2 Mood. C. C. 242.

*Annotations* :—*Apld. R. v. Shepherd* (1856), Dears. C. C. 606. *Reid. R. v. Young* (1846), 2 Car. & Klr. 466.

## Part X.—Legal Effect of Communications by Post.

**Letters admitted in evidence.**—*See CRIMINAL LAW*, Vol. XIV., p. 402, Nos. 4226, 4227 ; *EVIDENCE*, Vol. XXII., pp. 360–379, Nos. 3735–3866.

**Communication of offer & acceptance in contracts.**—*See AGENCY*, Vol. I., p. 384, No. 883 ; *CONTRACT*, Vol. XII., pp. 75–79, Nos. 434–470.

**Payment by post.**—*See CONTRACT*, Vol. XII., pp. 471, 472, Nos. 3847–3853.

**Posting of dividend warrant.**—*See COMPANIES*, Vol. IX., p. 600, No. 4003.

**Notice of allotment of shares.**—*See COMPANIES*, Vol. IX., pp. 281, 282, Nos. 1734–1742.

**Notice of dishonoured bill of exchange.**—*See BILLS OF EXCHANGE*, Vol. VI., pp. 267–270, Nos. 1749–1767.

**Notice in distress proceedings.**—*See DISTRESS*, Vol. XVIII., p. 308, No. 436.

**Notices concerning elections.**—*See ELECTIONS*, Vol. XX., pp. 35, 36, 37, 118, Nos. 210–219, 903.

**Notice under Agricultural Holdings Act, 1883 (c. 61).**—*See AGRICULTURE*, Vol. II., p. 8, No. 21.

**Service of petitions in matrimonial causes.**—*See HUSBAND & WIFE*, Vol. XXVII., p. 395, Nos. 3909–3913.

**Notices in bankruptcy proceedings.**—*See BANKRUPTCY*, Vol. IV., pp. 507, 508, No. 4582 ; Vol. V., pp. 921, 944, Nos. 7536, 7730.

**Notices under Public Health Acts.**—*See PUBLIC HEALTH*.

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**Notice of defence to action on warranty—Under Food & Drugs Acts.**—*See FOOD & DRUGS*, Vol. XXV., p. 100, No. 235.

**Delivery of solicitor's bill of costs by post.**—*See SOLICITORS*.

**Communication of threats.**—*See CRIMINAL LAW*, Vol. XV., p. 815, Nos. 8883–8889.

**Transmission of case stated by magistrates.**—*See MAGISTRATES*, Vol. XXXIII., p. 414, No. 1250.

**Posting of workmen's Insurance cards.**—*See WORK & LABOUR*.

## POUND AND POUND-BREACH.

*See CRIMINAL LAW AND PROCEDURE ; DISTRESS.*

## POWER OF APPOINTMENT.

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<i>Execution of Deeds</i>	„ DEEDS.
<i>Executors and Administrators</i>	„ EXECUTORS.
<i>Infants</i>	„ INFANTS.
<i>Married Women</i>	„ HUSBAND AND WIFE.
<i>Perpetuities</i>	„ PERPETUITIES.
<i>Personal Property</i>	„ PERSONAL PROPERTY.
<i>Power of Attorney</i>	„ AGENCY; DEEDS.
<i>Power of Exchange and Partition</i>	„ PARTITION.
<i>Power of Jointuring</i>	„ SETTLEMENTS.
<i>Power of Leasing</i>	„ SETTLEMENTS.
<i>Power of Charging Portions</i>	„ EQUITY; SETTLEMENTS.
<i>Power of Sale</i>	„ SALE OF LAND; SETTLEMENTS.

<i>Power of Appointment of Trustees</i>	See TRUSTS AND TRUSTEES.
<i>Real Property</i>	„ REAL PROPERTY.
<i>Satisfaction</i>	„ EQUITY; WILLS.
<i>Settlements</i>	„ SETTLEMENTS.
<i>Statutory (Public) Powers, Exercise of</i>	„ COMPANIES; COMPULSORY PURCHASE OF LAND; CORPORATIONS; PUBLIC AUTHORITIES; TORT; AND TITLES <i>passim</i> .
<i>Trusts</i>	„ TRUSTS AND TRUSTEES.
<i>Wills</i>	„ WILLS.

## Part I.—Definition and Classification.

### SECT. 1.—DEFINITION.

1. *Power of disposition over property not one's own*—Given by donor directing mode of exercise.]—(1) An instrument exercising a special or general power of appointment over property must be executed & construed according to the rules for the time being applicable to instruments of that kind, although the power may have been created before, but exercised after, an alteration in the law as to the construction & mode of execution of such instruments.

(2) The word “devise” in Wills Act, 1837 (c. 26), includes in general a devise by way of appointment under a special or general power: consequently, where testator makes a will operating as an exercise of a special or general power, a devise of real estate by way of appointment which fails or is void, falls, under Wills Act, 1837 (c. 26), s. 25, into the residuary devise, if any, by way of appointment, unless a contrary intention appears by the will.

(3) A power of appointment is a power of disposition given to a person over property not his own by some one who directs the mode in which that power shall be exercised by a particular instrument (JESSEL, M.R.).—*FREME v. CLEMENT* (1881), 18 Ch. D. 499; 50 L. J. Ch. 801; 44 L. T. 399; 30 W. R. 1.

*Annotation*:—As to (2) *Overd. Holyland v. Lewin* (1884), 26 Ch. D. 266.

2. *Individual personal capacity of donee to do something*.]—*Re ARMSTRONG, Ex p. GILCHRIST*, No. 28, *post*.

*Distinguished from property*.]—See Part III., Sect. 1, *post*.

### SECT. 2.—CLASSIFICATION.

#### SUB-SECT. 1.—COMMON LAW POWER.

See, now, Law of Property Act, 1925 (c. 20), s. 1 (7).

3. *Effect as passing legal estate*.]—(1) An appointment under a common law power, or a power operating under Statute of Uses, 1535 (c. 10), by which the legal estate has passed, is at

most voidable, & a purchaser for value with the legal estate & without notice is not affected by the fraudulent execution of the power.

(2) An appointment in fraud of an equitable power, not operating so as to pass the legal estate or interest, is void, & a purchaser for value without notice can only rely on such equitable defences as are open to purchasers without the legal title who are subsequent in time against prior equitable titles.—*CLOUTTE v. STOREY*, [1911] 1 Ch. 18; 80 L. J. Ch. 193; 103 L. T. 617, C. A.

*Annotation*:—*Generally, Mentd. Thompson v. Thompson*, [1923] 2 Ch. 205.

#### SUB-SECT. 2.—EQUITABLE POWER.

4. *Effect as passing legal estate*.]—Testator devised real estate to his nine children *nominatim* as tenants in common, giving a power to three of them to sell the whole to avoid the difficulties of partition. W., one of the three, conducted certain sales under the power, retained more than his share of the purchase-moneys, & went into liquidation. Further sales were effected & out of the proceeds a further sum was paid to W.'s trustees in liquidation in respect of, & in excess of, his share.

There is an unquestionable power to sell . . . a power to sell in order to avoid the difficulties of partition. Testator contemplated that each individual might sell his undivided share. Then the purchaser of that undivided share might require to have a partition & in order to avoid all the expense & difficulty of partition testator gave this power . . . according to which the trustees might sell this estate & equity would compel the persons in whom the legal estate was vested to convey according to the trustees' contract (KAY, J.)—*Re BROWN, DIXON v. BROWN* (1886), 32 Ch. D. 597; 55 L. J. Ch. 556; 54 L. T. 789.

*Annotations*:—*Mentd. Re Griffiths Cycle Corpn., Dunlop Pneumatic Tyre Co. v. Griffiths Cycle Corpn.* (1901), 85 L. T. 675; *Wells v. Wells*, [1914] P. 157.

See, now, Law of Property Act, 1925 (c. 20), s. 1 (7).

5. — *Appointment in fraud of power*.]—*CLOUTTE v. STOREY*, No. 3, *ante*.

## SUB-SECT. 3.—POWER OPERATING UNDER STATUTE OF USES.

See, now, Law of Property Act, 1925 (c. 20), s. 1 (9), (10).

6. Effect as passing legal estate.]—*CLOUTTE v. STOREY*, No. 3, *ante*.

## SUB-SECT. 4.—POWERS APPENDANT, COLLATERAL OR IN GROSS.

7. Powers appendant or appurtenant—Donee with interest in property.—Interest capable of being affected by exercise of power.]—Powers to raise estates are either simply collateral (as where a party that has such power has not, nor ever had any estate in the land, as where such power is reserved to a stranger, & there it cannot be destroyed by such stranger, because it is no more than a bare nomination), or not simply collateral; & these latter are of two sorts:—(a) appendant & annexed to the estate, (b) in gross. A power of the first sort is, where tenant for life has a power to make leases for one & twenty years or three lives; such a power is not simply collateral; for if such a tenant charge the land with a rent, & then execute his power, the charge shall not be defeated whilst he lives. So if he had before covenanted to stand seised to the use of another; because the power in that case is annexed to the estate. But where the power does not fall within the estate, as here the tenant for life has a power to make an estate, which is not to begin till after his own estate determined, such power is not appendant or annexed to the land, but is a power in gross, because the estate for life has no concern in it (*HALE, C.B.*).—*EDWARDS v. SLEATER* (1665), *Hard.* 410; 145 E. R. 522.

*Annotations*:—*Consd.* *West v. Berney* (1819), 1 Russ. & M. 431. *Refd.* *King v. Melling* (1672), 3 Keb. 52; *Walmesly v. Butterworth* (1835), 4 L. J. Ch. 253. *Mentd.* *Neale v. Mackenzie* (1836), 1 M. & W. 747.

8. —————.]—The operations of fines & recoveries is the same upon trust estates as upon legal estates; & if so, it must inevitably follow, that an estate for life limited to the wife, & the remainder limited to her own right heirs in default of any appointment made by her last will, are both disposed of by the fine. If no such remainder had been limited by it, as the estate was the wife's own, & moved originally from her, whatever was not conveyed would have remained in her, & consequently been barred. This answers the objection of it being a naked power or power in gross & so not barred by the fine; for how can that be called a naked power which is to operate & take effect on the party's own estate? (*LORD TALBOT, C.*).—*PENNE v. PEACOCK* (1734), *Cas. temp. Talb.* 41; 2 Eq. Cas. Abr. 136; 25 E. R. 652.

*Annotation*:—*Refd.* *Parkes v. White* (1805), 11 Ves. 209.

9. —————.]—By a settlement made on the marriage of a lady then, & therein described as, "an infant of the age of nineteen years & upwards," it was agreed that, after the marriage, as soon as the case would admit, certain personal estate standing in the names of the trustees of her father's will in which the lady would take a vested interest on her marriage subject to an annuity for her mother's life, should be assigned to trustees, in trust for investment with the consent of the husband & wife, & to pay the income to the wife for her separate use, & after her death to her husband till bkpcy. or alienation; & then to hold the capital on trusts for the issue of the marriage; & in default of such issue, in trust for such person

or persons as the wife should by deed or will appoint. The wife appointed the fund by deed to her husband, & died without issue, being still an infant. An action having been brought by the trustee in the husband's bkpcy., who was also the legal personal representative of the wife, against the next of kin of the wife, claiming the property.

The first power, a power simply collateral, I understand to be a power given to a person who has no interest whatever in the property over which the power is given. The second power, a power in gross, is a power given to a person who has an interest in the property over which the power extends, but such an interest as cannot be affected by the exercise of the power. . . . The third kind of power is a power exercisable by a person who has an interest in the property, which interest is capable of being affected diminished or disposed of to some extent by the exercise of the power. That power is commonly called a power appendant or appurtenant (*JESSEL, M.R.*).—*Re D'ANGIBAU, ANDREWS v. ANDREWS* (1879), 15 Ch. D. 228; 49 L. J. Ch. 182; 41 L. T. 645; 28 W. R. 311; *affd.* (1880), 15 Ch. D. 236, C. A.

*Annotations*:—*Refd.* *Shipway v. Ball* (1881), 16 Ch. D. 376; *Re Mayall, Murray v. Mayall* (1883), 25 Ch. D. 89; *Re Howastle's Estates* (1883), 24 Ch. D. 129; *Pouey v. Horden*, [1900] 1 Ch. 492; *Re Wormher, Wormher v. Belt*, [1818] 2 Ch. 82; *Re Sutton, Boscawon v. Wyndham*, [1921] 1 Ch. 257. *Mentd.* *Re Baker, Collins v. Rhodes, Re Soaman, Rhodes v. Wish* (1881), 44 L. T. 414; *Re Plumpton's Marriage Settlement, Underhill v. Plumpton*, [1910] 1 Ch. 609; *Pullan v. Koo*, [1913] 1 Ch. 9; *Re Torrington*, [1913] 2 Ch. 623; *Re Pryce, Novill v. Pryce*, [1917] 1 Ch. 234.

10. Powers in gross—Donee with interest in property.—Interest not affected by exercise of power.]—*EDWARDS v. SLEATER*, No. 7, *ante*.

11. —————.]—By a marriage settlement made in 1832 certain estates were limited to the use of A. for life, remainder to the use of trustees for a term of six hundred years to, secure £20,000, as portions for younger children, remainder to B., the eldest son of A., in tail male, with remainder over. The settlement contained a power for A. by deed & will to appoint a further sum of £10,000 as portions for younger children. In 1854 B. executed a disentailing deed, in which A. joined as protector of the settlement, by which the estates were granted, subject to the several uses, estates, & charges created by the settlement anterior to the limitations in favour of B.'s estate tail, & to all powers & privileges to such precedent estates annexed, to such uses as A. & B. might jointly appoint. A. & B. in exercise of such power created mtges. on the estates, & entered into the usual covenants for title, with an indemnity (*inter alia*) against portions. A. by his will charged the estates with a further sum of £10,000 for portions, & died in 1896. In 1909 questions arose as to the priorities of the mtges. created by the joint power, & the further portions appointed by A.'s will:—*Held*: (1) A.'s power to raise portions related to the estate of the donee in the land in gross, & was therefore capable of being released in 1854; (2) it was a power "belonging or annexed or exercisable in respect of" a precedent estate, & was not released by A.'s concurrence in the disentailing deed; (3) A.'s covenants for title in the mtges. did not amount to a release by him of his power, & therefore the portions appointed by the will had priority over the mtges.—*NORTIDGE v. DERING, RABAN v. DERING*, [1909] 2 Ch. 647; 79 L. J. Ch. 65; 101 L. T. 491; *on appeal*, [1910] 1 Ch. 297.

*Annotation*:—*Generally, Refd.* *Re Evered, Molineux v. Evered* (1910), 102 L. T. 694.

12. Collateral powers—Naked powers not coupled with interest.]—*EDWARDS v. SLEATER*, No. 7, *ante*.



**Sect. 2.—Classification: Sub-sects. 4 & 5. Parts II. & III. Sect. 1.]**

13. — — — — —.]—Powers . . . are of three kinds, appendant, in gross, or simply collateral. A power of the last kind is an authority to deal with an estate, no interest in which is vested in the donee of the power; it is wholly different from an estate or interest (LORD WESTBURY, C.).—*DICKENSON v. TEASDALE* (1862), 1 De G. J. & Sm. 52; 1 New Rep. 7, 141; 7 L. T. 655; 9 Jur. N. S. 237; 46 E. R. 21, L. C.

*Annotations:—Reid, Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330. *Mentd. Proud v. Proud* (1862), 32 Beav. 234;

*Coope v. Crosswell* (1866), 2 Ch. App. 112; *Cunningham v. Foot* (1878), 3 App. Cas. 974; *Re England, Steward v. England*, [1895] 2 Ch. 100; *Re Chant, Bird v. Godfrey*, [1906] 2 Ch. 226; *Read v. Price*, [1909] 1 K. B. 577.

**SUB-SECT. 5.—GENERAL OR SPECIAL POWERS.**

**What is a general power within Wills Act, 1837 (c. 26), s. 25.]—See WILLS.**

**What is a general power within Legacy Duty Act 1796 (c. 52.)—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 51, 52, Nos. 336–340.**

## Part II.—Creation of Powers.

14. **Technical words not necessary.]—A.** on his marriage, conveys his land to a trustee to the use of himself for life, remainder to his wife for life, remainder to the heirs of their two bodies, remainder to A. in fee. Proviso that in default of issue of the marriage, the trustee shall convey to such uses as the survivor should appoint. Although the husband devises the land & dies first without issue, yet the wife has a good power of disposing of the estate by her appointment.—*OXFORD (Bp.) v. LEIGHTON* (1700), 2 Ver. 376; 23 E. R. 837.

15. — — — — —.]—**Disposition by donor only consistent with intention to create power.]—A** remote reversion in real estates & lands to be purchased & settled will pass by general words in a will; as “all & every other my lands, tenements, & hereditaments”; though the uses are immediate. But, the purchase being postponed to the death of the deviser, the reversion in the estates to be purchased & settled to the same uses, subsequent to his death, not being an interest vested in him, did not pass; & though upon the settlement a power of appointment was implied, the will, particularly executing express powers, did not amount to an execution of that implied power.—*A.-G. v. VIGOR* (1803), 8 Ves. 256; 32 E. R. 352, L. C.

*Annotations:—Reid, Quested v. Michell* (1855), 3 Eq. Rep. 1014; *Brookman v. Smith* (1871), L. R. 6 Exch. 291. *Mentd. Goodright v. Forrester* (1807), 8 East, 552; *Simpson v. Walker* (1831), 5 Sim. 1; *Doc d. Meyrick v. Meyrick* (1832), 2 Tyr. 178; *Jones v. Skinner* (1835), 6 L. J. Ch. 87; *Culley v. Doc d. Taylerson* (1840), 3 Per. & Rev. 539; *Andrew v. Andrew* (1855), 3 Sm. & G. 130; *Re Loveridge, Drayton v. Loveridge*, [1902] 2 Ch. 859.

16. — — — — —.]—**Use of word “assigns.”]**—Testator gave, devised & bequeathed all his residuary personal estate, & also all his freehold & copyhold estate, unto & to the use of trustees, to pay the rents, issues & profits to his niece & her assigns for life; & after her decease he gave, devised & bequeathed his real & personal estates unto the heirs exors., administrators & assigns of his niece, according to the several natures & qualities thereof:—*Held*: as to the real estate the niece had a general power of appointment after her death, & in default of appointment her heir would take by purchase, & the personal estate was given absolutely.—*QUESTED v. MICHELL* (1855), 3 Eq. Rep. 1014; 24 L. J. Ch. 722; 25 L. T. O. S. 232; 1 Jur. N. S. 488; 3 W. R. 435; *subsequent proceedings* (1857), 5 W. R. 834.

*Annotations:—N.F. Brookman v. Smith* (1871), L. R. 6 Exch. 291. *Consd. Milman v. Lane*, [1901] 2 K. B. 745. *Reid, Re White & Hindle* (1877), 47 L. J. Ch. 85.

17. — — — — —.]—**B.** in pursuance of a covenant made & entered into by him on his wife's marriage, devised certain freehold & leasehold property for life to trustees to the use of W. until bkpcy.; remainder to the use of the trustees during the joint lives of himself & wife; remainder to the use of E., his wife, for life; remainder to the use of all the children as tenants in common in fee, with benefit of survivorship in the event of any child dying under twenty-one & without issue, & in case all such children but one should die without issue, to remaining child his heirs, & assigns for ever, & in case every child born or to be born, should die under twenty-one without issue, to heirs & assigns of E., the wife, as if she had died sole & unmarried. All the children of E. having died in testator's lifetime without issue, one of whom only attained the age of twenty-one years, shortly after testator's death, W. filed a petition of insolvency, & was adjudicated bkpt. The estate accordingly vested in trustees for W. & wife, for their joint lives. The deed, acknowledged by E. under Fines & Recoveries Act, 1833 (c. 74), conveyed all the estate devised by testator to trustees in trust, as she, E., should by deed or will appoint. In pursuance of such power, E. appointed & devised all her estate to deft. for his own absolute use & benefit. Pltf., the heir-at-law both to testator & to E., claimed the property on the ground that the ultimate limitation “to heirs & assigns of E. as if she had died sole & unmarried,” did not take effect; & that it coalesced with the life estate by virtue of the rule in Shelley's case:—*Held*: (1) the devise over did not take effect by reason of the death of the child in testator's lifetime, & the foundation for the ultimate devise therefore failed; (2) in case there were no children to take the implied devise over would be a contingent remainder & capable of uniting with the previous life estate; (3) the words “heirs & assigns” did not confer a power of appointment upon E.—*BROOKMAN v. SMITH* (1871), L. R. 6 Exch. 291; 40 L. J. Ex. 161; 24 L. T. 625; 19 W. R. 1029; *affd.* (1872), L. R. 7 Exch. 271, Ex. Ch.

*Annotation:—As to (3) Fidd. Milman v. Lane*, [1901] 2 K. B. 745.

18. — — — — —.]—**Testator, who was seised in fee of a farm, devised it to the use of his nephew for the term of ninety-nine years if he should so long live, & from & after the determination of such term & estate to the use, in succession, of the nephew's four sons for a term of ninety-nine**

**PART I. SECT. 2, SUB-SECT. 5.**

**a. General rule.]—A** power is general, though there be a restriction against

exercising it in favour of one person.—*Edin v. Barington* (1854), 31 Ch. R. 568.—*Id.*

**b. Appointment among children—**

**Objects not limited to children.—Whether appointment general or special.]—Re Patterson** (1888), 5 Man. L. R. 374.—*CAN.*

years if they should so long live, with an ultimate devise on the death of the survivor upon trust to & for the use of the heirs & assigns of the survivor of the four sons:—*Held*: the word “assigns” could not be construed as giving a power of appointment to the survivor; the limitation to the heirs & assigns of the survivor must be construed as a limitation to the heirs of the survivor & their assigns, & upon the death of the survivor his heir-at-law was entitled to recover possession of the property from a purchaser to whom the survivor had conveyed it in his lifetime.—*MILMAN v. LANE*, [1901] 2 K. B. 745; 70 L. J. K. B. 731; 85 L. T. 180; 49 W. R. 545; 17 T. L. R. 542, C. A.

*Implied from recital in codicil.*—*Held*: from the recitals contained in a codicil, a power to appoint was thereby given, although the words used by testator were those only of substantive bequest.—*HOPKINSON v. PHIPPS* (1838), 7 L. J. Ch. 255; 2 Jur. 639.

20. —.]—Testator by his will directed his trustees to purchase a sum of bank annuities upon trust to pay the dividends to his son J. for life with a proviso against alienation, & he then provided that in case his son should marry with the consent of his trustees, the annuities should, subject to the life interest of his son, be settled for the benefit of any woman with whom his son should intermarry & the issue of such marriage in such manner as should be agreed upon with the concurrence of his trustees & subject to the trusts

to be declared in any settlement to be made on the marriage of his son or in case none should be declared, then the annuities should go as his son should by will appoint, & testator also provided that in case his son should die unmarried, or having been married without leaving issue, & without having exercised the power of appointment thereby given to him, then a moiety of the annuities should go to persons named in the will; the son died without ever having been married, & having by his will appointed a portion of the annuities to two of his brothers:—*Held*: sustaining this appointment, in the events which happened, the son had a power of appointment over the annuities.—*SHEFFIELD v. COVENTRY (EARL)* (1852), 2 De G. M. & G. 551; 22 L. J. Ch. 498; 20 L. T. O. S. 193; 17 Jur. 289; 42 E. R. 987, L. C. & L. J.

21. — *General scheme contrary to existence of power.*—A marriage settlement dealing with real estate belonging to the wife provided that, should she survive her husband, which happened, the trustees should reconvey the lands to her “her heirs, exors., administrators, & assigns respectively for her & their own use & benefit, or otherwise as she shall direct”:—*Held*: these words did not necessarily confer a general power of appointment on the wife; it appearing that such a power would defeat the whole scheme of the deed.—*VAN GRUTTEN v. FOXWELL* (1901), 84 L. T. 545, H. L.; *affg. S. C. sub nom. FOXWELL v. VAN GRUTTEN* (1900), 44 Sol. Jo. 377, C. A.

*Construction of will.*—*See WILLS.*

## Part III.—Construction of Powers.

### SECT. 1.—IN GENERAL.

22. *Bare powers—Construed strictly.*—(1) Devise of £30,000 to testator's wife for life, & afterward to be distributed among his children, as she by deed, will, or instrument in nature of a will, should appoint. She, having married again, appoints by will (*inter alia*) unto two of the children who died in her lifetime:—*Held*: their representatives were not entitled; & the shares so appointed to them lapsed, & fell into the residue.

(2) Cts. of law & of equity will equally transpose words in instruments to make the limitations intelligible, & attain the party's clear intent; but never to defeat the interests given or let in more than expressed.

(3) Appointee under a power must claim not only under the power, but according to the nature of the instrument under which it is executed.

(4) If an instrument is to operate as a will for the execution of a power, it must have all the incident consequences of a will. In the case of a will to pass lands by virtue of a power, it must be executed according to the provisions of the Stat. Frauds; & so in the case of a testament to pass personalty under a power; it must be such an instrument as is capable in its own nature of passing personal estate.

(5) When the execution of a power is by will, & is not expressed in the precise words which would be required in a deed, as under a clear intent to create an estate tail, though not formally worded, there the ct. will effectuate such intent, notwithstanding the appointee takes, in some sense, under the power.

(6) In like cases where, in any power, there is also one of revocation, & to appoint new uses, & the power itself is executed without any like reservation of a new power to revoke, the act, if substantive from the nature of the instrument, is irrevocable.

(7) Appointee under a power, takes under the authority of that power, as if therein mentioned *nominalim*, in so far as relates to the substance of the benefit; but he does not take as from the time when the power was created.

(8) Mere powers construed strictly. Powers coupled with an interest construed liberally.—*MARLBOROUGH (DUKE) v. GODOLPHIN (LORD)* (1750), 2 Ves. Sen. 61; 28 E. R. 41, L. C.

*Annotations*:—*As to* (1) *Consd.* *Teynham v. Webb* (1751), 2 Ves. Sen. 198; *Southby v. Stonehouse* (1755), 2 Ves. Sen. 610; *Burrough v. Philcox*, *Lacey v. Philcox* (1840), 5 My. & Cr. 72. *Dbtd.* *Salisbury v. Denton* (1857), 3 K. & J. 529. *N.F.* *Re Caplin's Will* (1865), 2 Drew. & Sm. 527. *Consd.* *Pocock v. A.-G.* (1876), 3 Ch. D. 342. *Dbtd.* *Wilson v. Duguid* (1883), 24 Ch. D. 244. *Reid.* *De Serru v. Clarke* (1874), 43 L. J. Ch. 821. *As to* (2) *Reid.* *Jenkins v. Quinchant* (1800), 5 Ves. 596, n.; *Brown v. Higgs* (1803), 8 Ves. 561. *As to* (3) *Apld.* *Robinson v. Hardcastle* (1788), 2 Term Rep. 241; *Re Bowles*, *Page v. Page*, [1905] 1 Ch. 371. *Reid.* *Foley v. Parry* (1833), *Coop. temp. Brough.* 219. *As to* (7) *Consd.* *A.-G. v. Pickard* (1838), 3 M. & W. 552. *Reid.* *Re Dowsett*, *Dowsett v. Meakin*, [1901] 1 Ch. 398. *Generally*, *Reid.* *Hawkins v. Kemp* (1803), 3 East, 410; *Re Vizard's Trusts* (1866), 1 Ch. App. 588; *Re Moses*, *Beddington v. Beddington*, [1902] 1 Ch. 100. *Mentd.* *Hurst v. Winchelsea* (1758), 2 Keny. 444.

23. *Powers coupled with interest—Construed liberally.*—*MARLBOROUGH (DUKE) v. GODOLPHIN (LORD)*, No. 22, *ante*.

24. *Avoidance for uncertainty.*—*LEE v. OKEY* (1835), 1 Y. & C. Ex. 550; 5 L. J. Ex. Eq. 44; 160 E. R. 225.

### PART III. SECT. 1.

*e. Power divesting vested estates—Must be construed strictly.*—*Re KINGSTON'S ESTATE* (1880), 5 L. R. Ir. 169.—*IR.*

## SECT. 2.—VESTING OF PROPERTY.

**25. Whether property vested in donee.]**—By a marriage settlement it was declared & agreed between the parties, & the husband covenanted with the trustees, that in case the wife, or the husband in her right should at any time during his life become possessed of, interested in, or entitled to, any personal estate, moneys, effects or other property, in possession, reversion, remainder or expectancy, by gift, bequest, or under Statute of Distribution, 1870 (c. 10), the husband & wife would, within six months, transfer, assure, assign, & make over all such property to the trustees upon the trusts of the settlement. Subsequently to the marriage, the father of the wife, by his will, vested a sum of £5,000 in trustees to hold the same upon such trusts as the wife should by deed or will appoint; & in default of such appointment, to pay the dividends & interest of the sum of £5,000 to the wife for her separate use, & after her death upon trust for her exors. or administrators:—*Held*: the covenant in the settlement did not affect or control the general power of appointment given to the wife over the £5,000 by her father's will.

As long as the power remains a power unexercised, so long it is a totally distinct thing from property (KINDERSLEY, V.-C.).—TOWNSHEND v. HARROWBY (1858), 27 L. J. Ch. 553; 31 L. T. O. S. 33; 4 Jur. N. S. 353; 6 W. R. 413.

*Annotations*:—*N.F.*, *Re O'Connell, Mawle v. Jagoe*, [1903] 2 Ch. 574. *Follid.* *Tremayne v. Rashleigh*, [1908] 1 Ch. 681. *Apld.* *Vetch v. Elder*, [1908] W. N. 137. *Mentd.* *Re Dowling's Settlement, Trusts, Gregory v. Dowling*, [1904] 1 Ch. 441; *Lloyd v. Prichard*, [1908] 1 Ch. 265.

**26. —.]**—A marriage settlement contained a covenant that all property afterwards acquired by the wife, of the value of £500 or upwards, should be settled, capital sums to be held on the trusts, of the settlement, & any annuity or interest for the life of the wife to be paid to her separate use, without power of anticipation. The wife's father, reciting that he wished to give her property without the obligation of having it settled, bequeathed a share of his estate, exceeding £5,500 in value, to such uses & on such trusts as she might appoint, & in default of appointment, in trust for her for life, for her separate use, with remainders over. The wife then executed eleven deeds, each appointing to her separate use £499 19s. 11d., four of the deeds being executed on one day, six on another, & one on another:—*Held*: the wife was entitled to the eleven sums of £499 19s. 11d. for her separate use, without any obligation to settle them.—BOWER v. SMITH (1871), L. R. 11 Eq. 279; 40 L. J. Ch. 194; 24 L. T. 118; 19 W. R. 399.

*Annotations*:—*Consd.* *Steward v. Poppleton*, [1877] W. N. 20. *Follid.* *Re Gerard, Oliphant v. Gerard* (1888), 58 L. T. 800. *Distd.* *Re O'Connell, Mawle v. Jagoe*, [1903] 2 Ch. 574; *Tremayne v. Rashleigh*, [1908] 1 Ch. 681. *Re Hinckes, Dashwood v. Hinckes*, [1900] 2 Ch. 511. *Mentd.* *Re Davies, Harrison v. Davis*, [1897] 2 Ch. 204.

**27. —.]**—*STEWART v. POPPLETON*, W. N. 20.

*Annotations*:—*Distd.* *Re Gerard, Oliphant v. Gerard* (1888), 58 L. T. 800. *Follid.* *Re O'Connell, Mawle v. Jagoe*, [1903] 2 Ch. 574. *Distd.* *Tremayne v. Rashleigh*, [1908] 1 Ch. 681. *Mentd.* *Re Davies, Harrison v. Davis*, [1897] 2 Ch. 204.

**28. —.]**—No two ideas can well be more distinct the one from the other than those of "property" & "power." . . . A "power" is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his

"property" than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they "property." In one sense no doubt they may be called the "property" of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not "property" within the meaning of that word as used in law (FRY, L.J.).—*Re ARMSTRONG, Ex p. GILCHRIST* (1886), 17 Q. B. D. 521; 55 L. J. Q. B. 578; 55 L. T. 538; 51 J. P. 292; 34 W. R. 709; 2 T. L. R. 745, C. A.

*Annotations*:—*Consd.* *Re Roper, Roper v. Doncaster* (1888), 39 Ch. D. 482; *Tremayne v. Rashleigh*, [1908] 1 Ch. 681; *Goatley v. Jones* (No. 1), *Goatley v. Jones* (No. 2), [1909] 1 Ch. 557. *Re Armistrong, Ex p. Boyd* (1888), 21 Q. B. D. 264; *Re Rose, Rose's Trustee of the Property v. Rose*, [1904] 2 Ch. 348; *Re Mathieson* (1926), 70 Sol. Jo. 1161.

**29. —.]**—By a marriage settlement, made in 1878, it was agreed that if M., the intended wife, or her husband in her right, should at one & the same time, & from the same source become entitled to any real or personal property of the value of £500 or upwards, then & in every such case the husband & wife should cause the same to be vested in the trustees of the settlement, to be held by them upon the trusts of the property assigned by M. By his will, made in 1884, the father of M. bequeathed to the trustees of the will a sum of £4,000 upon trust for such persons & purposes as M. should appoint in writing, & in default of or subject to any such appointment in trust for her sole & separate use, & testator declared it to be his intention that M. might be able, by exercising her power of appointment, to defeat the operation of the covenant contained in her marriage settlement for the settlement of her after-acquired property. Testator died in 1887. M. appointed that the sum of £4,000 should be held in trust for her separate use by nine separate appointments, made on separate days, & each under £500 in amount:—*Held*: the sum of £4,000 had been properly appointed by M., & was payable to her, & was not bound by her covenant to settle after-acquired property.—*Re GERARD (LORD), OLIPHANT v. GERARD* (1888), 58 L. T. 800.

*Annotations*:—*Consd.* *Re O'Connell, Mawle v. Jagoe*, [1903] 2 Ch. 574; *Tremayne v. Rashleigh*, [1908] 1 Ch. 681.

**30. —.]**—A covenant for settlement of after-acquired property extends to property which is limited to such purposes as the covenantor shall appoint, & in default of appointment to him or her absolutely. A marriage settlement contained a covenant that any property exceeding £200 in value which the wife should become possessed of or entitled to should be brought into settlement. Property, exceeding £200 in value, was subsequently bequeathed in trust for such purposes as she should appoint, & in default of appointment to her absolutely for her separate use. She executed deeds poll purporting to appoint out of the property several sums of £199 each to herself absolutely:—*Held*: notwithstanding the general power of appointment, the bequeathed property was bound by the covenant, & the deeds poll were therefore ineffectual.—*Re O'CONNELL, MAWLE v. JAGOE*, [1903] 2 Ch. 574; 72 L. J. Ch. 709; 89 L. T. 166; 52 W. R. 102.

*Annotation*:—*N.F.* *Tremayne v. Rashleigh*, [1908] 1 Ch. 681.

**31. —.]**—The distinction between a person's own property & property which is not his own, but which he can dispose of by will in any way he pleases by virtue of a power conferred upon him is well established. Such last-mentioned property is not his own in any proper sense (*per Cur.*).—*STAMP DUTIES COMR. v. STEPHEN*, [1904] A. C.

137; 89 L. T. 511; *sub nom.* NEW SOUTH WALES STAMP DUTIES COMRS. v. STEPHEN, 73 L. J. P. C. 9; 20 T. L. R. 63, P. C.

*Annotations*.—*Reid. Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Bruton v. Stamp Duties Comr.*, [1913] A. C. 747.

32. —.]—By a voluntary settlement dated Mar. 26, 1902, appct., a married woman, covenanted to settle all real & personal property to which she was then, or should at any time during her then present coverture become entitled for any estate or interest whatsoever in possession, reversion, remainder, contingency, or expectancy. There was no child of the marriage, which was dissolved on the wife's petition as from June 9, 1904, & the property of the wife comprised in her marriage settlement was ordered to be conveyed to her as if the husband had died in her lifetime.

In these circumstances questions arose whether the trustees of the voluntary settlement were entitled by virtue of the above-mentioned covenant to the following moneys, namely, a sum of £2,800 which became payable on Apr. 12, 1905, representing appct.'s fund settled by her marriage settlement, & at the date thereof neither ascertained nor payable, over which fund, in the event of there being no child of the marriage, appct. had a general power of appointment exercisable by deed while not under coverture, or by will, whether covert or sole, & to which fund in default of any such appointment she was absolutely entitled if she survived her husband: on Dec. 4, 1905, appct. had appointed the marriage settlement funds to herself absolutely:—*Held*: the determination of the question of title to the sum of £2,800 turned upon the distinction between power & property, & although the exercise of the power after the dissolution of her marriage created property, yet during the coverture all that appct. had was a power of appointment over the fund, & a power not being within the scope of the covenant, the sum of £2,800 belonged to her absolutely.—*TREMAINE v. RASHLEIGH*, [1908] 1 Ch. 681; 77 L. J. Ch. 292; 98 L. T. 615; 52 Sol. Jo. 203.

*Annotation*.—*Reid. Vetch v. Elder*, [1908] W. N. 137.

33. —.]—*VETCH v. ELDER*, [1908] W. N. 137.

### SECT. 3.—GIFT FOR LIFE WITH SUPERADDED POWER.

#### SUB-SECT. 1.—SUPERADDED POWER OF APPOINTMENT.

##### A. Where No Gift Over.

34. *Whether absolute gift to donee.*]—A devise "to my wife for life, & by her to be disposed of to such of my children as she shall think fit," gives the wife an estate during her life, with a power to dispose of the estate to any of their children in fee.—*LIEFFE v. SALTINGSTONE* (1674), 1 Mod. Rep. 189; 86 E. R. 819; *sub nom.* LEEFFE v. SALTINGSTONE, *Freem. K. B.* 176; *sub nom.* SALTONSTALL'S (SIR RICHARD) CASE, 2 Lev. 104.

*Annotations*.—*Apld. Thomlinson v. Dighton* (1712), 10 Mod. Rep. 71. *Distd. Kemp v. Kemp* (1801), 5 Ves. 849. *Apld. Doe d. Chadwick v. Jackson* (1836), 1 Mood. & T. 553. *Reid. Doe v. Alchin* (1818), 2 B. & Ald. 122. *Mentd. Luddington v. Kime* (1896), 1 Ld. Raym. 203.

35. —.]—Testator devised all his real & personal estate upon the trusts following: As to all his estates, both freehold & copyhold, or other interest, to F., W., & J., the wife of H., in trust

for the sole & exclusive use & benefit of J., & to pay the rents, profits, & proceeds arising from the estates to J., or to such person or persons as she should appoint to receive the same, for her life, for her separate use; & as to all his personal estate, he gave & bequeathed the same to the said F., W., & J., upon the same trusts as were therebefore mentioned with respect to his freehold & copyhold estates, in trust for the sole benefit of J. for life, for her separate use; & he declared that her receipt alone should be a sufficient authority to his trustees for all his goods, furniture, etc., & also for the payment of proceeds arising from any stock or fund of which he might die possessed, & that she should have the entire power of disposing thereof by will to such person or persons as she might think fit; & upon her dying without a will or testamentary writing, in her lifetime, to her right heirs for ever:—*Held*: J. took either an estate for life for her separate use, with a power of disposition by will, notwithstanding her coverture, or an estate in fee simple, with a life estate to her separate use, with a similar power of disposition.—*ATCHISON v. LE MANN* (1854), 23 L. T. O. S. 302, L. C. & L. J.J.; *affg. S. C. sub nom.* WATKINS v. ATCHISON, *ATCHISON v. LE MANN* (1853), 10 Hare, App. II., xlvii.

*Annotations*.—*Consd. Lochmore v. Brothelidge* (1863), 32 Beav. 353. *Reid. Greenwood v. Vardon* (1854), 3 Eq. Rep. 181; *Taylor v. Meads* (1865), 4 De G. J. & Sm. 597. *Mentd. Berestford v. A.-G.*, [1918] P. 33.

36. — *Power exercisable by deed or will.*]—Where a person has an absolute & general power of appointing a fund as well in his lifetime as at his death & there is no gift over, yet if no appointment be made, his administrator cannot claim the fund, & even creditors will not be entitled to the benefit of it without some step taken towards an appointment; though where any such appointment be made the ct. will arrest the fund *in transitu* for the benefit of creditors.

A fund is given after the death of J. to such persons as J. shall appoint, & in default of appointment to "such persons as would then by virtue of Statute of Distribution, 1670 (c. 10), be entitled to testator's personal estate, in case he had died intestate. There being no appointment the funds shall go to such persons as were the next of kin of testator at the time of his death.—*HARRINGTON v. HARTE* (1784), 1 Cox, Eq. Cas. 131; 29 E. R. 1094, L. C.

*Annotations*.—*Reid. O'Grady v. Wilnot*, [1916] 2 A. C. 231. *Mentd. Clapton v. Bulmer* (1840), 10 Sim. 426.

37. —.]—Money in ct. stood limited to a widow for life, & afterwards as she should by deed or will appoint.

The ct. directed payment to her, without requiring an appointment.—*CAMBRIDGE v. ROUS* (No. 2) (1858), 25 Beav. 574; 53 E. R. 756.

38. — *General power exercisable by will.*]—Investment of stock directed in trust to pay the dividends to testator's son for life, & after his death to transfer part of the capital according to his appointment:—*Held*: an interest for life only, with a power.—*NANNOCK v. HORTON* (1802), 7 Ves. 391; 32 E. R. 158, L. C.

*Annotations*.—*Reid. Jones v. Tucker* (1817), 2 Mer. 533; *Doe d. Nowell v. Toake* (1825), 2 Bing. 497; *Lovell v. Knight* (1831), 1 L. J. Ch. 47; *Innes v. Sayer* (1851), 3 Mac. & G. 604; *Re Mills, Mills v. Mills* (1856), 34 Ch. D. 186; *Re Huddleston, Bruno v. Eyston*, [1894] 3 Ch. 565. *Mentd. Sibley v. Perry* (1802), 7 Ves. 522; *Cuthbert v. Purrier* (1822), Jac. 415; *Bromley v. Wright* (1849), 7 Hare, 334; *Re Jodrell, Jodrell v. Seale* (1890), 44 Ch. D. 590; *Re Gue, Smith v. Gue* (1892), 36 Sol. Jo. 698.

### PART III. SECT. 3, SUB-SECT. 1.—A.

34.1. *Whether absolute gift to donee.*]—*REID v. CARLETON*, [1905] 1 I. R. 147.—*IR.*

d. — *Right of donees to appoint to themselves.*]—*MEAGHER v. MEAGHER* (1915), 34 O. L. R. 33; 8 O. W. N. 357.—*CAN.*

**Sect. 3.—Gift for life with superadded power: Subsect. 1, A. & B. (a).]**

39. ———.]—A gift of personal estate to the wife for life, with a direction, that, after her death, one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment. The sale by the widow of a sum of 8 per cent. stock, which constituted nearly the whole of the residue, & the investment of the proceeds in the purchase of long annuities in her own name, does not amount to an exercise of her power.—*REITH v. SEYMOUR* (1828), 4 Russ. 263; 8 L. J. O. S. Ch. 97; 38 E. R. 804.

*Annotations:—*Consd. *Nowlan v. Walsh, Nowlan v. Wilde* (1851), 4 De G. & Sm. 584. *Reid. Hughes v. Wells* (1852), 9 Hare, 749; *Pennock v. Pennock* (1871), L. R. 13 Eq. 144.

40. ———.]—Testator directed that, after his wife's death, part of his stock should be transferred to G. for her sole & entire use during her life; that she should not alienate it, but enjoy the interest during her life; & that, at her decease, she might dispose of it, as she thought fit:—*Held*: G. took an interest for life, with a power to dispose of the stock by her will.—*ARCHIBALD v. WRIGHT* (1838), 9 Sim. 161; 7 L. J. Ch. 120; 2 Jur. 759; 59 E. R. 320.

*Annotations:—*Consd. *Nowlan v. Walsh, Nowlan v. Wilde* (1851), 4 De G. & Sm. 584. *Distd. Re David's Trusts* (1859), 29 L. J. Ch. 116. *Apld. Re Flower, Edmonds v. Edmonds* (1885), 55 L. J. Ch. 200. *Reid. Humble v. Bowman* (1877), 47 L. J. Ch. 62.

41. ———.]—A lady being absolutely entitled, upon the death of her mother, among other property, to the sum of £900, in the hands of trustees under the marriage settlement of her father & mother, married during her infancy, without any settlement having been made of her property. The mother died shortly after her daughter's marriage, whereby the £900, with other property, became a vested interest in possession, & was claimed by the husband in virtue of his marital rights; but the trustees refusing to pay him the £900 unless he consented to settle a portion of it upon his wife, for her separate use, he agreed to do so; & accordingly the sum of £500 was paid by them, at the direction of the husband & wife, to new trustees, upon trust for her separate use for life, she being still an infant, & after her decease, to such purposes as she should by her last will & testament direct or appoint, & in default of such direction or appointment, in trust for her next of kin:—*Held*: the limitation of the settlement gave her but a life estate, with a power to appoint.—*HANSEN v. MILLER* (1844), 14 Sim. 22; 3 L. T. O. S. 2; 8 Jur. 209; 60 E. R. 264.

42. ———.]—Husband, in a deed of separation from his wife, B., covenanted with trustees to assign upon certain trusts for her benefit one-half of all property coming to her or him in her right, & it was agreed that the other half should belong to him absolutely. One of the trustees, by will, gave a share of her property to A., a married lady, for her separate use for life, with a general power of appointment on her decease. She gave another share to B., the wife who was separated from her husband, for her separate use for life, with remainder to her children. By a codicil she revoked the bequest of this last share, & directed B. should have her share the same as A. to be at her own disposal, independent of her children, so that no part of it should be under trust, but to be "entirely at her own disposal, to give to any of her children who may be kind & dutiful to her":—*Held*: the wife, B., took an estate for her separate use during her life, & she had a general

power of appointment.—*KER v. RUXTON* (1852), 19 L. T. O. S. 268; 16 Jur. 491.

43. ———.]—*RUDDOCK v. POOLE* (1837), 1 Jur. 980.

44. ———.]—Testator by his will after bequests & legacies to his wife & two daughters, gave to M., a third daughter, £30 *per annum* during her natural life & not to be subject to the debts, control or engagement of the present or any future husband she might happen to have, "only she has the power left of leaving it by her will to be paid by my exors., or whom they appoint, out of my real property," & he devised his real property to his son, subject to all legacies bequeathed to his wife & daughters. M. by her will, after reciting the clause in her father's will giving the annuity, in exercise of the power thereby given, gave & devised "the annuity of thirty pounds" to her daughter T.:—*Held*: there was no uncertainty in the gift over; M. had a general power of appointment; & the annuity was a perpetual annuity charged upon the real estate.—*TOWNSEND v. ASCROFT*, [1917] 2 Ch. 14; 86 L. J. Ch. 517; 116 L. T. 680; 61 Sol. Jo. 507.

45. ——— **Special power exercisable by will.**]—Testator, who had lent his brother-in-law £100, appointed the brother-in-law one of the exors. of his will, & after giving certain legacies proceeded: "I give to my brother-in-law the sum of £500 in consideration of his undertaking to be my exor., & carrying out my instructions & wishes to the best of his ability. The instructions are contained in letters addressed to him"; & after making another bequest proceeded: "I give, devise & bequeath all my real & personal property of what nature or kind soever, not hereinbefore otherwise disposed of, to E., to be by her used according to her discretion, as regards the interest, during her lifetime for the benefit of such members of the H. family as may from time to time most require it, & at her death the principal sum is to be divided, at her discretion, with the above idea in view. She is responsible to no one for the use of the interest of the money, & can retain what sum she wishes for her own use; but I wish that, in case of her marriage or death, the sum should be reserved for the above object, & that no husband she may marry shall have any control over the same." On summons:—*Held*: E. was absolutely entitled to testator's residuary estate for her life free from any trust, with a power to appoint the principal among those members of the H. family living at her death who most required it.—*Re HYSLOP, HYSLOP v. CHAMBERLAIN* (1894), as reported in 71 L. T. 373.

*Annotation:—*Mentd. *Re Stewart, Stewart v. McLaughlin*, [1908] 2 Ch. 251.

**B Where Gift Over.**

**(a) In General.**

46. **Whether life interest enlarged.**]—Devise & bequest of real & personal estate in trust to pay the rents, dividends, etc., to the separate use of a married woman for life; & after her decease to convey, etc., according to her appointment; with a limitation over, in case of her death in the life of testatrix, or in default of appointment:—*Held*: absolute property, notwithstanding the indication of an intention, that the estate should remain in the trustee for her life, with powers, inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest.—*BARFORD v. STREET* (1809), 16 Ves. 155; 33 E. R. 935.

*Annotation:—*Expld. *Hughes v. Wells* (1852), 9 Hare, 749.

47. ———.]—Devise of an estate at *Irchester* to devisor's granddaughter A. for her life;

remainder to two trustees during the life of A., in trust only, to support contingent estates; & after her decease, to all & every the children in tail, with cross remainders between them in tail; & in default of issue of all & every the children of the deviser's granddaughter, he devised to his daughter B. for life; remainder to such one or more of the children of B., as she by deed or will, attested by three witnesses, duly executed, should appoint, for their lives; remainder to all & every the child & children of such daughter or daughters to be appointed by B. as aforesaid; & if only one should be appointed, then to her & the heirs of her body; & if more than one should be appointed, then all of them to take their mother's shares *per stirpes*, as tenants in common, & not as joint tenants; with cross remainders between them, the children of such daughters, as to their mothers' shares in tail; & on failure of such issue of any one or more of such daughters with cross remainders to the others of their issue: & in default of such appointment, & of any appointment not exhausting the whole fee, the deviser gave the estate at Irchester, or so much of the fee as should not be exhausted by such appointment made as aforesaid, to B. for life; with remainder to all her daughters for their lives with cross-remainders between them for life; with remainder, during the lives of all the daughters of B. & the life of the survivor to support contingent remainders; & for default of issue of any or either of the daughters then living of B. he devised the estate to B. & her heirs. A. died sole & intestate, leaving B. her heir-at-law as well as the heir-at-law of the deviser. B. had issue nine daughters, many of whom were married & had issue:—*Held*: B. had in the freehold & copyhold lands of the deviser an estate for her life, with an ultimate reversion to herself in fee.—*MEDLYCOTT v. JORTIN* (1821), 2 Brod. & Bing. 632; 6 Moore, C. P. 1; 129 E. R. 1109.

48. —.]—By fine & settlement made after marriage, certain lands, of which the wife was seised in fee before the marriage, were conveyed to her separate use for life, with remainder to the use of such person or persons as she, notwithstanding her coverture, should appoint; with remainder, in default of appointment, in trust for herself for life, with remainder to her two daughters in fee. The wife afterwards joined with her husband in the deposit of the title deeds of the premises, by way of equitable mtge. for securing the repayment of the husband's debts:—*Held*: the deed of settlement gave the wife no power of appointing in fee, & the mtgee. had no claim upon the estate as against the two daughters.—*LEWTHWAITE v. CLARKSON* (1836), 2 Y. & C. Ex. 370; 7 L. J. Ex. Eq. 19; 1 Jur. 793; 160 E. R. 440.

49. —.]—Testator bequeathed to his wife £800 *per annum* for her life, to be paid quarterly, & after her death the said annuity to be equally divided between six persons, whom he named, or the survivors or survivor of them. He also gave to each of these six persons £100 *per annum* during their lives, to be paid quarterly, with power to leave their said respective annuities at their deaths to any persons they might marry, or any children they might leave: but in case of any of them dying without exercising such power, then to the survivors or survivor:—*Held*: the gifts over of the annuities of £800 & £100 respectively were not gifts of so much stock in the 3 per cents. as would produce those annuities, but gifts of annuities for the respective lives only of the persons, to whom they were limited, as tenants in common.—*BLEWITT v. ROBERTS* (1841), Cr. & Ph. 274; 10

Sim. 491; 10 L. J. Ch. 342; 41 E. R. 495; *sub nom. BLEWITT v. STAUFFERS*, 5 Jur. 979, L. C.

*Annotations*.—*Reid*, *Blight v. Hartnoll* (1881), 19 Ch. D. 294; *Townsend v. Ascroft*, [1917] 2 Ch. 14. *Mentid*. *Rogers v. Towsey* (1845), 2 Holt, Eq. 270; *Stokes v. Heron* (1845), 12 Cl. & Fin. 101; *Yates v. Maddan* (1851), 3 Mac. & G. 532; *Kerr v. Middlesex Hospital* (1852), 2 De G. M. & G. 576; *Baynes v. Ridge* (1853), 1 Eq. Rep. 157; *Ford v. Batley* (1853), 23 L. J. Ch. 225; *Nicholls v. Hawkes* (1853), 22 L. J. Ch. 255; *Hedges v. Harpur* (1858), 3 De G. & J. 129; *Mansergh v. Campbell* (1858), 25 Beav. 544; *Hill v. Potts* (1862), 31 L. J. Ch. 380; *Bent v. Cullon* (1871), 6 Ch. App. 235; *Re Morgan*, *Morgan v. Morgan* (1893), 69 L. T. 407; *Re Evans*, *Thomas v. Thomas* (1908), 77 L. J. Ch. 583.

50. —.]—Testator gave to his nephew E. £2,000, & to his nephew W. £2,000, & to his niece G. £2,000. "if they respectively survived him & attained the age of twenty-one years, when the legacies to his nephews were to be paid: in case of the death of either of his nephews or niece leaving issue, such issue to take the parent's legacy as by his or her will directed: if no will, equally: but in case of the death of either of such nephews or niece before his or her legacy payable his or her legacy to go to survivor of nephews & niece during the minority of nephews & niece, or any of them; exors. to apply income of legacy for maintenance & education; the legacy of his niece & any share she might acquire by death of her brothers, or either of them, to be settled for her separate use, with power by will to dispose of principal amongst children, if any, equally: if no children, to sink into residue." The two nephews survived testator, & attained twenty-one in his lifetime:—*Held*: the nephews were entitled only to the income of their respective legacies for life, with power of appointment among their children, & if no children, to the legacies absolutely.—*MARTINEAU v. ROGERS* (1856), 8 De G. M. & G. 328; 25 L. J. Ch. 398; 17 L. T. O. S. 129; 4 W. R. 502; 44 E. R. 416, L. C. & L. J.J.

*Annotation*.—*Reid*, *Re Hall-Dare*, *Le Marchant v. Leo Warner*, [1916] 1 Ch. 272.

51. —.]—Testator by his will bequeathed to each of the persons thereafter named, including a married niece, for his or her own absolute use, £10,000 "except as hereinafter limited." After bequeathing certain annuities to three ladies, testator directed that the legacies to his nieces were to be invested, & the interest therefrom, together with the annuities, were to be in trust for their separate use, & in case any one of the three annuitants, or either of his nieces, should become bkpt. or insolvent, or sell, mtgee., or dispose of the annual sum or interest bequeathed to her, then the same should cease & become part of his residuary estate as though she were dead, except in respect of his married niece, whose legacy was to go to her children according to her appointment, & in default to them equally. Upon the death of the married niece:—*Held*: she took the legacy for her life only, with remainder to her children as she should appoint, & in default to them equally, & therefore her husband ought not, in respect of it, to take out administration to her.—*Re WARE'S TRUSTS* (1871), 41 L. J. Ch. 121; 25 L. T. 737; 20 W. R. 142.

52. —.]—Testatrix gave real & personal estate to trustees upon trust to pay the income to E. for life, & hold the capital in trust as E. should by will appoint, & in default to pay thereout certain legacies, & hold the residue in trust for C. & W.; & in case E. should become of unsound mind, to apply the income or any part of it at their discretion towards her maintenance & support:—*Held*: while E. was of sound mind, she, together with C. & W., could, on providing for the legacies, dispose of the estate.—*GARDINER v. YOUNG* (1876), 34 L. T. 348.



*Sect. 3.—Gift for life with superadded power: Subsect. 1, B. (a) & (b).]*

53. —.]—Testator gave the residue of his estate to trustees to pay the income thereof to his four children in equal shares for life, & after their death, as to the share of each child as he or she should by deed or will appoint, & in default of appointment, among his or her children equally; but declared that if the income of the share of any one of his children should, from any cause, during his or her life, cease to be payable into his or her hands as an inalienable personal provision, then all the dispositions in favour of such child should be void, & the subsequent devise should take effect:—*Held*: the clause of forfeiture was void, & each child took an absolute interest in his or her share of testator's estate.—*Re WOLSTENHOLME, MARSHALL v. AIZLEWOOD* (1881), 43 L. T. 752; 29 W. R. 414.

54. Life interest in & power over one-half share of residue—Life interest as survivor in other half share—Power not applicable to whole residue.—A trustee gave each of two daughters the life rent of half the residue of his estate, & in a certain event, which happened, power was committed to his daughters respectively to "convey the fee of the share of the residue life-rented by them respectively," under burden of the life rent of the survivor, & failing the daughters exercising this power, the fee was destined over:—*Held*: although the predeceasing daughter had not dealt with her half, the surviving one had power to convey only the half of the residue.—*TENNANT v. MORRIS* (1858), 20 Dunl. (Ct. of Sess.) (II. L.) 7; 30 Sc. Jur. 493, H. L.

(b) To Personal Representatives of Donee.

See, generally, SETTLEMENTS; WILLS.

55. Whether life interest enlarged.]—Testator bequeathed £700 to his daughter's husband, his exors., etc., in trust to pay the interest to his daughter, for her separate use for life, & after her death, to such persons as she should appoint by will, & in default of appointment, to her personal representatives. The daughter died without having made any appointment:—*Held*: her next of kin, to the exclusion of her husband, were entitled to the £700.—*ROBINSON v. SMITH* (1833), 6 Sim. 47; 2 L. J. Ch. 76; 58 E. R. 512. *Annotations*:—*Mentd.* *King v. Cleaveland* (1859), 4 De G. & J. 477; *Re Turner* (1865), 2 Drew. & Sm. 501; *Stockdale v. Nicholson* (1867), L. R. 4 Eq. 359; *Briggs v. Upton* (1871), 7 Ch. App. 376.

56. —.]—By a marriage settlement a sum of money, the property of the wife, was vested in trustees in trust for the separate use of the wife during her life, & after her decease in trust for the husband during his life, & after the death of the survivor, upon certain trusts for the children, & in default of children, who, being sons, should attain twenty-one, or being daughters, should attain that age or marry, in trust for such person or persons as the wife should notwithstanding her coverture, by deed or will appoint, & in default of appointment, in trust to pay & transfer the same to the exors. or administrators of the wife:—*Held*: under the ultimate limitation to the exors. or administrators of the wife the fund did not belong to the next of kin of the wife, in exclusion of the husband, but passed to the administratrix of the wife as part of her general personal estate.—*DANIEL v. DUDLEY* (1841), 1 Ph. 1; 41 E. R. 531, L. C.

*Annotations*:—*Consd.* *Holloway v. Clarkson* (1843), 6 Jur. 923. *Apld.* *Allen v. Thorp* (1843), 7 Beav. 72. *Consd.* *Morris v. Morris* (1855), 4 Hare, 599; *A.-G. v. Malkin* (1846), 2 Ph. 64. *Reid.* *Mackenzie v. Mackenzie* (1851),

3 Mac. & G. 559; *Page v. Soper* (1853), 11 Hare, 321. *Mentd.* *Johnson v. Johnson* (1843), 3 Hare, 157; *Long v. Watkinson* (1852), 17 Beav. 471; *Re Morgan's Trusts* (1854), 2 W. R. 439; *Dixon v. Dixon* (1857), 24 Beav. 129; *Re Seymour's Trusts* (1859), 28 L. J. Ch. 705; *Re Clay, Clay v. Clay* (1885), 54 L. J. Ch. 648.

57. —.]—Bequests to females, some of whom were married & some single, for their separate use for their respective lives, & after their decease to such persons as they should respectively appoint; & in default of appointment, to their respective exors., administrators, & assigns:—*Held*: each of the legatees, whether married or unmarried women, were entitled upon petition, without executing any formal appointment, to an immediate transfer or payment to themselves of the corpus of their shares of the fund.—*HOLLOWAY v. CLARKSON* (1843), 2 Hare, 521; 67 E. R. 215.

*Annotations*:—*Consd.* *Mackenzie v. Mackenzie* (1851), 3 Mac. & G. 559. *Distd.* *Hughes v. Wells* (1852), 9 Hare, 749; *Taylor v. Millington* (1858), 4 Jur. N. S. 204. *Apld.* *Cambridge v. Rous* (1858), 25 Beav. 574. *Reid.* *Page v. Soper* (1853), 11 Hare, 321; *Re David's Trusts* (1859), John. 495; *Humble v. Bowman* (1877), 47 L. J. Ch. 62; *Re Onslow, Plowden v. Gayford* (1888), 39 Ch. D. 622. *Mentd.* *Smith v. Palmer* (1849), 7 Hare, 225; *Long v. Watkinson* (1852), 17 Beav. 471; *Re Seymour's Trusts* (1859), John. 472; *Re Clay, Clay v. Clay* (1885), 54 L. J. Ch. 648.

58. —.]—Bequest of personalty, in trust for the legatee for life, with remainder to her appointees by will, with remainder, in default of appointment, to her exors. & administrators:—*Held*: the legatee took the capital absolutely.—*DEVAL v. DICKENS* (1845), 9 Jur. 550.

*Annotations*:—*Foldd.* *Page v. Soper* (1853), 11 Hare, 321. *Reid.* *Re Onslow, Plowden v. Gayford* (1888), 39 Ch. D. 622.

59. —.]—The trusts of some stock were, by a settlement, declared to be for A., B., C., & D., equally; with a proviso, that the shares of females should not be paid to them, but should be invested, & the income paid to them for their lives, & that, after the death of each such female, the trustees should stand possessed of her share for such persons as she should by will appoint, & in default of appointment, for the exors. or administrators, or other the personal representatives or representative of such female:—*Held*: each female had an absolute interest in her share, & had a right to a transfer.—*ST. JOHN v. GIBSON* (1847), 17 L. J. Ch. 95; 10 L. T. O. S. 480; 12 Jur. 373.

60. —.]—Where trust funds were settled to the separate use of a married woman for her life, & after her decease upon trust for such persons as she should by will appoint, & in default of appointment, for her exors. & administrators, she, having become a widow, applied for a transfer of the funds to herself & her assignees, offering to release her power of appointment:—*Held*: she was absolutely entitled to the trust funds, & the order was made accordingly.—*PAGE v. SOPER* (1853), 11 Hare, 321; 1 Eq. Rep. 540; 22 L. J. Ch. 1044; 17 Jur. 851; 1 W. R. 518; 68 E. R. 1298. *Annotation*:—*Reid.* *Re Onslow, Plowden v. Gayford* (1888), 39 Ch. D. 622.

61. —.]—Testator bequeathed one-third of his residue to his daughter, her exors., etc., to be vested at twenty-one, but not to be payable until twenty-five. He declared it should not be subject to the control of any husband, but should devolve & be settled by deed upon her, as a *feme sole*, & that the income should not be anticipated, & that until her marriage, she should only be entitled to receive the dividends, & retain the power to bequeath the capital by will. The daughter, being unmarried:—*Held*: she took absolutely, & was entitled to payment of the fund out of ct. on attaining twenty-one.—*Re YOUNG'S SETTLEMENT* (1853), 18 Beav. 199; 52 E. R. 79.



62. —.]—By a marriage settlement, an annuity & policy of assurance were assigned by the husband to trustees, upon trust for himself & his wife during their lives, & then for the benefit of the children of the marriage & in default of children, to such person as the husband should by deed or will appoint, & in default of appointment, "unto the exors. or administrators of the husband to & for their own use & benefit":—*Held*: the exors. took the property as part of the husband's general assets.—*JOHNSON v. ROUTH* (1857), 27 L. J. Ch. 305; 30 L. T. O. S. 111; 3 Jur. N. S. 1048; 6 W. R. 6.

*Annotation*:—*Refd. Harrington v. Atherton* (1864), 4 New Rep. 206.

63. —.]—W. B. directed that his trustees should, as to a sixth part of certain funds, transfer & pay the same equally unto M. B. & C. L. & all the other children of G. B., but as to the shares of M. B. & C. B. & others, upon trust to pay the interest, etc., arising therefrom unto M. B. & C. B. & others, for & during their lives, as tenants in common: & after their respective decease, then as to their shares in the principal moneys, constituting one sixth part, to pay the shares unto such person as M. B. & C. B. & others respectively, notwithstanding coverture, should appoint: & in default, to M. B. & C. B. & others, their respective exors. & administrators, absolutely as tenants in common. W. B. then directed that the interest to be paid to M. B. & C. B. & others for life should be for their separate use, etc., & he declared that in case M. B. & C. B. & the others named, or either of them, should at any time attempt to alienate their respective estates or interests under the will, the share, estate, & interest of such of them so attempting to alienate should immediately go & belong to such person or persons who under the trusts would be next entitled to the same. M. B. & C. B. after testator's death, intermarried with J. C. R. & S. L. respectively: & M. R. & C. L. now by their bill prayed that the principal sums constituting their parts of the funds might be declared to belong to them, that the trustees be ordered to transfer the same:—*Held*: plffs. were absolutely entitled to their shares of the funds.—*ROGERS v. BIRKHEAD* (1857), 3 Jur. N. S. 405.

64. —.]—The property of a married woman, settled by an ante-nuptial settlement for her separate use for life, with remainder as she should by deed or will appoint, with remainder in failure of appointment to her exors. or administrators, is an absolute settlement for her sole & separate use, without restraint on anticipation, & vests in equity the entire corpus in her for all purposes.

A., a widow & administratrix of her deceased husband, who had died intestate, & entitled to dower as to his real estate, & to a third of his personal estate, being about to contract a second marriage, executed with her intended husband a settlement, whereby she settled the estate she was so possessed of & entitled to, to her sole & separate use, with power of appointment by deed or will, & with his consent gave a letter instructing her bankers to keep separate accounts, & to consider any private overdraft by her on her own account secured by the administrative deposits in their hands. At this time two sums of £6,000 & £8,000 were in deposit on such account, & subsequently various other sums were, from time to time, paid in by her to the same account, & placed at interest with the bank, who allowed her to overdraw her private account on the strength of the arrangement so made. By her will she executed the power of appointment reserved to her by the settlement,

& having at the time of her death overdrawn her private account to a considerable amount, the bankers claimed, as against the parties interested under the will, to retain the sums so paid into their hands, on account of the administrative account, & especially the sums of £6,000 & £8,000, so deposited with them, in payment of the sums due to them on account of the overdrafts made by her on her private account, & brought a suit to enforce such lien:—*Held*: whether or not the bankers had notice of the settlement (which fact was uncertain) the letter of instruction to them by A. was a valid execution of the right reserved by her, as regarded the two sums of £6,000 & £8,000 then in their hands, & in the absence of fraud gave the bankers a lien on those sums for any future overdraft that might be made in accordance with the terms of such letter.—*LONDON CHARTERED BANK OF AUSTRALIA v. LEMPRIERE* (1873), L. R. 4 P. C. 572; 9 Moo. P. C. C. N. S. 426; 42 L. J. P. C. 49; 29 L. T. 186; 21 W. R. 513; 17 E. R. 574, P. C.

*Annotations*:—*Distd. Adamson v. Hammond* (1873), L. R. 3 P. & D. 141. *Apd. Mayd v. Field* (1876), 3 Ch. D. 587. *Follid. Re Harvey's Estate, Godfrey v. Harben* (1879), 13 Ch. D. 216. *Refd. Outram v. Hyde* (1875), 24 W. R. 298; 13 Ch. D. 216. *Refd. Wainford v. Hoyl* (1875), L. R. 20 Eq. 321; Paul v. Paul (1882), 51 L. J. Ch. 839; *Re Roper, Roper v. Doncaster* (1888), 39 Ch. D. 482. *Mentd. Re Grisoll, Re p. Jones* (1879), 12 Ch. D. 484; *National Bank of Australasia v. United Hand in Hand & Band of Hope Co.* (1879), 4 App. Cas. 391; *Pike v. Fitzgibbon, Martin v. Fitzgibbon* (1881), 17 Ch. D. 454; *Re Hastings, Hallott v. Hastings* (1887), 36 Ch. D. 94; *Re Wheeler's Settlement, Trusts, Briggs v. Ryan*, [1899] 2 Ch. 717.

65. —.]—By a marriage settlement, the wife's real & personal estate was assigned to trustees on trust to pay the annual income to husband for life, remainder to wife for life, remainder as she should by deed or will appoint; & in default for her personal representatives. The wife predeceased her husband, intestate & without issue. After the husband's death, his exors. took out administration of the wife's estates:—*Held*: they were entitled to the fund.—*RE BEST'S SETTLEMENT TRUSTS* (1874), L. R. 18 Eq. 686; 43 L. J. Ch. 545; 22 W. R. 599.

*Annotation*:—*Consd. Smith v. Iliffe* (1875), L. R. 20 Eq. 666.

66. —.]—By a marriage settlement made in 1878 a fund was settled upon trust to pay the income to the wife for life, & during her then intended coverture such income was to be for her separate use, & after her death the fund was to be held in default of children in trust for such persons as the wife should during coverture by will, & when discovered by deed or will appoint, & in default, if the wife should survive the husband, in trust for her, her exors., administrators, & assigns. The husband died in 1880. There was no issue of the marriage. The lady married again, after Married Women's Property Act, 1882 (c. 75), & no settlement was made on that marriage. Upon a summons taken out by her & her second husband to have it determined whether she could release the power of appointment by will given to her by the settlement, & call for a transfer of the settled property:—*Held*: if the lady had come to the ct. immediately before her second marriage she would have been entitled to have the settled property transferred to her, & Married Women's Property Act, 1882 (c. 75), had added the incident of separate use to her interest in such property, so that the lady & her husband were now entitled to have that property made over to them without any release by her of the power.—*RE ONSLOW, FLOWDEN v. GAYFORD* (1888), 39 Ch. D. 622; 57 L. J. Ch. 940; 59 L. T. 308; 36 W. R. 883.

*Annotation*:—*Consd. Re Davenport, Turner v. King* (1894), 64 L. J. Ch. 252.

**Sect. 3.—Gift for life with superadded power: Sub-sect. 1, B. (b), (c) & (d), & C.; sub-sect. 2.]**

67. —[—(1) Testator, who died before 1882, by his will gave property to trustees upon trust to pay the income equally to two daughters for their respective lives for their separate use, & as to the capital declared that the same, being equally divided, should be subject to their respective appointments by will, & assigned & paid over accordingly, & in default of appointment to their exors., administrators, or assigns respectively. The trustees had some prior payments to make out of the capital. The two daughters married after 1882:—*Held*: on releasing their powers of appointment they were entitled to a declaration that they were entitled to their shares as absolute owners.

(2) The direction to pay to the exors., administrators, or assigns of the life tenant is, in such a connection, equivalent to a gift of the reversionary interest to the life tenant herself; & by virtue of the Married Women's Property Act, 1882 (c. 75), the reversionary interest in such a case now coalesces with the life interest, while the testamentary power can be released.

(3) There is, however, no occasion for an express release of the power where the capital is actually paid over to the married woman, a sufficient release being implied from the circumstance.—*Re DAVENPORT, TURNER v. KING*, [1895] 1 Ch. 361; 64 L. J. Ch. 252; 71 L. T. 875; 43 W. R. 217; 13 R. 167.

**(c) To Next of Kin of Donee.**

68. **Life estate not enlarged.**—Settlement by a *feme sole*, in contemplation of marriage, of part of her fortune in trust to pay the dividends to herself for her separate use for life, & after her death for her intended husband; & after the death of the survivor to transfer the capital according to her appointment, by will; & in case she should die without appointment, & he should be then dead, in trust for her next of kin, their exors., etc., according to the Statute of Distribution, 1670 (c. 10):—*Held*: an interest for life only in the widow, with a power of disposition by will.—*ANDERSON v. DAWSON* (1808), 15 Ves. 532; 33 E. R. 866.

*Annotations*:—*Distd.* *Godsal v. Webb* (1838), 2 Keen, 99. *Reid.* *Holloway v. Clarkson* (1843), 2 Hare, 521.

69. —[—A gift by will of real & personal estate to L. for life, & then to L.'s husband for life, & then to her appointees by deed or will, & in default to her "next of kin according to the Statute of Distribution of personal estate; & in the like shares & proportions as if she had died without having been married"; with a direction to L. to appoint trustees, in whom the property was to be vested upon the above trusts. L. died in the lifetime of testatrix, leaving testatrix, who was her mother, & one other person, who was the only child of her only sister, her next of kin according to the statute:—*Held*: the gift to the next of kin had not lapsed.—*NICHOLS v. HAVILAND* (1855), 1 K. & J. 504; 1 Jur. N. S. 891; 69 E. R. 558; *sub nom.* *NICHOLS v. HAVILAND, HAVILAND v. LEIGHTON*, 26 L. T. O. S. 52.

**(d) To Heirs of Donee.**

*See, now*, Law of Property Act, 1925 (c. 20), s. 131: **REAL PROPERTY.**

70. **Application of rule in Shelley's case**—*Re-*

**mainder to heirs**—**Estate for life coalesces with remainder.**—(1) By a will made in 1833 testatrix devised a freehold messuage unto trustees, their heirs & assigns, upon trust for her daughter during her life, & after her decease upon such trusts for the lawful child or children of the daughter as she should by deed or will appoint, & "in default of such appointment" in trust for her daughter's right heirs. Testatrix directed that the receipts of her daughter should be a discharge to the trustees, that the messuage should be enjoyed by her daughter free from the debts, control, or engagements of any husband with whom she might intermarry, & that the trustees might reimburse themselves. Testatrix authorised the trustees, their heirs or assigns, also to sell the messuage with the consent of her daughter "or other the persons or person who shall be beneficially interested under the trusts." The daughter after her mother's death granted the messuage to debts, in fee simple, & died without having been married. *Pltf.*, her heir-at-law, having brought an action to recover the messuage:—*Held*: the messuage was devised to the trustees in fee simple at law; the limitation to the right heirs of the daughter in default of an appointment to her children was a remainder & not an executory devise; both the estate for life devised to the daughter & the remainder to her right heirs were equitable estates; consequently the estate for life & the remainder to the right heirs coalesced pursuant to the rule in *Shelley's Case* (1581), 1 Co. Rep. 93b, the daughter could make a valid disposition of the fee simple, & debts. were entitled to the messuage.

(2) A power given by will to a tenant for life to appoint to his children, with an express limitation over "in default of such appointment" cannot be construed as conferring upon the children any estate or interest in default of the exercise of the power of appointment, at least in the absence of provisions extending the operation of the power.—*RICHARDSON v. HARRISON* (1885), 16 Q. B. 105; 55 L. J. Q. B. 58; 54 L. T. 456, C. A.

*Annotations*:—*As to* (1) *Reid.* *Evans v. Evans*, [1892] 2 Ch. 173. *Generally.* *Mentd.* *Re Brooke, Brooke v. Dickson*, [1923] 2 Ch. 265.

71. —[—**Accompanied by words of distribution.**—Where an estate is given for life, & the remainder to the "issue" is accompanied by words of distribution & by words which would convey an estate in fee or in tail to the issue, the estate of the first taker is limited to an estate for life, & that whether the estate is given in fee to the issue by the usual technical words "heirs of the body," or by implication. By a will made in 1806, testator devised lands to his son B. for life, with remainder to trustees to preserve contingent uses; & from & after the decease of B. "to the use of all & every the issue, child, or children of the body of B. lawfully to be begotten, in such shares & proportions, manner & form, as B. by deed or will shall limit, appoint, or devise the premises"; & "in default of such issue," to the use of other sons of testator & their heirs, as tenants in common:—*Held*: B. had power to appoint to his children in fee, & although there was no gift to the issue or children in default of appointment, they, under the terms of the will, took the same estate as B. had power to appoint to them, viz. an estate in fee; & therefore, the first taker, B., was entitled to an estate for life only, & not to an estate tail.—*BRADLEY v. CARTWRIGHT* (1867),

**PART III. SECT. 2, SUB-SECT. 1.—B. (c).**

a. *Failure of appointment to third party—Whether next of kin take.*—*HIGGINSON v. KERR* (1898), 30 O. R. 62.—CAN.

f. —[—*SHARPE v. M'CALL*, [1903] 1 I. R. 179.—IR.

L. R. 2 C. P. 511; 36 L. J. C. P. 218; 16 L. T. 587; 15 W. R. 922.

*Annotation*.—*Distd.* Richardson v. Harrison (1885), 10 Q. B. D. 85.

72. ————]—*BROOKMAN v. SMITH*, No. 17, *ante*.

73. ————]—By a deed of conveyance lands were limited to the use of E. & his assigns during his life without impeachment of waste, with an ultimate limitation to the use "of such person or persons as at the decease of E. shall be his heir or heirs-at-law, & of the heirs & assigns of such person or persons":—*Held*: the rule in *Shelley's Case* ((1581), 1 Co. Rep. 93b) did not apply, & E. took, not an estate in fee simple, but merely a life estate, with a contingent remainder in fee to the person or persons who at his death answered the description of his heir or co-heirs-at-law.—*EVANS v. EVANS*, [1892] 2 Ch. 173; 61 L. J. Ch. 456; 67 L. T. 152; 40 W. R. 465; 36 Sol. Jo. 425, C. A.

*Annotations*.—*Consd.* *Re* Davison's Settltmt., Cattermole Davison v. Munby, [1913] 2 Ch. 498. *Mentd.* *Re* Watkins, Maybury v. Lightfoot, [1912] 2 Ch. 430.

74. ————]—By her marriage settlement D. conveyed certain freehold & copyhold hereditaments to trustees to hold in trust for her during her life for her separate use, & after her death in trust for such person or persons & in such manner as she should by her will appoint, & in default of & until such appointment & so far as no such appointment should extend "in trust for the heir-at-law of D.":—*Held*: the rule in *Shelley's Case* ((1581), 1 Co. Rep. 93b) did not apply, & under the limitations of the settlement Mrs. D. took an estate for life; the person who at her death answered the description of her heir-at-law took an estate for life, & there was a resulting trust in favour of Mrs. D. as settlor.—*Re* DAVISON'S SETTLEMENT, CATTERMOLE DAVISON v. MUNBY, [1892] 2 Ch. 498; 83 L. J. Ch. 148; 109 L. T. 666; 36 Sol. Jo. 50.

#### C. Life Estate Severed from Power.

75. *Tenant for life may take absolutely.*]—Devise to one for life, & after to her issue, & if she has no issue, power to dispose thereof at her will & pleasure; the contingency of issue never happened:—*Held*: she took a fee.—*GOODTITLE v. PEARSON v. OTWAY* (1753), 2 Wils. 6; 95 E. R. 656.

76. ————]—Testator gave a real & personal estate in trust, for the separate use of his wife for life, with remainder to his children, & in case all his children died under twenty-one, then unto his wife, to will as she might think right. The children all died under twenty-one:—*Held*: the wife took an absolute interest, & not a life estate, with power of appointment by will.—*LOMAS v. MATTHEWS* (1835), 4 L. J. Ch. 238.

77. ————]—A sum of stock was held in trust a lady for life, then for any husband for life, & after she should appoint to him, & subject in case of her children; & in default thereto, in such uses as she should appoint. The lady, at the age of sixty-eight, having never married, appointed the fund to herself & been owner of appointment in favour of herself & children:—*Held*: she was entitled her share of the capital.—*MILES v. KNIGHT*, [1877] L. J. Ch. 458; 12 L. T. O. S. 63.

78. ————]—Testator directed his property to be placed in the funds, & the income to be paid to his wife for her life. After her death he bequeathed two legacies of £6,000 & £1,000. The remainder of his property he left "at the dis-

posal" of his wife, if she remained a widow. If she should marry, she was to have no control over his property, but the exors. were to pay her an annuity during her life; & the remainder of testator's property, after paying the above legacies, was to be divided among his nephews & nieces:—*Held*: the widow, who did not marry again, took the capital of the residue, subject to the legacies.—*NOWLAN v. WALSH, NOWLAN v. WILDE* (1851), 4 De G. & Sm. 584; 17 L. T. O. S. 292; 64 E. R. 967.

*Annotation*.—*Distd.* Pennock v. Pennock (1871), L. R. 13 Eq. 144.

79. ————]—Testator gave a fund to A. for life, & afterwards to his surviving children, but if he died without any, he gave one half of it "to be disposed of as A. should think proper." The son never married:—*Held*: he took an absolute interest in the one half, & not a life interest, with a power of appointment.—*Re* MAXWELL'S WILL (1857), 24 Beav. 240; 26 L. J. Ch. 854; 30 L. T. O. S. 49; 3 Jur. N. S. 902; 53 E. R. 352.

*Annotation*.—*Distd.* Pennock v. Pennock (1871), L. R. 13 Eq. 144.

#### SUB-SECT. 2.—SUPERADDED POWER OF USING CAPITAL.

80. *Whether life interest enlarged to absolute interest.*]—Testator bequeathed the residue to trustees upon trust to permit his wife to receive the annual produce during her life, & also to apply to her own use such parts of the capital as she should think proper, & after her decease to stand possessed thereof, upon trust for such persons as she should by will appoint, & in default, upon trust to pay certain legacies:—*Held*: the widow took a life estate only, with power of disposition of the capital during her life & of appointment by will, & not an absolute interest.—*SCOTT v. JOSSELYN* (1859), 26 Beav. 174; 28 L. J. Ch. 297; 32 L. J. O. S. 250; 5 Jur. N. S. 560; 53 E. R. 863.

*Annotation*.—*Distd.* *Re* Ryder, Burton v. Kearsley, [1914] 1 Ch. 865.

81. ————]—Testator bequeathed the income of his residue to his widow for life, but desired "that in case anything should occur that her income is not sufficient, she shall be at liberty to go to the principal." He gave the residue to his brothers. The residue only produced £30 a year, & the widow claimed the whole capital:—*Held*: she was only entitled to so much of the capital as, with the income, would afford her a maintenance suitable to her station in life.—*Re* PEDROTTI'S WILL (1859), 27 Beav. 583; 29 L. J. Ch. 92; 1 L. T. 390; 6 Jur. N. S. 187; 54 E. R. 231.

*Annotations*.—*Distd.* *Re* Richards, Uglow v. Richards, [1902] 1 Ch. 76. *Re* *Re* Ryder, Burton v. Kearsley, [1914] 1 Ch. 865.

82. ————]—Testator gave to his wife all his copyhold, freehold & personal estate to her absolute use, & to her heirs, exors., etc.; also his personal, leasehold & general possession, to & for her use, & the use of his children. He also authorised her to appropriate any part thereof for her immediate use, & for that of her children:—*Held*: this was a gift to the wife & children as joint tenants, with a power to the wife to appropriate for immediate use, as in the words of the will.—*CURTIS v. GRAHAM* (1864), 10 L. T. 734; 12 W. R. 998.

83. ————]—Testator gave to his wife the rents & interest of all property for her life, but still giving her liberty to sell & dispose of the whole or any part of the property if she should think proper

**Sect. 3.—Gift for life with superadded power: Sub-sect. 2. Sects. 4 & 5: Sub-sect. 1.]**

so to do; & he directed that all his property remaining at her death should be divided into two equal parts, one moiety among six persons, & the other moiety among three, but that if any of the nine legatees should die before receiving their share, having no child, such legatee's share should be equally divided between the other legatees:—*Held*: testator's widow took only a life interest in the property.—*ROSE v. ROWE* (1869), 21 L. T. 349; 17 W. R. 1077.

84. —.]—Testatrix by will appointed certain real estate to her husband upon trust for his own use for life, "with power to take & apply the whole or any part of the capital arising therefrom to & for his own benefit," after his decease, "subject as aforesaid," over to other persons. The husband died without exercising the power:—*Held*: he had only a life estate, & the property went to the persons to whom it was given in remainder after his decease.—*PENNOCK v. PENNOCK* (1871), L. R. 13 Eq. 144; 41 L. J. Ch. 141; 25 L. T. 691; 20 W. R. 141.

*Annotations*.—*Distd.* *Re Ryder, Burton v. Kearsley*, [1914] 1 Ch. 865. *Reid.* *Re Wilcock's Trusts* (1875), 24 W. R. 290.

85. —.]—Testator by his will gave all his property to his widow "for the term of her natural life to be disposed of as she may think proper for her own use & benefit according to the nature & quality thereof," & "in the event of her decease, should there be anything remaining of the property or any part thereof," he gave "said part or parts thereof" to certain persons:—*Held*: the widow had no power to dispose of the property by will, & on her death it went to the ulterior takers named in the husband's will. *Qu.*: whether she took anything more than a life estate with a right to enjoy the property *in specie*.—*Re THOMSON'S ESTATE, HEHRING v. BARROW* (1880), 14 Ch. D. 263; 49 L. J. Ch. 622; 43 L. T. 35; 28 W. R. 802, C. A.

*Annotations*.—*Consd.* *Re Pounder, Williams v. Pounder* (1886), 56 L. J. Ch. 113; *Re Ryder, Burton v. Kearsley*, [1914] 1 Ch. 865. *Reid.* *Re Sheldon & Kombe* (1885), 53 L. T. 527.

86. —.]—Bequest of the income of an estate to testator's wife for life with a direction that "in case such income shall not be sufficient she is to use such portion of" the capital "as she may deem expedient." On wife's decease "what is left" of the capital to be divided among certain residuary legatees:—*Held*: the wife has a general power of appointment over the capital during her life. *Qu.*: whether the wife can appoint by will.—*Re RICHARDS, UGLOW v. RICHARDS*, [1902] 1 Ch. 76; 71 L. J. Ch. 66; 85 L. T. 452; 50 W. R. 90; 40 Sol. Jo. 50.

*Annotation*.—*Follid.* *Re Ryder, Burton v. Kearsley*, [1914] 1 Ch. 865.

87. —.]—Testatrix appointed her husband & another person (who disclaimed) her exors. & trustees, & gave her real & personal estate to her trustees upon trust for sale & conversion & investment of the proceeds, & to stand possessed thereof upon trust as to one-third of the income to pay the same to her mother (who predeceased testatrix) during her life, & after her death to pay the same to her husband until he should marry again or die, & as to the remaining two-thirds of the income upon trust to pay the same to her husband until he should marry again or die, & she thereby authorised her husband so long as he was entitled to the income of part of the whole of her estate to apply such portion of the corpus of her estate as he should think fit for his own use

& benefit, & subject as aforesaid gave her estate for certain charitable purposes. Testatrix died in 1910. Her husband did not marry again, & died, having by a deed poll appointed the corpus of testatrix's estate to himself & for his own absolute benefit:—*Held*: on the true construction of testatrix's will the husband had power in his lifetime to appoint the corpus of the whole estate to himself absolutely, & he became absolutely entitled under the joint effect of the will & deed poll.—*Re RYDER, BURTON v. KEARSLEY*, [1914] 1 Ch. 865; 83 L. J. Ch. 653; 110 L. T. 970; 58 Sol. Jo. 556, C. A.

**SECT. 4.—INDEFINITE GIFTS WITH SUPERADDED POWER.**

88. Gift of property with full power of disposition.]—*DANIEL v. UPLY* (1626), Lat. 39, 134; W. Jo. 137; Noy, 80; 82 E. R. 264, 312; *sub nom.* *DANYEL v. UBLEY*, Benl. 178.

*Annotations*.—*Consd.* *Crockett v. Crockett* (1848), 2 Ph. 553. *Reid.* *Grange v. Tiving* (1665), O'Bridg. 107; *Loose v. Saltingston* (1674), Freem. K. B. 176; *Thomlinson v. Dighton* (1712), 1 Salk. 239; *Marlborough v. Godolphin* (1750), 2 Ves. Sen. 61; *Compton v. Collinson* (1790), 1 Hy. Bl. 334; *Doe d. Gill v. Pearson* (1805), 6 East, 173; *Re Macleay* (1875), L. R. 20 Eq. 180; *Re Rosher, Rosher v. Rosher* (1884), 26 Ch. D. 801. *Mentd.* *Petty v. Goddard* (1662), O'Bridg. 35; *Ward v. S. E. Ry.* (1860), 6 Jur. N. S. 890.

89. —.]—Tenant in fee simple devised land to his wife, her heirs & assigns, for ever, "with the intention that she may enjoy the same during her life, & by her will dispose of the same as she thinks proper:—*Held*: the wife took a fee, though, in a later part of the will, the deviser limited lands in fee by using the words "heirs & assigns for ever," without any additional words.—*DOE d. HERBERT v. THOMAS* (1835), 3 Ad. & El. 123; 111 E. R. 360; *sub nom.* *DOE d. HERBERT v. LEWIS & THOMAS*, 1 Har. & W. 231; 4 Nev. & M. K. B. 697.

*Annotations*.—*Reid.* *Archibald v. Wright* (1838), 9 Sim. 161; *Holmes v. Godson* (1856), 8 De G. M. & G. 152.

90. —.]—S. by will gave his real & personal estate to his brother J., with full power to sell & dispose thereof by deed, writing, will, or otherwise, & appointed him "sole exor.;" but in case J. should not dispose of the real & personal estate, or any part thereof, & not otherwise, testator gave the same, or such part thereof as he should not dispose of, to H. for life, with remainders over; & appointed another exor. Testator made various dispositions with special reference to the alternative of the survivorship of himself or J. J. died in testator's lifetime:—*Held*: taking into consideration the whole will, the gift to J. must be read as a gift to him for life with an absolute power of appointment, & with a gift over if J. should die before testator, or if he should survive but not dispose of the estate; & in the event which had happened the gift over was valid.—*Re STRINGER'S ESTATE, SHAW v. JONES*, *UPD* (1877), 6 Ch. D. 1; 46 L. J. Ch. 633; 37 L. T. 233, 25 W. R. 815, C. A.

*Annotations*.—*Reid.* *Re Fowler, Fowler v. Fowler*, [1917] 2 Ch. 307. *Mentd.* *Re Lowman, Deven v. Pester*, [1895] 2 Ch. 348; *Dalton v. Fitzgerald*, [1891] 2 Ch. 86; *Re Anderson, Pegler v. Gillatt*, [1905] 2 Ch. 2.

91. —.]—By his will, subject to the payment of his debts & funeral & testamentary expenses, testator gave all his property to his wife B., absolute use & benefit, so that during her life for the purpose of her maintenance & support, she shall have the fullest power to sell & dispose of my estate absolutely. After her death, as to such parts of my . . . estate as she shall not have so

or disposed of as aforesaid, subject to payment of my wife's funeral expenses, I give . . . the same" in trust for sale for the benefit of other persons. The wife was also appointed sole extrix. On testator's death his widow took possession of his estate, & his debts & funeral & testamentary expenses were paid during her lifetime. At her death a considerable part of the estate remained unsold & undisposed of:—*Held*: the widow took an absolute interest, & the part undisposed of passed by her will.—*Re JONES, RICHARDS v. JONES*, [1898] 1 Ch. 438; 67 L. J. Ch. 211; 78 L. T. 74; 46 W. R. 313; 42 Sol. Jo. 269.

*Annotations*:—*Distd. Re Sanford, Sanford v. Sanford*, [1901] 1 Ch. 939. *Consd. Roberts v. Thorp* (1911), 56 Sol. Jo. 13.

92. —.]—Testator by his will, dated in 1894, devised certain real estate to his two sons in strict settlement, & also gave them certain personal estate. He gave the residue of his real & personal estate to his wife absolutely, & appointed her extrix., during her life & his sons executors on her death. By a codicil, dated in 1898, he revoked his will & gave all his property to his wife, "so that she may have full possession of it & entire power & control over it, to deal with it or act with regard to it as she may think proper." In the event, however, of her not surviving him, or dying "without having devised or appointed" the whole or any part of his property, then he declared that his will should take effect as if his codicil had not been made; & he appointed his wife extrix. of his codicil during her life:—*Held*: the wife took an estate for life only with a general power of appointment.—*Re SANFORD, SANFORD v. SANFORD*, [1901] 1 Ch. 939; 70 L. J. Ch. 591; 84 L. T. 456.

*Annotation*:—*Reid. Roberts v. Thorp* (1911), 56 Sol. Jo. 13.

93. Gift to trustees for use of wife—With power of appointment after death.]—*O'KEATE v. CALTHORPE* (1739), cited in 8 Ves. at p. 177; 32 E. R. 321, L. C.

*Annotations*:—*Reid. Sperling v. Rochfort* (1803), 8 Ves. 163; *Richards v. Chambers* (1805), 10 Ves. 580.

94. —.]—A sum of money in the public funds being given by will to trustees for the separate use of a *feme covert* & to be subject to her appointment after her death; the wife made an appointment of this money to her husband; & on bill filed by husband & wife against trustees to transfer this fund, the ct. on examination of the wife decreed the same accordingly.—*FREDERICK v. HARTWELL* (1785), 1 Cox, Eq. Cas. 193; 29 E. R. 1124.

95. —.]—G. granted & devised to trustees certain freehold property for the term of ninety-nine years, at a peppercorn rent, upon trust, to permit his wife & such persons as she should by will bequeath the same, to take to his, her or their own use & benefit the rents, etc., of the lands for the term of ninety-nine years, exclusively of any husband of his wife. The wife, after her husband's death, conveyed her interest in the property to certain persons represented by deft. & subsequently made her will, giving the property to pltf.:—*Held*: the wife of G. took the property for the whole term of ninety-nine years, & not merely a life estate, with remainder to such persons as she should appoint by will; & she had conveyed away all her interest to deft.—*GLOVER v. HALL* (1849), 16 Sim. 568; 18 L. J. Ch. 305; 60 E. R. 995.

96. Gift interest to children—With power to dispose of share by will.]—Testator made an indefinite bequest of the interest of his residue to a class of children equally, with a declaration that they should have the right to will away their shares on

their deaths. There was a gift over, if they should omit to make their wills:—*Held*: they took absolute vested interests & not a life interest, with a power to bequeath, & the gift over was void for repugnancy.—*WEALE v. OLLIVE* (No. 2) (1863), 32 Beav. 421; 55 E. R. 165.

97. Power of appointment of income by will.]—A testamentary power of appointing the income of personal estate was given by deed. "Subject to such appointment" of the income, trusts of the capital were declared:—*Held*: the power extended to the capital.—*Re I'HERMINIER, MOUNSEY v. BUSTON*, [1894] 1 Ch. 675; 63 L. J. Ch. 496; 70 L. T. 727; 8 R. 598.

## SECT. 5.—ABSOLUTE GIFT WITH POWER.

### SUB-SECT. 1.—WHERE NO GIFT OVER.

98. Whether amounting to absolute gift—General power.]—A. by will devises his land to B. in fee, paying £400, whereof £200 to be at the disposal of his wife by her will, to whom she should think fit. The wife dies intestate, her administrator shall have this £200, the property thereof being absolutely vested in the wife.—*ROBINSON v. DUGATE* (1690), 2 Vern. 181; 23 E. R. 719.

*Annotations*:—*Apld. Maskelyne v. Maskelyne* (1775), Amb. 750. *Consd. Buckland v. Barton* (1793), 2 Hy. Bl. 136. *Apld. Hixon v. Oliver* (1806), 13 Ves. 108. *Distd. Hansen v. Miller* (1844), 14 Sim. 22. *Reid. Bai Mottivahoo v. Bai Mamooabai* (1897), 13 T. L. R. 307.

99. —.]—Upon a settlement of lands to be sold in trust for several purposes, the residue is given to B. & his heirs, reserving only £200 to be paid to such person as the donor should by writing under his hand direct, who died without any such direction, the £200 will go to his heir, & not to B. or his assigns.—*ANON.* (1721), 1 Com. 345; 92 E. R. 1104; *sub nom. EMBLYN v. FREEMAN*, Prec. Ch. 541.

*Annotations*:—*Reid. Digby v. Legard* (1774), 2 Dick. 500; *Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497; *Sidney v. Shelley* (1815), 19 Ves. 352; *Re Cooper's Trusts* (1853), 23 L. J. Ch. 27, n.; *Smith v. Lomas* (1864), 33 L. J. Ch. 578. *Mentd. Hewitt v. Wright* (1780), 1 Bro. C. C. 86.

100. —.]—Bequest of £300 to A. to dispose of by will:—*Held*: an absolute interest in A.—*MASKELYNE v. MASKELYNE* (1775), Amb. 750; 27 E. R. 484.

*Annotation*:—*Apld. Hixon v. Oliver* (1806), 13 Ves. 108.

101. —.]—*ELTON v. SHEPARD* (1781), 1 Bro. C. C. 532; 28 E. R. 1282.

*Annotations*:—*Apld. Haig v. Swinney* (1823), 1 Sim. & St. 487; *Re Coward, Coward v. Larkman* (1887), 56 L. T. 278. *Reid. Adamson v. Armitage* (1815), 19 Ves. 416; *Stretch v. Watkins* (1816), 1 Madd. 253; *Oldman v. Slater* (1829), 3 Sim. 84; *Rishton v. Cobb* (1839), 5 My. & Cr. 145.

102. —.]—Bequest to testator's wife of £60 a year for life, " & the sum of £300 to be disposed of as she thinks proper to be paid after her death," & a leasehold house & furniture for life:—*Held*: an absolute interest in the £300 transmissible to the administrator, not a mere power of appointment.—*HIXON v. OLIVER* (1806), 13 Ves. 108; 33 E. R. 235.

*Annotation*:—*Reid. Bai Mottivahoo v. Bai Mamooabai* (1897), 13 T. L. R. 307.

103. —.]—Bequest to a woman of the dividends of a sum of stock for her separate use, with a direction that at her death she might leave it to her children, or whom she might choose:—*Held*: an absolute gift, & she was entitled to payment.—*SOUTHHOUSE v. BATE* (1851), 16 Beav. 132; 18 L. T. O. S. 218; 51 E. R. 727.

104. —.]—*WATTS v. CAMPBELL* (1860), 2 Giff. 112; 66 E. R. 48.

105. —.]—*Special power*.]—Testator bequeathed the remainder of his property to his

1. 5.—*Absolute gift with power: Sub-sects. 1*  
2. *Sects. 6 & 7.*

sister, B., to dispose of amongst her children as she might think proper:—*Held*: B. took no interest in the residue.—*BLAKENEY v. BLAKENEY* (1833), 6 Sim. 52; 58 E. R. 515.

106. ———.]—Testator directed that all his property should be at the disposal of his wife, for herself & her children:—*Held*: the wife was either a trustee with a large discretion as to the application of the fund, or had a power in favour of the children, subject to the life estate in herself.—*CROCKETT v. CROCKETT* (1848), 2 Ph. 553; 17 L. J. Ch. 230; 10 L. T. O. S. 409; 12 Jur. 234; 41 E. R. 1057; *previous proceedings* (1842), Hare, 461.

*Annotations*:—*Consd.* Webb v. Woods (1852), 2 Sim. N. S. 267. *Fid.* Hart v. Tribe (1854), 18 Beav. 215. *Dist.* Bibby v. Thompson (No. 1) (1863), 32 Beav. 646. *Consd.* Lambe v. Eames (1871), 6 Ch. App. 597. *Reid.* Alexander v. Alexander (1856), 27 L. T. O. S. 333; Smith v. Smith (1856), 2 Jur. N. S. 907; Byne v. Blackburn (1858), 26 Beav. 41; Ward v. Grey (1859), 28 Beav. 485; Izod v. Izod (1863), 1 New Rep. 462; Armstrong v. Armstrong (1869), 38 L. J. Ch. 463; Greene v. Greene (1869), 17 W. R. 487; Hicks v. Ross (1872), L. R. 14 Eq. 141. *Mentd.* Hodgson v. Green (1842), 11 L. J. Ch. 312; Thorp v. Owen (1843), 2 Hare, 607; Salmon v. Tidmarsh (1859), 5 Jur. N. S. 1380; Newill v. Newill (1872), 7 Ch. App. 253.

107. ———.]—(1) A bequest by testator of £100 to his wife "for her present expenses of herself & the children":—*Held*: to be an absolute gift to the wife.

(2) Testator gave his wife £4,000 "to be used for her own & the children's benefit, as she shall in her judgment & conscience think fit, being convinced that it will be disposed of conscientiously & properly by her, for the purposes mentioned; at the same time recommending her not to diminish the principal but to vest it in govt. or freehold securities":—*Held*: this was a gift to the wife for life, to be employed, in such manner as she should think fit, for the benefit of herself & the children, she fairly & honestly exercising that discretion; & subject to such life estate, the children took an interest in the capital.—*HART v. TRIBE* (1854), 18 Beav. 215; 23 L. J. Ch. 462; 23 L. T. O. S. 124; 2 W. R. 289; 52 E. R. 85.

*Annotation*:—*As to* (2) *Apld.* Curnick v. Tucker (1874), L. R. 17 Eq. 320.

108. ———.]—Bequest to A. for life, & after her decease to B. or his heirs, in such manner as he might deem proper. B. died, without appointing, before A.:—*Held*: a gift by substitution, to the next of kin of B., at his & not at A.'s death, according to the Statute of Distribution, 1670 (c. 10), as tenants in common & in the proportions fixed by the statute.—*JACOBS v. JACOBS* (1853), 10 Beav. 557; 22 L. J. Ch. 668; 21 L. T. O. S. 97; 17 Jur. 293; 1 W. R. 238; 51 E. R. 895.

*Annotations*:—*Apld.* Bullock v. Downes (1860), 9 H. L. Cas. 1. *Reid.* Doody v. Higgins (1856), 2 K. & J. 729; Berens v. Fellowes (1887), 56 L. T. 391. *Mentd.* Low v. Smith (1856), 25 L. J. Ch. 503; *Re* Bromby (1900), 44 Sol. Jo. 675.

109. ———.]—Testator bequeathed his residue to his wife, "with power for her to dispose of the same" amongst his children or any of them, for such interest, temporary or lasting, as she should see most fitting:—*Held*: the wife took absolutely.—*HOWARTH v. DEWELL* (1860), 29 Beav. 18; 6 Jur. N. S. 1360; 9 W. R. 27; 54 E. R. 531.

*Annotation*:—*Apld.* Lambe v. Eames (1870), L. R. 10 Eq. 267.

110. ———.]—Testator appointed his wife sole extrix., & left to her all his property, landed & personal, of every description, for her sole use & benefit, in the full confidence that she would so

dispose of it amongst all their children, during her lifetime & at her decease, doing equal justice to all of them:—*Held*: the wife took a life interest, with a power of appointment amongst the children as she might think fit.—*CURNICK v. TUCKER* (1874), L. R. 17 Eq. 320.

*Annotations*:—*Consd.* Le Marchant v. Le Marchant (1874), L. R. 18 Eq. 414; *Re* Adams & Kensington Vestry (1883), 24 Ch. D. 199. *Reid.* *Re* Williams, Williams v. Williams, [1897] 2 Ch. 12.

*Precatory trusts.*—*See* TRUSTS & TRUSTEES.

SUB-SECT. 2.—WHERE GIFT OVER.

*See, generally, SETTLEMENTS; WILLS*

111. *Whether gift over repugnant & void.*—

Testator devised real estate to his second son if he should attain twenty-one, charged with a legacy to a daughter, & if the second son died under twenty-one, then to the eldest son when he attained twenty-one, charged with the legacy & in case it should happen that all testator's three children should die without issue, & without appointing the disposal of the estate, then over:—*Held*: the devise over was repugnant & void.—*GULLIVER v. VAUX* (1746), 8 De G. M. & G. 167 n.; 44 E. R. 353.

*Annotations*:—*Consd.* Holmes v. Godson (1856), 8 De G. M. & G. 152; Shaw v. Ford (1877), 7 Ch. D. 669.

112. ———.]—J. gives the residue of his estate to his daughter C. to dispose of as she shall think fit; but if she should die unmarried, or intestate then what was left to her should go to his brother's children. C. possessed this residue, & disposed of it in making purchases, & taking securities in her own name. She afterwards died intestate & unmarried:—*Held*: all her personal estate belonged to her next of kin; & no part of it could be considered as the specific personal estate of her father, or go to his brother's children.—*LIGHTBURN v. GILL* (1764), 3 Bro. Parl. Cas. 250; 1 E. R. 1300, H. L.

*Annotations*:—*Consd.* Holmes v. Godson (1856), 8 De G. M. & G. 152. *Reid.* Barton v. Barton (1857), 3 K. & J. 512.

113. ———.]—Testator gave £1,000 stock to a married woman for her separate use, & whenever she should die, to be absolutely in her own power to dispose of by will or writing purporting to be her will to any person or persons, purpose or purposes, she should think proper; but, in case of failure of any such disposition or appointment, to go over:—*Held*: this was not a power, but an absolute gift, qualified only to exclude the husband upon the death of his wife; therefore it passed by general words in her will.—*HALES v. MARGERUM* (1796), 3 Ves. 299; 30 E. R. 1021.

*Annotations*:—*Dist.* Langham v. Nenny (1797), 3 Ves. 467; Croft v. Elee (1798), 4 Ves. 60; Nannock v. Horton (1802), 7 Ves. 391. *Apld.* Atchison v. Le Mann (1854), 23 L. T. O. S. 302. *Expld.* Hawthorn v. Sheddin (1856), 3 Sm. & G. 293. *Reid.* Bull v. Kingston (1816), 1 Mer. 314; *Re* Yalden (1851), 1 De G. M. & G. 53; *Re* Fox v. Charlton, Charlton v. Hall, Hall v. Fox (1862), 6 L. T. 743.

114. ———.]—Bequest of personal property in trust for A., a married woman, for her separate use; with a power of disposing by will, except to particular persons; " & in case she dies without a will, I give all that may remain at her decease to B." followed by a gift of "all the rest & residue" to A., who is appointed extrix.:—*Held*: A. took the absolute interest in the property, not a power of disposing merely; & the gift to B., of "all that may remain at her decease," was void for uncertainty.—*BULL v. KINGSTON* (1816), 1 Mer. 314; 35 E. R. 690.

*Annotation*:—*Consd.* Borton v. Borton (1849), 16 Sim. 552.

115. ———.]—Testator devises two freehold houses to his widow & two other trustees, to hold



the same unto & to the use of them & their heirs, upon trust for his widow during her life; & after her decease, upon trust for his daughter-in-law, P., her heirs & assigns, for ever, but not to be subject to the debts or control of her husband, but for her own use only, & subject to be disposed of by her in her lifetime, or by her last will & testament, as she may think proper. In a subsequent part of the will, testator gives the two houses over to his son (her husband), in case his daughter-in-law should die in the lifetime of his widow:—*Held*: P. had not a power distinct from her estate.—*MINOT v. EATON* (1826), 4 L. J. O. S. Ch. 134.

116. —.]—Bequest to two persons "in two equal parts, each for his & her sole use & benefit, & to be disposed of as each of them pleases, at their death, or if not so disposed of, to be equally divided at their deaths between their children":—*Held*: an absolute gift of the principal.—*RE MORTLOCK'S TRUST* (1857), 3 K. & J. 456; 26 L. J. Ch. 671; 69 E. R. 1189.

*Annotations*:—*N.F. Freeland v. Pearson* (1867), L. R. 3 Eq. 658. *Consd. Humble v. Bowman* (1877), 47 L. J. Ch. 62. *Reid. Bai Motivahoo v. Bai Mamoochai* (1897), 13 T. L. R. 307.

117. —.]—Testator, by his will, gave his residue to his wife absolutely. By a codicil he revoked this gift, & after making a specific gift, gave his residue to his wife "for her own absolute use & benefit & disposal"; but, without prejudice to the absolute power of disposal by his wife of all the residue, in case at her decease any part thereof should "remain undisposed of" by her, he gave the same to two other persons equally as tenants in common, subject to the payment by them of his wife's debts & funeral expenses:—*Held*: testator's wife took a life interest with a power of disposition by act *inter vivos*, but not by will.—*RE POUNDER, WILLIAMS v. POUNDER* (1880), 56 L. J. Ch. 113; 56 L. T. 104.

*Annotations*:—*Distd. Re Jones, Richards v. Jones*, [1898] 1 Ch. 438. *Consd. Re Sanford, Sanford v. Sanford*, [1901] 1 Ch. 939.

118. —.]—Testator gave, devised & bequeathed to his wife "the whole of my real & personal estate & property absolutely in full confidence that she will make such use of it as I should have made myself & that at her death she will devise it to such one or more of my nieces as she may think fit & in default of any disposition by her thereof by her will or testament I hereby direct that all my estate & property acquired by her under this my will shall at her death be equally divided among the surviving said nieces":—*Held*: upon the true construction of the will there was an absolute gift of testator's real & personal estate to his wife subject to an executory gift of the same at her death to such of his nieces as should survive her, equally if more than one, so far as his wife should not dispose by will of the estate in favour of such surviving nieces, or any one or more of them.—*COMISKEY v. BOWRING-HANBURY*, [1905] A. C. 84; 74 L. J. Ch. 263; 92 L. T. 241; 53 W. R. 402; 21 T. L. R. 262, H. L.

*Annotations*:—*Reid. Re Burley, Alexander v. Burley*, [1910] 1 Ch. 215; *Re Conolly, Conolly v. Conolly*, [1910] 1 Ch. 219.

#### SECT. 6.—CONSTRUCTION OF "CHILDREN" AND "ISSUE."

See SETTLEMENTS; TRUSTS & TRUSTEES; WILLS.

#### SECT. 7.—CONSTRUCTION OF POWERS AS TESTAMENTARY.

119. Whether power made testamentary by reference to death of donee.]—*ANON.* (1578), 3 Leon. 71; 74 E. R. 548.

*Annotations*:—*Apld. Thomlinson v. Dighton* (1712), 10 Mod. Rep. 71. *Distd. Goodtitle d. Pearson v. Otway* (1753), 2 Wils. 6. *Distd. Doe d. Thorley v. Thorley* (1809), 10 East. 438. *Expld. Doe d. Herbert v. Thomas* (1835), 3 Ad. & El. 123. *Consd. Humble v. Bowman* (1877), 47 L. J. Ch. 62. *Reid. Leefe v. Saltington* (1874), Freem. K. B. 176.

120. —.]—Devise to A. testator's wife for life, & then to be at her disposal, provided it be to any of his children, gives an estate for life, with a power to dispose of the fee. Where such devise with an after taken husband did by lease & release, & fine, convey the premises to a trustee & his heirs, to the use of the wife for life, without impeachment of waste; remainder to her daughter by her first husband, & the heirs of her body, remainder to the son by her first husband & his heirs; this adjudged a good execution of the power.—*TOMLINSON v. DIGHTON* (1712), 1 P. Wms. 149; 24 E. R. 335; *sub nom. THOMLINSON v. DIGHTON*, 10 Mod. Rep. 31, 71; 1 Salk. 239; *affg. S.C. sub nom. DIGHTON v. TOMLINSON* (1710), 1 Com. 194.

*Annotations*:—*Apld. Maskelyne v. Maskelyne* (1775), Amb. 750. *Distd. Cross v. Hudson* (1789), 3 Bro. C. C. 31; *Doe d. Thorley v. Thorley* (1809), 10 East. 438. *Consd. Doe d. Chadwick v. Jackson* (1837), 1 Mood. & R. 553. *Apld. Sheehy v. Muskerry* (1848), 1 H. L. Cas. 576. *Distd. Freeland v. Pearson* (1867), L. R. 3 Eq. 658. *Reid. Goodtitle v. Petto* (1732), 2 Stra. 934; *Bellasis v. Uthwatt* (1737), West temp. Hard. 273; *Doe d. Milburn v. Salkeld* (1755), Willes, 673; *Komp v. Komp* (1801), 5 Ves. 849; *West v. Berney* (1819), 1 Russ. & M. 431; *Downes v. Timperon* (1828), 4 Russ. 334; *Crockett v. Crockett* (1848), 17 L. J. Ch. 230; *Re Yalden* (1851), 1 De G. M. & G. 53; *Holmes v. Godson* (1856), 8 De G. M. & G. 152; *Humble v. Bowman* (1877), 47 L. J. Ch. 62. *Mentd. Idle v. Cook* (1705), 1 P. Wms. 70; *Andrews v. Fulham* (1738), 2 Stra. 1092; *Doe d. Gill v. Pearson* (1805), 2 Smith, K. B. 295.

121. —.]—Money invested in trust for a married woman to pay her the interest for life, to her separate use & after her decease, to such person, & subject to such powers, etc., as she should by any instrument in writing from time to time or by will appoint, during her present coverture, she cannot dispose of the principal at once, by deed, but by a revocable act only.—*SOCKETT v. WRAY* (1794), 4 Bro. C. C. 483; 2 Atk. 67; 29 E. R. 1000.

*Annotations*:—*Expld. Bradley v. Polcott* (1797), 3 Ves. 324. *Consd. Sperling v. Roehfort* (1803), 8 Ves. 164; *Anderson v. Dawson* (1808), 15 Ves. 532; *Heatley v. Thomas* (1809), 15 Ves. 596. *Reid. London Chartered Bank of Australia v. Lemprière* (1873), L. R. 4 P. C. 572; *Re Armstrong, Ex p. Gilchrist* (1886), 17 Q. B. D. 521; *Re Roper, Roper v. Doncaster* (1888), 39 Ch. D. 482. *Mentd. Whistler v. Newman* (1798), 4 Ves. 129; *Richards v. Chambers, Seaman v. Dull* (1805), 10 Ves. 580; *Jackson v. Hobhouse* (1817), 2 Mer. 483; *Murray v. Barlee* (1831), 4 Sim. 82; *Johnson v. Frooth* (1836), Donnelly, 16; *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494; *Re Hastings, Hallett v. Hastings* (1887), 35 Ch. D. 94.

122. —.]—Devise to testator's widow for life, to be by her divided amongst such of testator's children & their issue as should be surviving at her death. The power well executed by a will appointing a share to each of the surviving children of the testator, or in case of their deaths, to their children respectively, & another share to the children of a deceased child.—*Ex p. WILLIAMS* (1819), 1 Jac. & W. 89; 37 E. R. 309.

*Annotations*:—*Consd. Freeland v. Pearson* (1867), L. R. 3 Eq. 658; *Humble v. Bowman* (1877), 47 L. J. Ch. 62. *Mentd. Stokes v. Heron* (1845), 12 Cl. & Fin. 161.

123. —.]—Bequest of £500 to A., for her life & at her decease to divide it in portions as she shall choose to her children & if she died before testatrix, to be equally divided amongst her children:—*Held*: the children of A. living at her death were the only objects of the power &



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*Sect. 10.]*

was settled upon testator's son D. for life with remainder for his children, with an ultimate remainder, in default of children, "upon the same trusts, both as to the capital & the income thereof, as are hereinbefore declared of the legacy of £10,000 hereinbefore bequeathed by me for the benefit of my daughter B. & her issue or as near thereto as the circumstances of the case will admit." Testator's son D. died in 1894, without having had issue; & B. died in 1923, without having had issue, & having made certain testamentary dispositions. Thereupon questions arose; first, whether upon the true construction of testator's will, his daughter, B., had power to appoint a life interest in favour of her husband C. in the residuary estate of the testator, & secondly, whether, if she had that power, she had effectually exercised it. As regards the second question, it is sufficient to state that the ct. decided that question in the affirmative:—*Held*: upon the true construction of testator's will, notwithstanding that the bequest of the residue contained no reference in terms to any powers applicable to the settled legacy inasmuch as the power extended to an appointment of the whole income of the legacy & was not limited to an appointment of a definite sum, the effect of the referential words was to make the power of appointment in favour of a husband applicable to the residue as well as to the settled legacy; & such construction of the will did not offend the rule against a multiplication of charges; & accordingly, deft. C. was entitled to a life interest in the residuary estate of testator as well as in the settled legacy of £10,000.—*Re ARNELL, Re EDWARDS, PRICKETT v. PRICKETT*, [1924] 1 Ch. 473; 93 L. J. Ch. 276; 130 L. T. 700; 68 Sol. Jo. 367.

142. — [Whether accretion to original settlement or new settlement with referential trusts.]—By a marriage settlement, certain funds were settled upon certain usual trusts for the benefit of the husband & wife & their children, & it contained a hotchpot clause. By the will of the wife's mother, made subsequently, a portion of her personal estate was bequeathed to the trustees to pay & transfer the same to the trustees of the settlement, to be held by them upon & for the same trusts & purposes as were therein expressed concerning the property thereby settled. On a summons taken out by the trustees of the settlement to ascertain the effect of this bequest, it was contended by parties to whom but small appointments under the settlement had been made that the bequest was to be treated as an accretion to the settlement, so as to make the hotchpot clause applicable by bringing into account the funds already appointed under the settlement:—*Held*: inasmuch as there was no context in the will importing that the use of the words "same trusts" implied an accretion of the settlement trust funds, the bequest must be deemed to be of an independent fund, to which the hotchpot clause in the settlement was not applicable.—*Re NORTH, MEATES v. BISHOP* (1897), 76 L. T. 186.

*Annotations*:—*Consd. Re Walpole's Marriage Settlement, Thomson v. Walpole*, [1903] 1 Ch. 928; *Re Fraser, Ind. v. Fraser*, [1913] 2 Ch. 324.

143. — [By marriage arts. dated in 1845, certain funds were settled upon trust for the husband, A. for life, then for the wife C. for life, then for the children of the marriage as the

husband should appoint, or in default of appointment by the husband as the wife should appoint. In 1876 A. died without having exercised his power of appointment except as to a specific portion of the funds appointed in trust for a daughter. In 1879 C. appointed that after her decease the trustees should stand possessed of the trust funds for the time being subject to the trusts of the arts., other than the sum appointed by A., in trust for the remaining six children of the marriage in equal shares. In 1893 one of the sons, W., by his marriage settlement assigned to trustees his one-sixth share of the trust funds, which he specified in a schedule, to which he was entitled on the death of his mother, & all other, if any, his estate & interest of & in all other the trust funds for the time being, subject to the trusts of the arts. of 1845. By a codicil dated in 1878, Mrs. B. directed that the property which she had left by her will to A. should be transferred to the trustees of the marriage arts. & be held upon the trusts thereof, & she died in 1900. Subsequently, in 1900, C. appointed this property in trust for certain of her children, including W.:—*Held*: (1) the appointment of 1879 did not operate as an appointment of any moneys not then subject to the trusts of the marriage arts.; (2) W.'s marriage settlement passed only such estate as he then had in the trust funds; & therefore, his share of the property bequeathed by Mrs. B.'s codicil was not included in that settlement. (3) *Semble*: the effect of Mrs. B.'s bequest was not to make the property an accretion to the funds originally settled by the marriage arts., but to create a new referential settlement of such property upon similar trusts.—*Re WALPOLE'S MARRIAGE SETTLEMENT, THOMSON v. WALPOLE*, [1903] 1 Ch. 928; 72 L. J. Ch. 522; 88 L. T. 419; 51 W. R. 587.

*Annotation*:—*As to* (3) *Refd. Re Beaumont, Re Trusts of Indenture of 29th April, 1904, Beaumont-Nesbitt v. Packer* (1913), 57 Sol. Jo. 283.

144. — [By deed settled funds on usual trusts for his daughter B. for life & her issue, with a gift over in default of her issue, which happened, for the children of his three other children on attaining twenty-one or marriage. The settlement empowered B. by deed or will to appoint one-half of the income of the trust funds in favour of any husband of hers who might survive her during her widowhood. On the same day P. made his will & bequeathed the sum of £20,000 to the persons who at his death should be the trustees of the settlement "to be held upon the trusts," etc., in such settlement declared concerning the property thereby settled, & so that such trusts, etc., should "take effect in relation to the said sum of £20,000 in the same manner in all respects as if such sum had formed part of the property originally settled by such indenture." P.'s three other children were married, & at his death in 1917 he had several grandchildren. B. died in 1918, & by her will made in 1912, after reciting the settlement, appointed one-half of the income of "the trust fund thereby settled" to her husband during his widowhood. The husband claimed one-half of the income of the whole of the trust funds, including the £20,000, & two of the grandchildren, who had attained twenty-one, claimed immediate payment of their respective shares in one-half of the capital of the whole of the trust funds:—*Held*: the effect of P.'s will was to make the legacy of £20,000 an accretion to the funds originally settled by the

the ct. being inclined to treat the exercise of the special power as a condition upon which the operation, not

the exercise, of the general power will be dependent.—*JOHNSTON v. STUBBS*, [1926] N. Z. L. R. 747.—N. Z.

h. No reference to preceding power.—*Effect of*.—*MANLTRY v. MANLTRY* (1852), 2 I. Ch. R. 32.—IR.

deed of 1910, & not to create a new independent referential settlement of the legacy upon the same trusts & power as in the original settlement declared, & therefore the husband was entitled under the appointment to one-half of the income of the whole of the trust funds, including the \$20,000.—*Re PAUL'S SETTLEMENT TRUSTS, PAUL v. NELSON*, [1920] 1 Ch. 99; 88 L. J. Ch. 530; 121 L. T. 544; 63 Sol. Jo. 724.

*Annotation*.—*Distd. Re Campbell's Trusts, Public Trustee v. Campbell*, [1922] 1 Ch. 551.

145. — [1922] —.] — Testator devised & bequeathed all his real & personal estate to trustees upon trust to sell & convert the same & stand possessed of the residue upon trust for his sons equally. He directed his trustees to retain the share of each upon trust for the son for life, & after his death upon trust for his issue, as he should by deed or will appoint, & in default of appointment, equally, but with the proviso contained in a hotchpot clause. Testator empowered his sons by deed or will to appoint to their respective wives all or any part, not exceeding one-third part, of the income of their respective shares in his residuary estate. The gifts to the sons were expressly declared to be conditional on each of them on attaining the age of twenty-one assigning to the trustees of testator's will their interests under his marriage settlement "to be held upon the like trusts & with & subject to the like powers & provisions declared concerning the share for the same son," in testator's residuary estate. All the sons complied with this condition & assigned their interests. By a memorandum of direction & a deed poll the sons directed the trustees to hold the share of each of them in a sum which represented surplus income "as an addition to the capital" of their respective shares, & "so as to follow the destination thereof," & be subject to the same trusts, but with one exception. There were thus three trust funds, the residuary, the assigned, & the surplus income fund. In the exercise of the power of appointment one son appointed to his wife for life the income from his share of testator's residuary estate, & a second son made a similar appointment of one-third of the income of his share, "including in such share" the share under testator's marriage settlement which he had assigned to the trustees of the will:—*Held*: (1) the assigned & surplus income funds were not an accretion to testator's residuary estate, & therefore the appointment of a share in the income from the residuary fund did not carry with it the shares in the income of the two other funds; (2) the assignments, the memorandum of direction, & the deed poll were separate settlements of separate funds, with different settlors, & each must be treated as a separate settlement in which were written out the referential trusts therein referred to, & therefore the appointment by the second son of his share of the assigned funds was good, & there was no general hotchpot clause.—*Re CAMPBELL'S TRUSTS, PUBLIC TRUSTEE v. CAMPBELL*, [1922] 1 Ch. 551; 91 L. J. Ch. 433; 127 L. T. 236.

#### SECT. 10.—RESTRICTION OF POWERS.

146. Where instrument executory—Court will give effect to intention.]—By arts. the wife's fortune, & an equal sum advanced by the husband, were agreed to be settled for the husband for their joint lives, & if he should die first leaving issue by her, for her for life; after her decease, as to the capital, in such manner as he should appoint; in

default of appointment to be divided equally among the issue at twenty-one, with maintenance & survivorship; after marriage, in pursuance of the arts., an estate purchased with the fund was settled upon the husband for the joint lives of him & his wife; remainder to trustees to preserve, etc.; remainder, in case of his death first without issue, to certain uses; remainder, in case of his death first leaving any child or children, to the wife for life; remainder to all the child or children, in such shares as the husband should appoint; for want of appointment equally in tail with cross-remainders; remainder to the heirs of the husband. Children only are the objects; & an appointment to a child for life, remainder to his children as he shall appoint, is an excess of power; & the doctrine of *cy-près*, by giving the child an estate tail, is not applicable; but the appointment is void for the excess only; & what is ill-appointed, goes as in default of appointment.—*BRISTOW v. WARDE* (1794), 2 Ves. 336; 30 E. R. 660, L. C.

*Annotations*.—*Consd. Wilson v. Piggett* (1794), 2 Ves. 351; *Mackinley v. Elson* (1837), 8 Sim. 561; *Peover v. Hassel* (1861), 1 John. & H. 341. *Expld. Minton v. Kirwood* (1868), 3 Ch. App. 614. *Reid Smith v. Camelford* (1795), 2 Ves. 698. *Vanderzee v. Adlom* (1799), 4 Ves. 771; *Spencer v. Spencer* (1800), 5 Ves. 362; *Kemp v. Kemp* (1801), 5 Ves. 849; *Butcher v. Butcher*, *Gooday v. Butcher* (1812), 1 Ves. & B. 79; *Hewitt v. Dacre* (1838), 2 Keen, 622; *Re Fowler's Trusts* (1859), 27 Boar. 362; *Wood v. Wood* (1870), L. R. 10 Eq. 290; *Re Ashton, Ingram v. Papillon*, [1897] 2 Ch. 574. *Mentd. Re Mortimer, Gray v. Gray* (1905), 74 L. J. Ch. 745.

147. — [1922] —.]—By marriage arts. a reversionary interest in a fund was agreed to be settled on the husband for life, remainder to the wife for life, & after the death of the survivor, on the issue of the marriage living at the death of the survivor of the husband & wife, in equal shares if more than one, & if but one, then the whole to go to such only child; & if there should be no issue of the marriage living at the death of the survivor of the husband & wife, then the fund was to go as the husband should appoint. The only child of the marriage died in the father's lifetime, leaving a child:—*Held*: the word issue was to be construed child, & therefore an appointment of the fund made by the father was valid.—*SWIFT v. SWIFT* (1830), 8 Sim. 108; 5 L. J. Ch. 376; 50 E. R. 67.

*Annotations*.—*Distd. Harrison v. Symons* (1866), 14 W. R. 959. *Mentd. Re Thomson's Trusts* (1852), 22 L. J. Ch. 273.

148. Where instrument executed—Necessity for express words.]—An annuity was assigned to trustees, in trust to pay the same to such persons as B. should, by any writing signed by her, notwithstanding her coverture, appoint, but so as not to deprive herself of the benefit thereof by sale or other anticipation; & for want of such appointment, in trust to pay the same to B. for her separate use:—*Held*: B. has not only a limited power of appointment, but also, under the latter part of the clause, the general uncontrolled dominion over the annuity.—*BARRYMORE v. ELLIS* (1836), 8 Sim. 1; 59 E. R. 1.

*Annotations*.—*Apld. Brown v. Bamford* (1846), 1 Ph. 620. *Consd. Vaughan v. Vanderstegen* (1853), 2 Drow. 165. *Reid. Medley v. Horton* (1844), 14 Sim. 222. *Mentd. Moore v. Moore* (1844), 1 Coll. 54.

149. — [1922] —.]—Testator gave to trustees a sum of three per cents. in trust for his daughter for life, & after her decease, in trust for such persons & for such purposes as she should, either by deed, or by her will signed & published by her in the presence of & attested by two witnesses, appoint, & in default of appointment, in trust for her children; but, if she should leave no child, then in trust for testator's other daughters & their children. The daughter, by her will, which was

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*Part IV. Sect. 1.]*

expressed to be signed & sealed only, but which was attested by three witnesses, gave several pecuniary legacies, & directed them to be paid out of the moneys invested in her name in the four per cent. Govt. securities. The daughter died unmarried. She had no four per cents. standing in her name, nor was there any property to satisfy the legacies, except the three per cents. standing in the names of the trustees of her father's will :—*Held* : the power was not confined to the daughter's children, but was general ; & her will was a due execution of it.—*MACKINLEY v. SISON* (1837), 8 Sim. 561 ; 59 E. R. 222 ; *sub nom.* *MACHINLEY v. SISON*, 1 Jur. 558.

*Annotations* :—*Apld. Re Strachan, Causton v. Buckler, Re Buckler, Causton v. Buckler* (1905), 50 Sol. Jo. 75. *Held*. *Innes v. Sayer* (1851), 3 Mac. & G. 606 ; *Peover v. Hassel* (1861), 1 John. & H. 341. *Mentd.* *Burdett v. Spillisbury* (1843), 10 Cl. & Fin. 340 ; *Barnes v. Vincent* (1845), 3 Notes of Cases, 628 ; *Vincent v. Sodor & Man (Bp.)* (1849), 8 C. B. 905.

150. — — —.]—Testator directed his trustees, during the life of his daughter, who was married, to pay the interest of a share of his property to such person or persons as she should from time to time during her life, whether covert or sole, under her hand, authorise & appoint to receive the same, & in default of appointment, into her proper hands, for her sole & separate use, independently of her then or any future husband, & so as to be free from his debts, etc., & that the receipt or receipts of her, or of the person or persons whom she might authorise to receive the same annual proceeds, or any part thereof, should be alone an effectual discharge to his trustees for the payment thereof ; & that his trustees should always be at liberty to require from her a separate authority or receipt, from time to time, for each quarterly payment ; it being his intention that the annual proceeds should not be sold, charged, or otherwise disposed of :—*Held* : the restraining clause did not apply to the power of appointment given to the daughter ; & therefore, an appointment of the interest of the share made by her for her life was good.—*MEDLEY v. HORTON* (1844), 14 Sim. 222 ; 13 L. J. Ch. 442 ; 8 Jur. 853 ; 60 E. R. 343.

151. — — —.]—Under a marriage settlement certain money & stock in the funds were vested in trustees upon trust, during the joint lives of the husband & wife, to pay the interest & dividends to such persons & for such purposes as the wife, notwithstanding the coverture, should, by any writing under her hand, except in any mode of anticipation, direct or appoint ; or, in default of such direction or appointment, into her own hands for her own sole & separate use, independently of her husband ; & so that her receipts, notwithstanding the coverture or the receipts of the appointee, might be good discharges :—*Held* : the effect of this instrument was to restrain the wife from anticipation, whether by an appointment under the power, or by an assignment independent of the power.—*MOORE v. MOORE* (1844), 1 Coll. 54 ; 13 L. J. Ch. 124 ; 63 E. R. 318 ; *sub nom.* *MOORE v. MOORE, Ex p. ASPREY*, 8 Jur. 139.

*Annotations* :—*Held.* *Medley v. Horton* (1844), 8 Jur. 853. *Mentd.* *Morrell v. Cowan* (1877), 6 Ch. D. 166.

152. — — —.]—Property was held, in trust to pay the dividends to such person as a married woman should, but not by way of anticipation, appoint, & in default of appointment, to her for her separate use, & it was declared that the receipts of her or her appointee should be good

discharges :—*Held* : she could not, by anticipation, charge the dividends not accrued due.—*HARNETT v. MACDOUGALL* (1845), 8 Beav. 187 ; 14 L. J. Ch. 173 ; 5 L. T. O. S. 18 ; 50 E. R. 74.

*Annotation* :—*Mentd.* *Hood Barrs v. Heriot*, [1896] A. C. 174.

153. — — —.]—Gift by will of leasehold & other personal estates to trustees in trust to pay the rents, etc., to such person or persons as a married woman should, by writing under her hand from time to time, but not by way of anticipation, appoint, & in default of such appointment, or so far as the same should not extend, into her proper hands for her sole & separate use, with a direction that her receipts, notwithstanding coverture, should be good discharges, & after her death in trust for her children :—*Held* : the particular terms of the gift, the restraint on anticipation applied to an assignment, by the married woman, of her separate estate as well as to an appointment in execution of her power, notwithstanding the will did not provide that her receipts alone should be good discharges.—*BROWN v. BAMFORD* (1846), 1 Ph. 620 ; 15 L. J. Ch. 301 ; 7 L. T. O. S. 249 ; 10 Jur. 447 ; 41 E. R. 769, L. C. ; *reversg.* (1842), 11 Sim. 127.

*Annotations* :—*Consd.* *Vaughan v. Vanderstegen* (1853), 2 Drew. 165. *Held.* *Medley v. Horton* (1844), 14 Sim. 222 ; *Moore v. Moore* (1844), 13 L. J. Ch. 124 ; *Spring v. Pride* (1864), 12 W. R. 610.

154. — — —.]—A *feme sole*, by a settlement made three years before her coverture, declared the trusts of a fund, which she had previously transferred into the names of trustees, to be for such person or persons and for such uses as she should by deed appoint ; & in default of such appointment for herself so long as she should continue sole & unmarried ; & in the event of her marriage, for herself for life for her separate use, without power of anticipation, with remainder for all or any one or more of her children, grandchildren, or other issue as she should by deed or will appoint ; with remainder, in default of such appointment, for her children equally, with remainder, in default of children who should obtain a vested interest, for her next of kin as therein mentioned :—*Held* : upon the marriage of the settlor, her ability to exercise the general power of appointment reserved in the settlement became suspended ; the trust declared of the fund in the event of marriage being inconsistent with the continuance of a general power of appointment in the settlor over the fund.—*GOULD v. GOULD* (1856), 25 L. J. Ch. 642 ; 2 Jur. N. S. 484 ; 4 W. R. 516.

*Annotation* :—*N.F.* *Wood v. Wood* (1870), L. R. 10 Eq. 220.

155. — — —.]—Under a settlement of the wife's estate a general power to appoint to any person or persons was given to the husband, if there should be children surviving both parents before the limitations to children. A power, in the same words, was given to the wife in default of such children :—*Held* : the words being plain, the husband's general power could not be limited.—*PROVER v. HASSEL* (1861), 1 John. & H. 341 ; 30 L. J. Ch. 314 ; 4 L. T. 113 ; 7 Jur. N. S. 406 ; 9 W. R. 398 ; 70 E. R. 778.

*Annotations* :—*Distd.* *Minton v. Kirwood* (1868), 3 Ch. App. 614. *Held.* *Re Smith, Eastick v. Smith*, [1904] 1 Ch. 139.

156. — — —.]—A voluntary settlement in favour of several persons contained a power authorising the tenant for life, a volunteer, to revoke the trusts of the property & again resettle the same upon such trusts as to her should seem meet :—*Held* : this general power could not be controlled, & an appointment of the property to

herself absolutely, to the exclusion of the other persons entitled under the settlement, was a good execution of the power.—*MADE KING v. WARREN* (1863), 32 Beav. 111; 55 E. R. 44.

157. ———.]—Where, in a deed, a power is given to appoint among "issue," followed by a limitation over in their favour, & then it is declared that the "children" shall take in equal shares, the word "children" does not cut down the strict technical meaning of the word "issue."—*HARRISON v. SYMONS* (1866), 14 W. R. 959.

*Annotation* :—*Reid. Re Warren's Trusts* (1884), 26 Ch. D. 208.

158. ———.]—*MINTON v. KIRWOOD*, No. 139, *ante*.

159. ———.]—A general power of appointment was given to a *feme sole* under a settlement of her property, with subsequent trusts, in default of appointment, for herself, & any future husband, & a power of appointment among children, & with a provision that her after acquired property should be subject to the same trusts:—*Held*: the general power could be exercised during coverture, & an appointment made in exercise of it after marriage in favour of the donee of the power & her husband was valid.—*WOOD v. WOOD* (1870), L. R. 10 Eq. 220; 39 L. J. Ch. 790; 23 L. T. 295; 18 W. R. 819.

160. ———.]—Testator gave his residuary estate to trustees upon trust for his daughter for life, & after her death amongst her children, grandchildren, or other issue, as she should by deed or will appoint, & in default of appointment as she should by deed or will generally appoint, & in default of appointment under that power to her nearest of kin, according to the Statutes of Distribution. The daughter made a testamentary appointment under the general power in favour of her husband, reciting, as the fact was, that she had then no children. She afterwards had children, but died without revoking the appointment:—*Held*: (1) there was an implied gift to the objects of the first power in default of appointment; (2) if not, the appointment was conditional on there being no children, & they took as nearest of kin as in default of appointment.—

*Re JEFFERYS' TRUSTS* (1872), L. R. 14 Eq. 136; 42 L. J. Ch. 17; 26 L. T. 821; 20 W. R. 667.

*Annotation* :—*Expld. Richardson v. Harrison* (1885), 16 Q. B. D. 85.

#### SECT. 11.—ADDITIONAL OR SUBSTITUTIONAL POWERS.

161. *Presumption against multiplication of charges—Power to charge proportion of fund.*—Testator by his will made a series of specific devises, upon trust for each of his children for life, with power for such child to appoint by will to his or her widow or surviving husband an annuity not exceeding one-third of the income of the property specifically devised to him or her for life; & he then gave his residuary real & personal estate upon & for the trusts & purposes, & with the same or the like powers, in favour of all his children, share & share alike, & their issue, as should correspond with those thereinbefore expressed & declared concerning the estates specifically devised:—*Held*: each child had power to appoint by will an annuity not exceeding one-third of the total income arising from the specifically devised estate and the child's share of residue. *Secus*, if the power had been to appoint an annuity of or not exceeding a fixed amount.—*COOPER v. MACDONALD* (1873), L. R. 16 Eq. 258; 42 L. J. Ch. 533; 28 L. T. 693; 21 W. R. 833, L. C.

*Annotations* :—*Consd. Re Beaumont, Bradshaw v. Packer*, [1913] 1 Ch. 325. *Appl. Re Arnell, Re Edwards, Prickett v. Prickett*, [1924] 1 Ch. 473. *Reid. Re Campbell's Trusts, Public Trustee v. Campbell*, [1922] 1 Ch. 551. *Mentd. Stevenson v. Mason* (1873), L. R. 17 Eq. 78; *Re Walker's Estate, Church v. Tyacke* (1879), 12 Ch. D. 205; *Askew v. Askew* (1888), 57 L. J. Ch. 629; *Orrington v. Orrington* (1895), 13 R. 770; *Re Firth, Loveridge v. Firth*, [1914] 2 Ch. 386.

162. ———.]—*Re ARNELL, Re EDWARDS, PRICKETT v. PRICKETT*, No. 141, *ante*.

#### SECT. 12.—APPLICATION OF RULE AGAINST PERPETUITIES.

*See PERPETUITIES*, pp. 107 *et seq.*, *ante*.

## Part IV.—Exercise of Powers.

### SECT. 1.—IN GENERAL.

163. *Exercise according to terms of power.*—A particular affirmative power must be directly pursued (*WILMOT, LORD COMMISSIONER*).—*CHURCHMAN v. HARVEY* (1757), Amb. App. I, 824; 27 E. R. 519.

*Annotation* :—*Reid. Thornton v. Bright* (1836), 2 My. & Cr. 230.

164. *Condition precedent to exercise—Performance made non-obligatory or impossible—Whether power exercisable without performance.*—When a thing is to be done, as a condition precedent to the exercise of a power, & then subsequent legislation removes the obligation to do the thing, or makes the doing it impossible, it does not follow that the power may be exercised without doing the thing.—*SHREWSBURY (EARL) v. SCOTT* (1860), 6 C. B. N. S. 221; 29 L. J. C. P. 190; 141 E. R. 437; *sub nom. HOPE-SCOTT v. SHREWSBURY (EARL)*, 6 Jur. N. S. 472, Ex. Ch.

*Annotation* :—*Mentd. Lang v. Purves* (1862), 15 Moo. P. C. C. 389.

165. *Exercise avoiding prior act of donee*—

*Bond to Crown binding lands subject to power.*—A man possessed of an estate & of a power of appointment, cannot so exercise the power as to avoid his own act.

Where A. possessed a certain estate with such a power, & had given a bond to the Crown & afterwards exercised the power of appointment in favour of B.:—*Held*: such appointment was bad, & the bond bound all lands over which the obligor had a disposing power at the time of its execution.—*ELLIS v. R.* (1851), 6 Exch. 921; 20 L. J. Ex. 348; 15 Jur. 917; 155 E. R. 820; *sub nom. R. v. ELLIS*, 18 L. T. O. S. 7, Ex. Ch.

166. *Evidence of exercise—Recital in deed of compromise.*—By arts. made on her marriage, a power of appointment was reserved to A. A. survived her husband & married again. During her second marriage, A. & her husband executed a deed of compromise, which recited the execution of the power of appointment by A. in the lifetime of her first husband, & her subsequent destruction of the deed immediately after his death. The original draft of the appointment was found in the

**Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2, A. & B.]**

solr.'s office, & his bill of costs, which, however, contained no charge for attending the execution of the deed:—*Held*: though the deed of compromise would not affect her rights, yet, after the lapse of forty years, the recital was sufficient evidence of the execution of the power as against those claiming under A.'s will.—*DYNE v. COSTO-BADIE* (1853), 17 Beav. 140; 1 Eq. Rep. 116; 23 L. J. Ch. 66; 21 L. T. O. S. 135; 1 W. R. 315; 51 E. R. 986.

**167. Exercise by will — Further exercise to correct omissions—Revocation of will.]**—On the marriage of A. & B. in 1824, two estates belonging to B., the wife, were vested in trustees upon certain trusts in favour of A. & B. & the issue of the marriage, but by mistake no provision was made for the daughters of any son of the marriage, & as to one of the estates, no power of disposing of it was given to B. in case there should be no issue of the marriage. The blunder being discovered, A. & B., in 1825, under a general power of appointment given them by the settlement, paramount to the limitations therein, relimited the estates to the old uses, except as to the life estates to themselves & the survivor of them, which were omitted by a second mistake, & they supplied the omission in the original settlement. There being no issue, B., in 1827, made her will in pursuance of the power "reserved to her by the original settlement & every other power enabling her in that behalf." The second blunder being afterwards discovered, in 1840 A. & B., under the general power, appointed to the old uses, & supplied the second omission. This deed of appointment recited the intention of A. & B. to vary the limitations, but it was clear, in the opinion of the ct., that the sole intention & object of the appointment was merely to cure the second blunder:—*Held*: the will of B. was revoked.—*WALKER v. ARMSTRONG* (1856), 21 Beav. 284; 25 L. J. Ch. 402; 27 L. T. O. S. 10; 2 Jur. N. S. 221; 4 W. R. 280; 52 E. R. 868; on appeal, 8 De G. M. & G. 531, L. J. J.

*Annotations*.—*Consd.* Cowper v. Mantell (No. 1) (1856), 22 Beav. 223. *Reid.* Re Hayes, Turnbull v. Hayes, [1901] 2 Ch. 529. *Mentd.* A.-G. v. Cambridge Consumers Gas Co. (1868), L. R. 6 Eq. 282; Bonhote v. Henderson, [1895] 1 Ch. 742; Rake v. Hooper (1900), 83 L. T. 669; Re Walton's Settlt., Walton v. Poirson, [1922] 2 Ch. 509.

**168. Instrument creating power invalid.]**—A married woman, who was entitled to an equitable estate in tail in copyholds, in Feb. 1870, executed a deed, acknowledged but not entered upon the ct. rolls of the manor within six months after execution, declaring that such copyholds should be held in trust for such persons as she & her husband should jointly appoint, & in default for herself in fee. In Mar. 1870, the married woman & her husband, purporting to exercise this joint power, by deed appointed the entailed copyholds, & covenanted to surrender those & other copyholds to which she was entitled in fee, to trustees upon trust to sell, invest the proceeds, & hold the fund for her separate use for life, than for her husband for life, & then for her children other than her eldest son. The married woman had several

children, & after her death & that of her husband the trustee of the settlement petitioned that all the copyholds, which had not been sold or surrendered, might vest in him for all the estate therein of the eldest son & customary heir, who was an infant, & a vesting order was made according to the prayer of the petition:—*Held*: a disentailing assurance by an equitable tenant in tail of copyholds, which is not entered upon the ct. rolls of the manor within six months after execution, is void; & therefore the power of appointment which the deed of Feb. 1870, purported to create could not be exercised.—*GREEN v. PATERSON* (1886), 32 Ch. D. 95; 56 L. J. Ch. 181; 54 L. T. 738; 34 W. R. 724, C. A.

*Annotations*.—*Mentd.* Harris v. Tubb (1889), 42 Ch. D. 79; Carter v. Carter, [1896] 1 Ch. 62.

**169. Donee married woman tenant for life—Restrained from anticipation—Exercise not confined to will.]**—*Re WADDINGTON, BACON v. BACON*, [1897] W. N. 7.

**170. Time for exercise—In relation to donee of power.]**—If a power be given to a person alive at the date of the instrument creating it, it must, of course, if exercised at all, be exercised during his life, & is therefore valid. If a power can be exercised only in favour of a person living at the date of the instrument creating it, it must, if exercised at all, be exercised during the life of such person, & is, therefore, unobjectionable.—*Re DE SOMMERY, COELENBIER v. DE SOMMERY*, [1912] 2 Ch. 622; 82 L. J. Ch. 17; 107 L. T. 823; 57 Sol. Jo. 78.

*Annotations*.—*Consd.* Re Allott, Hanmer v. Allott, [1924] 2 Ch. 498. *Reid.* Re Casel, Public Trustees v. Mountbatten, [1926] Ch. 358. *Mentd.* Kennedy v. Kennedy, [1914] A. C. 215; Re Scott, Scott v. Scott, [1915] 1 Ch. 592; Re Grosvenor, Grosvenor v. Grosvenor, [1916] 2 Ch. 375; Re Scott, Scott v. Scott, [1916] 2 Ch. 268; Re Hewett, Eldridge v. Hewett (1920), 90 L. J. Ch. 126.

**171. — In relation to object of appointment.]**—*Re DE SOMMERY, COELENBIER v. DE SOMMERY*, No. 170, *ante*.

**Whether tending to perpetuity.]**—*See PERPETUITIES*, pp. 107 *et seq.*, *ante*.

**Effect of bankruptcy.]**—*See BANKRUPTCY*, Vol. V., pp. 740 *et seq.*

**Disclaimer.]**—*See Law of Property Act, 1925* (c. 20), s. 156.

## SECT. 2.—WHO MAY EXERCISE.

### SUB-SECT. 1.—IN GENERAL.

**172. Person indicated by creator of power.]**—The person who is to execute a trust or exercise a power must be a person who is in some way pointed out by the creator of the trust or power as a proper person to execute or exercise it.—*Re CRUNDEN & MEUX'S CONTRACT*, [1909] 1 Ch. 690; 78 L. J. Ch. 396; 100 L. T. 472.

**173. Felons.]**—A felon, shortly before conviction, conveyed real estate to trustees upon certain trusts, reserving to himself a power of revocation. While still undischarged he borrowed a sum of money, & by a memorandum agreed that it should be charged upon his settled estate:—

condition of the valid exercise of a power of appointment conferred by a testamentary settlement that the donee of the power shall survive the grantor of the power.—*PENNY'S TRUSTEES v. PENNY'S TRUSTEES*, [1925] S. C. 175.—*SCOT*.

### PART IV. SECT. 2. SUB-SECT. 1.

*m. Trustees.*—*VALENTINE v. FITZSIMONS*, [1894] 1 L. R. 93.—*IR*.

### PART IV. SECT. 1.

**1701. Time for exercise—In relation to donee of power.]**—*COWAN v. BERSKERR* (1883), 5 O. R. 624.—*CAN*.

**k. Whether appointment rendered inoperative — By previous mortgage of life estate.]**—Testator's will, having given his daughter a life estate in certain lands, devised the same after her death amongst her children as she should by deed or will appoint. It

then provided that, in case of alienation or incumbrance by her, her share should go to the persons next in remainder, as if she were actually dead:—*Held*: the appointment executed by her was not rendered inoperative by reason of her having previously mortgaged her life estate.—*Re BRONE'S ESTATE* (1869), 5 I. R. Eq. 621.—*IR*.

**l. Donee of power predeceasing testator—Effect of.]**—It is a necessary

**Held:** the memorandum of charge was an equitable exercise of the power of revocation, & such power was duly exercised in favour of the mtgee.

It is quite competent for an undischarged felon to exercise a power contained in a settlement made previously to his conviction (HALL, V.-C.).—**MAINPRICE v. PEARSON** (1877), 25 W. R. 768.

— **Power of "administrator."**—See **CRIMINAL LAW**, Vol. XIV., pp. 495, 496, Nos. 5459–5461.

**Infants.**—See **INFANTS**, Vol. XXVIII., p. 150, Nos. 110–115.

— **On military service—Exercise of power of appointment by will.**—See **ROYAL FORCES**.

**Married women.**—See **HUSBAND & WIFE**, Vol. XXVII., pp. 108, 109, 136–146, Nos. 848–859, 1104–1184.

**Persons of unsound mind.**—See **LUNATICS**, Vol. XXXIII., pp. 212–215, 226–227, Nos. 1191–1215, 1360–1373.

**On disclaimer by one donee.**—See **Law of Property Act**, 1925 (c. 20), s. 156.

#### SUB-SECT. 2.—DELEGATION OF POWERS.

##### A. Powers Amounting to Absolute Ownership.

**174. Right to delegate.**—A. made his will & gave personalty to B., a married woman, for life, & after her death as she should appoint, & in default of appointment, to her husband; & if she should survive him & make no appointment, then to her children. B. had three children, & by her will she appointed, after her husband's death, £2,000 between two of her children, & £1,500 to the other, & she appointed the residue to her three children by name, in such manner as her husband should appoint by will. He by his will appointed £500 to one of the children; (£ ) to another, & the residue to the third:—**Held:** the husband had no power to exclude either of the children; his appointment was therefore bad; & the appointment of the wife took effect in favour of the three children.

It is not contended that [B.] had no power to delegate to her husband her power to appoint, & if it had been so contended, I should decide that the argument could not be sustained (KINDERSLEY, V.-C.).—**WHITE v. WILSON** (1852), 1 Drew. 298; 22 L. J. Ch. 62; 17 Jur. 15; 1 W. R. 47; 61 E. R. 466.

**Annotation:**—**Expld.** **Bulteel v. Plummer** (1869), L. R. 8 Eq. 585.

##### B. Powers Involving Exercise of Personal Discretion.

**175. Validity of delegation.**—A power under a settlement for a husband to dispose of a reversionary interest in an estate in such proportions as he should think fit, among the issue of the marriage; he, by will, delegates it to his wife, to dispose of in such shares as she pleases between his son & daughter:—**Held:** like a power of attorney & not transmissible to a third person, but could be executed by the husband only.—**INGRAM v. INGRAM** (1740), 2 Atk. 88; 26 E. R. 454, L. C. **Annotation:**—**Consd.** **Williamson v. Farwell** (1887), 5 Ch. D. 128.

**176.** —[A.-G. v. **BERRYMAN** (1752), 1 Dick. 168; 21 E. R. 234. **Annotation:**—**Refd.** **Alexander v. Alexander** (1755), 2 Ves. Sen. 640.

**177.** —[—(1) Power to appoint among children, each must have a part, not illusory nor

reversionary; but a particular interest, as for life, may be given to one.

(2) Such a power will not extend to grandchildren.

(3) A power to a man to appoint £1,000 among his children; he appoints £100, among the children, & £900, among others who are strangers: the appointment of the £900 will be so absolutely void, as that it will not be prevented from going over, if limited over for want of appointment, as if he had made none (CLARKE, M.R.).

(4) If the father gives the whole £1,000 to his children, & annexes a condition, that they shall release a debt owing to them, or pay money over, the appointment of the £1,000 would be absolute; & the condition would be only void (CLARKE, M.R.).

(5) Where there is a complete execution of a power, & something *ex abundante* added, which is improper, then the execution shall be good, & only the excess void; but where not a complete execution of a power, where the boundaries between the excess & execution are not distinguishable, it will be bad (CLARKE, M.R.).

(6) If there is a power to A. of personal trust or confidence, to exercise his judgment & discretion, A. cannot say this money shall be appointed by the discretion of B. for *delegatus non potest delegare* (CLARKE, M.R.).—**ALEXANDER v. ALEXANDER** (1755), 2 Ves. Sen. 640; 28 E. R. 408.

**Annotations:**—*As to* (1) **Distd.** **Doe d. Devonshire v. Cavendish** (1782), 3 Doug. K. B. 48; **Wollen v. Tanner** (1800), 5 Ves. 218. **Consd.** **Kemp v. Kemp** (1801), 5 Ves. 849; **Thornton v. Bright** (1836), 2 My. & Cr. 230; **Re Hughes**, **Hughes v. Footner**, [1921] 2 Ch. 208. **Refd.** **Butcher v. Butcher**, **Gooday v. Butcher** (1804), 9 Ves. 382; **Bray v. Bree** (1834), 8 Ill. N. S. 568. *As to* (3) **Consd.** **Routledge v. Dorrill** (1794), 2 Ves. 357; **Re Perkins**, **Perkins v. Bagot**, [1893] 1 Ch. 283. **Refd.** **Goldsmid v. Goldsmid** (1842), 2 Hare, 187. *As to* (4) **Consd.** **Re Perkins**, **Perkins v. Bagot**, [1893] 1 Ch. 283. **Refd.** **Re Holland**, **Holland v. Clapton**, [1914] 2 Ch. 595. *As to* (5) **Consd.** **Koe d. Brune v. Pridoux** (1808), 10 East. 158. **Distd.** **Cooke v. Farrand** (1816), 2 Marsh. 421. **Consd.** **Re Kerr's Trusts** (1877), 4 Ch. D. 600. **Apld.** **Re Perkins**, **Perkins v. Bagot**, [1893] 1 Ch. 283. *As to* (6) **Consd.** **Thornton v. Bright** (1836), 2 My. & Cr. 230. **Refd.** **Jebb v. Tugwell** (1855), 24 L. T. O. S. 321. **Generally** **Mentd.** **Haydon v. Wilsheare** (1789), 3 Term Rep. 372.

**178.** —[—**WHITE v. WILSON**, No. 174, ante.

**179.** —[—F. devised & bequeathed his real & personal property upon trust for his wife E. for her life, & after her death in trust for his children who should be living at the death of E. & the issue then living of his children, as E. should appoint, & in default of appointment, as therein mentioned. E. having survived F. by will appointed two-fifths of the residue of the trust fund in trust for T. a son of F. & E. for his life, subject as therein provided, & after his death to his children as he should appoint, so that the benefit of every such appointment should vest before or upon the expiration of twenty-one years from the death of T.; & if there should be no child of T. who should acquire a vested interest, then in trust for T. absolutely. Provided that if T. should alien or dispose of his share, or should become bkpt., the trust in his favour should cease & determine, & the property subject to the trust should be held by the trustees for the support, maintenance, or otherwise for the benefit of his wife & children, as the trustees in their direction should think proper. W. died, & T. became bkpt., & M. was appointed his assignee. The gift over in the proviso for cesser on the bkpcy. of T. was held void as being in excess of the power, & the prior limitation to the children of T., as he

#### PART IV. SECT. 2, SUB-SECT. 2.—A.

**1741. Right to delegate.**—**SMITH v. CHISHOME** (1888), 15 A. R. 738.—**CAN.**



**Sect. 2.—Who may exercise: Sub-sect. 2, B.; sub-sects. 3 & 4. Sect. 3: Sub-sect. 1.]**

should appoint, was also held void as being a delegation of a power.—*STOCKBRIDGE v. STORY* (1871), 19 W. R. 1049.

180. —[—Where the donee of a power appointed by will a life interest to M., an object of the power, & then delegated to M. a power to appoint a life interest to a stranger to the power, & subject thereto appointed the property to the children of M., who were objects of the power:—*Held*: the delegated power was void, but the subsequent appointment was good.—*CARR v. ATKINSON* (1872), L. R. 14 Eq. 397; 41 L. J. Ch. 785; 26 L. T. 680; 20 W. R. 620.

*Annotation*:—*Apld.* *Williamson v. Farwell* (1887), 35 Ch. D. 128.

181. —[—Husband & wife, having, under their marriage settlement, a joint power of appointment over personality in favour of the children of the marriage, of whom there were three survivors, appointed one-third of the fund to trustees upon such trusts as H., one of the sons, by deed, executed with the consent of the father during his life, & after his death with the consent of the trustees of his will, or by will, should appoint; & in default of such appointment, upon trust for H. for life, or until bkpcy. or assignment, such bkpcy. or assignment being limited to twenty-one years after the death of his surviving parent; & after H.'s death, upon trust for his exors. or administrators, as part of his personal estate; but if such interest should be previously determined, then upon the trusts therein mentioned:—*Held*: the appointment to such uses as H. should appoint, with consent of the trustees, was void, but the limitation over in default of appointment by H. was valid, & gave H. an absolute interest in the share, subject to the contingency of his committing a forfeiture within the prescribed period.—*WEBB v. SADLER* (1873), 8 Ch. App. 419; 42 L. J. Ch. 498; 28 L. T. 388; 21 W. R. 394, L. C. & L. J.

*Annotations*:—*Apld.* *Scotney v. Loner* (1885), 29 Ch. D. 128; *Williamson v. Farwell* (1887), 35 Ch. D. 128. *Consd.* *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54. *Mentd.* *Re Clay, Clay v. Clay* (1885), 54 L. J. Ch. 648; *Re Thompson, Muchell v. Newman* (1886), 55 L. T. 85.

182. —[—The donee of a power of appointment among his own children appointed to his son for life, with remainder to the son's children as he should appoint, & in default of such appointment, to the son absolutely. The son died without having attempted to exercise the power thus delegated to him:—*Held*: the ultimate limitation in favour of the son was valid & took effect.—*WILLIAMSON v. FARWELL* (1887), 35 Ch. D. 128; 56 L. J. Ch. 645; 56 L. T. 824; 36 W. R. 37.

183. —[—*Re BALDOCK (DECEASED)*, *BALDOCK v. BALDOCK* (1904), 48 Sol. Jo. 492.

184. —**Directions relating to maintenance or advancement of children.**—[Testator gave £7,000 stock to trustees, in trust to pay the dividends to his son for life, & after his death, to pay the capital & dividends to & amongst all his children, at such time or times, age or ages, & in such proportions, manner & form, & for such intents & purposes in all respects as the son should appoint; & in default of appointment, to pay & divide the same unto & equally amongst all the children as they should severally attain twenty-one, & in the meantime, to apply the dividends for their maintenance as the trustees should think fit. The son, by his will, directed that the stock should not be divided amongst his children until their mother's death, & that she should receive the dividends during her life, & apply the same, in the exercise of her sound discretion, for the best interest &

advantage of his children, & that, on her death, the capital should be divided amongst the children in certain proportions. The son left eleven children, some of whom were adult:—*Held*: the son's will was not a good execution of the power, so far as it directed the dividends of the stock to be paid to his wife during her life.—*CHESTER v. CHADWICK* (1842), 13 Sim. 102; 60 E. R. 40.

*Annotation*:—*Apld.* *Re Greenslade, Greenslade v. McCowen*, [1915] 1 Ch. 155.

185. —[—By his will made in 1889 E. A. G. devised & bequeathed his residuary real & personal estate to trustees upon trust as to a particular share thereof to pay the income to his daughter for life, with power to her to appoint the income to her husband, & after her decease, & subject to any appointment to her husband, to hold the share & the income in trust for her children, or any of their issue in such manner as she should by deed or will appoint. The will contained an express provision enabling trustees to apply any part of the annual income of the share to which an infant might be entitled towards the maintenance, education, or benefit of such infant, but by a codicil to his will testator declared that the powers of maintenance should only apply to income to which the infant was, or if of full age would be, entitled. The daughter married & had three children, all infants, & resps. to the summons. By her will, made in 1908, after appointing a defeasible life interest in the settled share to her husband, she appointed the share, & the income thereof, to all her children who should attain twenty-five before the expiration of twenty-one years from her death, or should be living at the expiration of such period without having attained twenty-five with a proviso under which possible grandchildren might become entitled under the appointment to an interest in their parent's share, & she "empowered the trustees of the settled share" to apply the income of the expectant share of any child or grandchild for or towards his or her maintenance, education, or benefit. Testatrix & her husband having both died, upon a summons taken out by the trustees of the will of E. A. G. asking whether they had a discretionary power under either of the wills to apply the income of the shares to which the infant depts. were contingently entitled, for their maintenance, education, & benefit:—*Held*: the power contained in the appointment by the mother's will was an attempt to delegate to the trustees a personal discretion exercisable by the donee, & therefore wholly inoperative.—*Re GREENSLADE, GREENSLADE v. MCCOWEN*, [1915] 1 Ch. 155; 84 L. J. Ch. 235; 112 L. T. 337; 59 Sol. Jo. 105.

*Annotation*:—*Distd.* *Re May's Settlement, Public Trustee v. Moredith*, [1926] Ch. 136.

186. —[—Testator gave a sum of money to trustees upon trust to pay the income to his daughter for life & after her decease as to the principal in trust for her issue born in her lifetime "for such interests in such proportions & in such manner in all respects" as she should by deed or will appoint, & in default of appointment for all her children equally. The daughter, in exercise of the power, by her will appointed the trust fund among all her children who should survive her & being male attain twenty-one or being female attain that age or marry under it; & she declared that during the period of twenty-one years from her death the income of each child's share should be paid to the child, & if the child should die within the period of twenty-one years the child should have a power of appoint-



ment by will, & subject thereto in the event of the child leaving issue in trust for such child absolutely, but in the event of the child leaving no issue then the share was to go by way of accruer to the other shares. If the child should survive the period of twenty-one years the child was to take absolutely; "provided always that the trustees," of testator's will, "shall, if & so far as I can authorise the same, have power from time to time or at any time during the period of twenty-one years in their absolute discretion to transfer & make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years or any part of such share or shares to such son for his own use absolutely":—*Held*: the power conferred upon the trustees by the proviso was an attempt to delegate the power given by testator to his daughter & was therefore an invalid exercise of that power.—*Re JOICEY, JOICEY v. ELLIOTT*, [1915] 2 Ch. 115; 84 L. J. Ch. 613; 113 L. T. 437, C. A.

*Annotation*:—*Distd. Re May's Settmt., Public Trustee v. Meredith*, [1926] Ch. 136.

187. ———.—A widow with a special power of appointing a settled fund, subject to her own life interest, to her issue "in such manner & form in every respect" as she should by deed or will appoint, irrevocably appointed the fund by deed to her two infant children, naming them, in equal shares as tenants in common, & gave the trustees an ordinary power of advancement:—*Held*: having regard to the wide words of the widow's power, & the fact that she had irrevocably appointed absolute interests, the power of advancement was in no sense a delegation of her special power, but merely ancillary to the absolute appointment, & therefore valid.—*Re MAY'S SETTLEMENT, PUBLIC TRUSTEE v. MEREDITH*, [1926] Ch. 136; 95 L. J. Ch. 230; 134 L. T. 696.

188. Where trustees disclaim devise.]—Where lands are devised to trustees in fee upon trusts or with powers which, in their execution, require the exercise of judgment & discretion, such as granting leases, & the trustees disclaim, so that the estate in fee descends to testator's heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will.—*ROBSON v. FLIGHT* (1865), 4 De G. J. & Sm. 608; 5 New Rep. 344; 34 L. J. Ch. 226; 11 L. T. 725; 11 Jur. N. S. 147; 13 W. R. 393; 46 E. R. 1054, L. C.

*Annotation*:—*Mentd. Gainsborough v. Watcombe Terra Cotta Clay Co., Dunning v. Gainsborough* (1885), 54 L. J. Ch. 991.

#### SUB-SECT. 3.—SURVIVORSHIP OF POWERS.

189. Whether power survives—Power to husband & wife.]—If a *feme sole* having £1,400 stock convey it to trustees to the use of her intended husband & herself for life, with power to dispose of £200, this power survives to the wife on the death of her husband.—*HORNER v. BENDLOES* (1742), 9 Mod. Rep. 335; 88 E. R. 490, L. C.

190. ———.—Bare power not annexed to estate or office.]—Where a naked power is given to several, it cannot be exercised by the survivors; but if a power be annexed to an office, any persons filling the office may execute it.—*BRASSEY v. CHALMERS* (1852), 16 Beav. 223; 51 E. R. 763; *on appeal, sub nom. BRASSEY v. CHALMERS, SEACOMBE v. HOLME* (1853), 4 De G. M. & G. 528, L.J.J.

*Annotations*:—*Mentd. Bradshaw v. Fane* (1856), 3 Drew. 534; *Re Fitch & Osborne* (1876), 3 Ch. D. 618.

191. ———.—To persons by name.]—A bare power, given to two or more persons by name & not annexed to an estate or office, does not survive (*EVE, J.*).—*Re HARDING, HARDING v. PATERSON*, [1923] 1 Ch. 182; 92 L. J. Ch. 251; 128 L. T. 562; 67 Sol. Jo. 298.

*Among executors.*]—*See EXECUTORS*, Vol. XXIII., pp. 46 *et seq.*; Vol. XXIV., pp. 612, 613, Nos. 6438–6444.

*Among trustees.*]—*See SETTLEMENTS; TRUSTEES.*

#### SUB-SECT. 4.—POWERS ANNEXED TO AN OFFICE.

192. Power exercisable by person filling office.]—*BRASSEY v. CHALMERS*, No. 190, *ante*.

193. ———.—Executor—Renunciation of probate.]—Testatrix bequeathed the residue of her property "to such charitable purposes as should be thereafter specified, or in default, according to the best judgment of M., sole exor. of her will." She died without specifying any charity, to which it was to be applied, & M. renounced probate:—*Held*: (1) it was a valid bequest to charitable purposes; (2) the power to M. was coupled with his office; & having renounced, he was not entitled to exercise his power of specifying the charity, to which the property was to be applied; (3) the fund was applicable to such purposes, as the King, by sign manual, should appoint.—*A.-G. v. FLETCHER* (1835), 5 L. J. Ch. 75.

*Annotation*:—*As to (2) Apld. Crawford v. Forshaw*, [1891] 2 Ch. 261.

194. ———.—Powers limited to "trustees, the survivor of them & representatives of survivor."]—Testator gave his residuary property to two trustees for his children, except J. who had misconducted himself; but testator trusted his conduct would change, & he gave his trustees & the survivors of them, & the exors. & administrators of such survivor, power to give to J. an equal share with his brothers & sisters. He appointed the two trustees exors., & by a codicil appointed a third exor.; one alone proved the will, & the others renounced. In a state of facts brought into the master's office, the sole exor. & trustee stated that J. had conducted himself to his satisfaction, & in such a manner as to entitle him to an equal share:—*Held*: the sole exor. had power to appoint, & had well appointed a share to J.—*EATON v. SMITH* (1839), 2 Beav. 236; 48 E. R. 1171.

195. ———.—Powers limited to trustees for the time being.]—By deed power was given to the trustees or trustee for the time being, at their or his entire discretion, to pay certain rents for the benefit of one, two or more of the children of B., the tenant for life, & there was a power to the surviving or continuing trustee to appoint new trustees. The trustees all died without appointing new trustees, & new trustees were appointed by the ct.:—*Held*: they had the discretionary power given to the original trustees.—*BARTLEY v. BARTLEY* (1855), 3 Drew. 384; 61 E. R. 949.

#### SECT. 3.—REQUISITES OF VALID EXECUTION.

##### SUB-SECT. 1.—IN GENERAL.

196. Necessity for compliance with formalities—Exercise to be by writing—Evidence of parol declaration.]—*LEWIS v. LEWIS* (1672), 2 Rep. Ch. 77; 21 E. R. 621.

**Sect. 3.—Requisites of valid execution: Sub-sects. 1**

**197. — Seal.]—**(1) Power to the survivor of the husband & wife to appoint among children, not well executed by a deed by both.

(2) Where a seal is required by the power, an appointment among children without seal is bad.—**MAC ADAM v. LOGAN** (1791), 3 Bro. C. C. 310; 29 E. R. 553, L. C.

**Annotations:—**As to (1) **Consd.** **Thomas v. Jones** (1862), 1 De G. J. & Sm. 63. **Refd.** **Hole v. Escoff** (1838), 8 L. J. Ch. 83.

**Attestation.]—****SAYLE v. FREELAND** (1680), 2 Vent. 350; 86 E. R. 480.

**Annotations:—****Consd.** **Fitzgerald v. Fauconberge** (1729), Fitz. G. 207. **Refd.** **Jones v. Dale** (1728), 1 Barn. K. B. 131; **Evelyn v. Evelyn** (1731), 2 P. Wms. 659; **Jones v. Clough** (1751), 2 Ves. Sen. 365. **Mentd.** **Coventry v. Coventry** (1721), Gilb. Ch. 180.

**199. —**—**]**—By a settlement before marriage £3,000 S. S. stock belonging to the wife was invested in trustees, who were to transfer one moiety to such person, etc., & for such uses, etc., as she should by her last will in writing, or other writing, under her hand & seal, to be attested by two or more credible witnesses, appoint, etc., & for want of such appointment, etc., then in trust to transfer all such stocks to her exor. or administrators. After her death a paper was found in her closet of her handwriting, by which she gave different sums to different persons but not signed or sealed by her, nor attested by witnesses. **LORD HARDWICKE** of opinion, that the words under her hand & seal to be attested by two or more credible witnesses, are referable to the will as well as to the other writing, & for want of the ceremony of sealing, & attestation by witnesses, this paper was not a good execution of the power.—**ROSS v. EWER** (1744), 3 Atk. 156; 26 E. R. 892, L. C.

**Annotations:—****Refd.** **Jenkin v. Whitehouse** (1757), 1 Burr. 431; **Tatnell v. Hankoy** (1838), 2 Moo. P. C. C. 342; **Doe d. Spillsbury v. Burdett** (1839), 9 Ad. & El. 936; **Barnes v. Vincent** (1846), 5 Moo. P. C. C. 201. **Mentd.** **In the Goods of Dawson** (1849), 7 Notes of Cases, 317.

**200. —**—**]**—**RICKETTS v. LOFTUS**, No. 356, post.

**201. —**—**Memorandum stating compliance.]—**No memorandum of attestation to a deed, made in execution of a power, stating the observance of all the particulars required by the deed creating the power, is needed to establish that the power has been, as to the forms required, duly executed.

A power authorised a deed to be made by two persons, "under their hands & seals, in the presence of, & attested by, two witnesses." The attestation of the deed exercising the power was in these words, "signed, sealed, & delivered in the presence of" two witnesses:—**Held:** this was a sufficient attestation.—**NEWTON v. RICKETTS** (1861), 9 H. L. Cas. 262; 31 L. J. Ch. 247; 5 L. T. 62; 7 Jur. N. S. 953; 10 W. R. 1; 11 E. R. 731, H. L.; *affg.* S. C. *sub nom.* **Re Ricketts' Trusts** (1860), 1 John. & H. 70.

**Deeds.]—**See Sub-sect. 2, post.

**Wills.]—**See Sub-sect. 3, A., post.

**202. Execution partly good partly bad.]—****ALEXANDER v. ALEXANDER**, No. 177, ante.

**203. Presumption of due execution—When arising.]—**Decree for raising money under a deed

of appointment; though the only copy produced appeared not executed; upon recitals of it in two settlements, as a subsisting effectual deed, & evidence from the books of deceased solr. of charges for the preparation & execution of it.—**SKIPWITH v. SHIRLEY** (1805), 11 Ves. 64; 32 E. R. 1012.

**Annotation:—****Refd.** **Ward v. Garnons** (1810), 17 Ves. 134.

**204. —**—**]**—By Mr. & Mrs. P.'s marriage settlement, estates in Kent & other counties, the lady's property, were settled on her for life, remainder to Mr. P. for life, if she should so appoint, remainder to their children, remainder as Mrs. P., by deed under her hand & seal, attested, etc., or by her will, signed & published in the presence of three witnesses, should appoint; remainder to Mrs. P. in fee, with a power of sale, & directions for reinvesting the proceeds in other estates, & in the usual securities, in the interim, & that upon the reinvestment, the uses of the settlement should cease as to the sold estates. Mrs. P., by deed not attested as to her signature, at the foot of which she had written, without date, directions for her burial, appointed the estates, after her decease, to her husband for life, & in default of children, to him in fee; & she revoked a prior deed of appointment. The estates were afterwards sold, & the proceeds invested in securities, but were never reinvested in lands, although their liability to be so was recognised by the parties. There was no issue of the marriage. Mrs. P. survived her husband, & applied part of the proceeds to her own use. At her death she was seised, exclusive of the settled property, of a mansion house, with outbuildings, gardens, & a small field adjoining it, & some cottages opposite to it, let to tenants, & was possessed of some personal estate, no part of which was in the name of a trustee. She devised the mansion house, with its appurtenances, & all other her real estates, to C. S., & bequeathed all her personal estate, whether in the name of herself or of any trustee, subject expressly to her debts & legacies, to other persons. After her death, the deed of appointment was found in her house, with the title deeds of the mansion house; but the revoked deed could not be found. Her debts & legacies greatly exceeded her assets:—**Held:** the former deed was not a testamentary instrument, & Mrs. P.'s receiving part of the proceeds of the settled estates was not an entry or claim within 54 Geo. 3, c. 168, but 54 Geo. 3, c. 168, remedied the defect of attestation.—**HOUGHAM v. SANDYS** (1827), 2 Sim. 95; 6 L. J. O. S. Ch. 67; 57 E. R. 725.

**Annotations:—****Consd.** **Burdett v. Spillsbury**, **Skyunner v. Spillsbury** (1843), 10 Cl. & Fin. 340. **Mentd.** **Re Pedder's Settlement** (1854), 5 De G. M. & G. 890; **Mincet v. Leman** (1855), 7 De G. M. & G. 340.

**205. —**—**Execution by attorney of donee.]—**Where a deed, more than thirty years old, purports to be an appointment under a special power & to be executed by the attorney of the donee of the power, although by reason of the antiquity of the deed, the execution of it by the attorney as such ought to be presumed yet there is no rule of law which requires or justifies the presumption by the ct. that the attorney was duly authorised to execute the power.—**Re AIRRY, AIRRY v. STAPLETON**, [1897] 1 Ch. 164; 66 L. J. Ch.

**PART IV. SECT. 3, SUB-SECT. 1.**

**203 i. Presumption of due execution—When arising.]—**The execution of a power must be presumed when it is necessary to validate an act.—**FENNEFATHER v. FENNEFATHER** (1873), 7 L. R. Eq. 300.—**IR.**

**n. Informal execution—What reforma-**

**tion necessary.]—**Where the execution of a power is informal, but for a valuable consideration, the instrument is to be reformed so as to be an execution in the mode in which the person having the power had a right to execute.—**MARNELL v. BLAKE** (1816), 4 Dow, 264.—**IR.**

**o. Distinction between power exer-**

**cised by deed or will—& by deed only.]—**There is a wide distinction between a power to be exercised by deed or will, & a power to be exercised by deed only, *inter vivos*, & which is of a binding effect upon the party executing it; a power to be exercised by a testamentary disposition is capable of being afterwards revoked.

152; 76 L. T. 151; 45 W. R. 286; 41 Sol. Jo. 128.

**206. Execution by general disposition—Without reference to power—Donee having no vested estate.]—**Where a party has a power over an estate, but no estate is vested in him, he may execute his power by a general disposition of the subject, without referring to the power.—**TANNER v. BABBAGE** (1835), 4 L. J. Ch. 101.

**207. State of donee's mind at execution—Jurisdiction of Court of Chancery—To decide upon validity.]—**The ct. has jurisdiction to decide upon the validity of the execution of a testamentary power over personality, with reference to the state of the donee's mind at the time of the alleged execution.—**MORGAN v. ANNIS** (1849), 3 De G. & Sm. 461; 64 E. R. 562.

**208. Donee domiciled abroad—Execution valid by law of domicile—Not in compliance with terms of power.]—**A power was reserved to a married woman, notwithstanding coverture, by deed executed by herself, " & attested by three or more credible witnesses," to appoint. *Qu.*: whether, if she had been lawfully domiciled abroad, any execution of the power valid by the law of the country of her domicile, but not in compliance with the express terms of the power, would have been sufficient.—**DOLPHIN v. ROBINS** (1859), 7 H. L. Cas. 390; 29 L. J. P. & M. 11; 34 L. T. O. S. 48; 23 J. P. 725; 5 Jur. N. S. 1271; 7 W. R. 674; 11 B. R. 156, H. L.; *affg.* S. C. *sub nom.* **ROBINS & PAXTON v. DOLPHIN** (1858), 1 Sw. & Tr. 37.

*Annotations:*—**Mentd.** **Yelverton v. Yelverton** (1859), 58 & Sm. 49; **Shaw v. Gould** (1868), L. R. 3 H. L. 55; **Le Sueur v. Le Sueur** (1876), 1 P. D. 139; **Harvey v. Furnie** (1882), 8 App. Cas. 43; **Le Mesurier v. Le Mesurier**, [1895] A. C. 517; **Re Mackenzie, Mackenzie v. Edwards-Moss**, [1911] 1 Ch. 578; **Lord Advocate v. Jaffrey**, [1921] 1 A. C. 146; **A.-G. for Alberta v. Cook**, [1926] A. C. 444.

**209. Execution to be according to rules for time being applicable to such instruments—Power created before but exercised after alteration in law—As to mode of execution.]—****FREME v. CLEMENT**, No. 1, *ante*.

#### SUB-SECT. 2.—BY DEED.

*See, now, Law of Property Act, 1925 (c. 20), ss. 159, 160.*

**210. Compliance with necessary formalities—Attestation.]—**Where lands were settled to the use of such person or persons, etc., as R. & T. should, during their joint lives, by any deed or writing under both their hands & seals, to be by them duly executed in the presence of, & to be attested by two witnesses, limit & appoint, & until such appointment to the use of R. for life, remainder to the use of T. for life, & they by deed, signed, sealed, & delivered by them, in the presence of two witnesses, appointed the land to J., but the attestation indorsed on the deed, & subscribed by the witnesses, only specified that it was sealed & delivered by R. & T. in their presence, but not that it was signed:—**Held**: this was not a due attestation as required by the power; & a subsequent attestation by the witnesses, after the death of R., certifying that the deed was signed as well as sealed & delivered in their presence, did not cure the defect in the original attestation.—**DOE d. MANSFIELD v. PEACH** (1814), 2 M. & S. 576; 105 E. R. 496.

*Annotations:*—**Foll.** **Wright v. Barlow** (1815), 3 M. & S.

512. **Consd.** **Moodie v. Reid** (1816), 1 Madd. 516; **Tatnall v. Hankey** (1838), 2 Moo. P. C. C. 342. **Distd.** **Burdett v. Spilsbury, Skynner v. Spilsbury** (1843), 10 Cl. & Fin. 340. **Appl.** **Barnes v. Vincent** (1845), 3 Notes of Cases, 628. (*See* 5 Moo. P. C. C. 201.) **Reid, Moodie v. Reid** (1816), 1 Madd. 516; 2 Marsh. 102; **Hougham v. Sandys** (1827), 2 Sim. 95; **Allen v. Bradshaw** (1835), 1 Curt. 110. **Mentd.** **Roberts v. Phillips** (1855), 24 L. J. Q. B. 171.

**211. ———.]—**Devise of lands to B. for life, with power to charge the same, by any deed or deeds, writing or writings, under her hand & seal, attested by two or more witnesses, or by will, etc., & for securing the raising & payment of the charge to limit & appoint the devised premises to trustees, etc.:—**Held**: the power was not well executed by deed charging the premises with a sum of money, & for securing the same demising them for a term; such deed being signed, sealed, & delivered in the presence of two witnesses, but the attestation indorsed on the deed & subscribed by the two witnesses, expressing only that it was sealed & delivered in their presence.—**WRIGHT v. BARLOW** (1815), 3 M. & S. 512; 105 E. R. 702.

*Annotations:*—**Foll.** **Waterman v. Smith** (1840), 9 Sim. 629. **Distd.** **Burdett v. Spilsbury, Skynner v. Spilsbury** (1843), 10 Cl. & Fin. 340. **Reid, Moodie v. Reid** (1816), 1 Madd. 516; **Allen v. Bradshaw** (1835), 1 Curt. 110.

**212. ———.]—**Where a power is given to appoint by any deed executed in the presence of & attested by two witnesses, the attestation is to be considered as forming part of the appointment.

But a power to J. S. to appoint by any deed, sealed & delivered in the presence of & attested by two witnesses, is not well executed by a deed in which the witnessing clause, with which it concludes, is "signed & sealed by J. S." to which the attestation is simply "witnesses A. B. & C. D."—**BULLER v. BURT** (1820), 6 Nev. & M. K. B. 281, n.

*Annotation:*—**Expld.** **Burdett v. Spilsbury, Skynner v. Spilsbury** (1843), 10 Cl. & Fin. 340.

**213. ———.]—**A power given to a husband & wife was required to be exercised by them by any deed or writing under their hands & seals, to be by them executed in the presence of & attested by two witnesses:—**Held**: a deed which was signed as well as sealed & delivered by the husband & wife in the presence of two witnesses was not a good exercise of the power, because the attestation clause did not extend to the signature, as well as to the sealing & delivery.—**WATERMAN v. SMITH** (1840), 9 Sim. 629; 4 Jur. 672; 59 E. R. 501.

*Annotation:*—**Consd.** **Burdett v. Spilsbury, Skynner v. Spilsbury** (1843), 10 Cl. & Fin. 340.

**214. ———.]—**In an action of covenant for not repairing premises pursuant to the covenants in an indenture of lease, the declaration in deducting pltf.'s title, stated that J. P., who had an interest & also a power to appoint "by any deed or writing to be by him sealed & delivered in the presence of & to be attested by two or more credible witnesses," by a deed professing to be attested by two credible witnesses, & to be made by virtue & in exercise & execution of the power, did "direct, limit, & appoint" the premises, & the reversion thereof, to the use of pltf. It appearing that one of the attesting witnesses was the wife of the appointee, so that the deed could not operate as a valid execution of the power, deft. had a verdict on a plea taking issue on the appointment. The ct. refused to allow the declaration, to be amended by stating the deed either as a grant or as a covenant to stand seized to uses, except on payment of all the costs of the trial.—**PERRY v. WATTS** (1842),

& where the donor of this power limits the execution of it in the hands of the donee to a particular mode of execution of the latter description, the only solution that can be given to his

intention in so doing is, that the donor intended the donee should possess the means of carrying her intention into effect with regard to the property, & of dealing with it in a man-

ner that might be revocable afterwards, should anything subsequently vary her intention.—**STUART v. KENNEDY** (1851), 18 L. T. O. S. 43.—**IR.**

**SECT. 3.—Requisites of valid execution: Sub-sects. 2 & 3, A.]**

3 Man. & G. 775; 4 Scott, N. R. 366; 11 L. J. C. P. 97; 133 E. R. 1351.

*Annotations:—Mentd.* Gurford v. Bayley (1842), 3 Man. & G. 781; Michael v. Myers (1843), 6 Man. & G. 702.

**215. Sufficiency of attestation.]—BULLER v. BURT, No. 212, ante.**

**216. —.]—NEWTON v. RICKETTS, No. 201, ante.**

**Donee domiciled abroad.]—See No. 208, ante.**

**SUB-SECT. 3.—BY WILL.**

**A. In General.**

*See Wills Act, 1837 (c. 26), ss. 9, 10.*

**217. Jurisdiction of Court of Probate—To inquire into execution of power.]—A Ct. of Probate has jurisdiction to examine into the execution of a power, so far as is necessary to determine whether the instrument executing it is testamentary.—TATNALL v. HANKEY (1838), 2 Moo. P. C. C. 342; 12 E. R. 1036, P. C.**

*Annotations:—Apld.* Barnes v. Vincent (1846), 5 Moo. P. C. C. 201. *Apld. In the Goods of* Alexander (1860), 29 L. J. P. M. & A. 93. *Consd. In the Goods of* Hallyburton (1866), L. R. 1 P. & D. 90. *Refd.* Brencley v. Lynn (1852), 2 Rob. Eccl. 441; D'Huart v. Harkness (1865), 34 L. J. Ch. 311; *In the Goods of* Hubor, [1896] P. 209.

**218. —.]—In the Goods of PENNINGTON (1842), 1 Notes of Cases, 399.**

*Annotations:—Mentd.* In the Goods of Streaker (1859), 4 Sw. & Tr. 192; Benson & Sankey v. Benson (1870), 40 L. J. P. & M. 1; *In the Goods of* Twoedale (1874), L. R. 3 P. & D. 204.

**219. —.]—The prerogative ct. refused probate to a will of a *feme covert* made in pursuance of a power, because it was, upon the face of it, not executed according to the requisites of the power:—*Held*: such will was entitled to probate, the ecclesiastical cts. having no jurisdiction to inquire as to the due execution of the power, but simply to grant probate, leaving it to a ct. of equity to determine the question of the due execution of the power.—BARNES v. VINCENT (1846), 5 Moo. P. C. C. 201; 4 Notes of Cases, App. XXI.; 7 L. T. O. S. 445; 10 Jur. 233; 13 E. R. 468, P. C.**

*Annotations:—Consd.* Este v. Este (1851), 2 Rob. Eccl. 351; Brencley v. Lynn (1852), 2 Rob. Eccl. 441. *Apld.* De Chatelain v. De Pontigny (1859), 1 Sw. & Tr. 411. *Consd.* In the Goods of Hallyburton (1866), L. R. 1 P. & D. 90. *Apld.* Paglar v. Tongue (1866), L. R. 1 P. & D. 158; *In the Goods of* De Pradol (1867), L. R. 1 P. & D. 464; Noble v. Phelps (1871), L. R. 2 P. & D. 276; Parkinson v. Townsend & Townsend (1875), 44 L. J. P. & M. 32. *Repld.* In the Goods of Tharp, Tharp v. Macdonald (1878), 3 P. D. 76. *Consd.* Phillips v. Jenkins (1881), 44 L. T. 281; *In the Goods of* Huber, [1896] P. 209. *Refd.* In the Goods of Wollaston (1863), 32 L. J. P. M. & A. 171; Hawksley v. Barrow (1866), L. R. 1 P. & D. 147; *In the Goods of* Graham (1872), L. R. 2 P. & D. 385.

**220. —.]—According to the present state of the law, I conceive this ct. must look at the power . . . I am clearly of the opinion I am entitled to see the deed (JENNER FUST).—ESTE v. ESTE (1851), 2 Rob. Eccl. 351; 16 L. T. O. S. 469; 15 Jur. 159; 163 E. R. 1342.**

**221. —.]—B. died in 1857, leaving a testamentary paper in her own handwriting, & signed by her, dated July, 1832, by which she bequeathed her whole property, whatever it might be at her death, to her daughter. Under arts of a marriage settlement the trustees held certain property in trust for B.'s separate use during coverture, & after her decease for such persons as B. should by her last will by her signed & published in the presence of & attested by three witnesses, appoint. In July, 1832, B.'s husband was alive, but predeceased her. The testamentary paper contained no reference whatever to the power, & was not published or attested. In the pleadings plffs. alleged that it was made in pursuance of a power, & the marriage arts. giving some power were not disputed:—*Held*: where a power was before it, & an averment that a testamentary paper was made in pursuance of a power, the ct. was bound to grant probate, & thereby to leave it to the competent ct. of construction to decide whether the testamentary paper is a due execution of or operative under the power.—DE CHATELAIN v. DE PONTIGNY (1859), 1 Sw. & Tr. 411; 29 L. J. P. M. & A. 147; 33 L. T. O. S. 126; 7 W. R. 497; 164 E. R. 790; *sub nom.* CHATELAIN v. PONTIGNY, 5 Jur. N. S. 579.**

**222. —.]—By a marriage settlement, power was reserved to A., the wife, to appoint by deed, revocable or irrevocable, or by will, the property comprised in the settlement. In exercise of this power A. executed a will, by which she appointed a life interest in the settled property to her husband with remainder to her niece. Subsequently, also in exercise of the power, she executed a deed, by which she "irrevocably appointed" the settled property absolutely to her husband, reserving to herself a life interest in the same:—*Held*: the case fell within the principle of Barnes v. Vincent, No. 219, ante, & granted probate of the will.—PARKINSON v. TOWNSEND & TOWNSEND (1875), 44 L. J. P. & M. 32; 33 L. T. 232; 39 J. P. 744; 23 W. R. 636.**

**223. —.]—When the will of a married woman is tendered for probate on the ground that she had separate property, & the probate is contested, if the ct. is satisfied that there is separate property it has power to grant probate of all such property as testatrix had power to dispose of without deciding what that property is. But it is in general the duty of the ct., so far as the evidence & pleadings enable it to do so, to decide judicially of what such property consists. *Semble*: where the will is made under a power, if the ct. has all persons interested before it, it ought to decide the question not only whether there is a power, but whether it is well executed.—In the Goods of THARP, THARP v. MACDONALD (1878), 3 P. D. 76; 38 L. T. 867; 26 W. R. 770, C. A.**

*Annotations:—Refd.* Phillips v. Jenkins (1880), 44 L. T. 281; *In the Goods of* Tomlinson (1881), 6 P. D. 209; *Re* Lambert's Estate, Stanton v. Lambert (1888), 39 Ch. D. 626. *Mentd.* Harding v. Sutton (1888), 59 L. T. 838; *In the Estate of* Hoys, Walker v. Gaskill, [1914] P. 192.

**224. —.]—Where a question of the valid execution of a power arises upon a will**

**PART IV. SECT. 3, SUB-SECT. 2.**

**2151. Sufficiency of attestation.]—Where a marriage settlement reserves to the wife a power of appointment by deed, to be witnessed by two witnesses & to be made with the written consent of the husband, the ct. will not aid an intended execution of it by deed executed by the wife in favour of her husband, but unattested & not accompanied by such written consent.—BENNETT v. BENNETT (1875),**

**1 V. L. R. (Eq.) 280.—AUS.**

**p. Recital in deed—Whether amounting to exercise of power.]—The recital in an instrument capable of operating as an execution of a power, of a part transaction, which would by itself have been inadequate, is a sufficient execution of such power.—LEES v. LEES (1871), 5 I. R. Eq. 549.—IR.**

**q. —.]—MICHIN v. MICHIN**

(1871), 19 W. R. 993; 5 I. R. Eq. 258.—IR.

**PART IV. SECT. 3, SUB-SECT. 2.—A. r. Restriction against appointment except by will—Mutual covenants entered into not to revoke appointment made by will.]—Re COLLARD & DUCKWORTH (1889), 16 O. R. 735.—CAN.**

**t. Wife's indorsement on will—After death of husband—Effect of.]—Power of appointment in such shares**

already before the Ct. of Probate, that question will be then determined without any inquiry before a ct. of construction.—*PHILLIPS v. JENKINS* (1880), 44 L. T. 281.

**225.** Compliance with formalities required by power—Necessity for—Attestation.]—*PARKER v. PARKER* (1714), Gilb. Ch. 168; 25 E. R. 118.

*Annotation*:—*Reid*. *Coventry v. Coventry* (1724), 1 Stra. 598.

**226.** ————]—A power given to testator's wife to dispose of a moiety of a leasehold estate by a will, "duly executed & attested"; & in default of appointment, the name was bequeathed "unto the exors. or administrators of her my wife, to & for his, her, or their own use & benefit." A will, neither signed or sealed, or attested, held not to be an execution of the power; & no exor. being named in the will, the administrator of testatrix was held entitled to the moiety of the leasehold for his own benefit.—*SANDERS v. FRANKS* (1817), 2 Madd. 147; 56 E. R. 289.

*Annotations*:—*Consd.* *Mackenzie v. Mackenzie* (1851), 3 Mac. & G. 559; *Johnson v. Itoth* (1857), 27 L. J. Ch. 305. *Reid*. *Marshall v. Collett* (1835), 1 Y. & C. Ex. 232; *Holloway v. Clarkson* (1843), 2 Hare, 521. *Mentd.* *Waite v. Templer* (1829), 2 Sim. 524; *Wellman v. Bowring* (1830), 3 Sim. 328; *Boyd v. Barker* (1859), 28 L. J. Ch. 445.

**227.** ————]—By indentures of lease & release, certain premises were conveyed to A. & his wife, after other uses, to such uses as M. by her last will & testament in writing, or any instrument in writing in the nature of, or purporting to be, her will, or by any codicil to be by her duly executed & published under her hand & seal, in the presence of & attested by three or more credible witnesses, notwithstanding her coverture, etc., should direct, limit, or appoint, etc. M. signed, sealed, & delivered, as & for her last will & testament, an instrument which concluded & was attested as follows: "In witness whereof I have set my hand & seal hereto, this 5th day of August, A.D. 1801, in the presence of the underwritten. Mary Switt. L.S. Signed, sealed, & delivered this 5th day of August, 1801, as the last will & testament of the said testatrix, M. who, in her presence, & in the presence of each other, have put our names as witnesses thereof. H. F. —J. G.—R. P."—*Held*: the power was well executed.—*WARD v. SWIFT* (1832), 1 Cr. & M. 171; 3 Tyr. 122; 2 L. J. Ex. 45; 149 E. R. 360.

*Annotations*:—*Appl.* *Curtels v. Kenrick* (1838), 3 M. & W. 461. *Consd.* *Vincent v. Sodor & Man*. (Bp.) (1851), 4 De G. & Sm. 294. *Reid*. *Burdett v. Spilsbury*, *Skyner v. Spilsbury* (1843), 10 Cl. & Fin. 340.

**228.** ————]—*FOSTER v. SOUTHEY* (1836), Donnelly, 108; 47 E. R. 258.

**229.** ————]—*MACKINLEY v. SISON*, No. 149, ante.

**230.** ————]—A power in a married woman, to dispose of personalty by will "to be signed & published by her in the presence of, & to be attested by two or more credible witnesses," is not duly exercised by an instrument signed & sealed in the presence of two witnesses, the attestation clause being: Witnesses to the execution hereof.—*GEORGE v. RIELLY* (1839), 2 Curt. 1; 163 E. R. 317.

*Annotation*:—*Consd.* *Barnes v. Vincent* (1845), 3 Notes of Cases, 628.

**231.** ————]—A married woman had power to dispose of certain stock & furniture, by a will to be executed in the presence of two witnesses; & also to dispose of other effects by will generally. By a will, duly executed, she disposed

of the stock & furniture; by an unsigned memorandum, at the foot of the will, in her own handwriting, previous to Jan. 1, 1838, she disposed of the other effects. Letters of administration with the will & memorandum granted.

The codicil cannot have operation, for the power to dispose of the long annuities was to be executed in the presence of two witnesses, & the codicil was executed in the presence of one witness only (*JENNER FUST*).—*In the Goods of BOSWELL* (1843), 3 Curt. 744; 2 Notes of Cases, 154; 163 E. R. 887.

**232.** ————]—Lands were limited to such uses, etc., as L. H. W. should appoint by her last will & testament, in writing, to be by her signed, sealed & published in the presence of & attested by three or more credible witnesses. L. H. W. signed & sealed an instrument, before Wills Act, 1837 (c. 20), containing an appointment commencing thus: "L. H. W. do publish & declare this to be my last will & testament," & ending thus: "I declare this only to be my last will & testament: In witness whereof I have, to this my last will & testament, set my hand & seal the 12th day of September," etc. The attestation was thus: "Witness C. B., E. B., A. B."—*Held*: the attestation was sufficient, & the power was well executed.—*BURDETT v. SPILSBURY*, *SKYNER v. SPILSBURY* (1843), 10 Cl. & Fin. 340; 6 Man. & G. 386; 7 Scott, N. R. 66; 8 Jur. 1; 8 E. R. 772, H. L.; *revgg.* S. C. *sub nom.* *DOE d. SPILSBURY v. BURDETT*, *DOE d. SPILSBURY v. SKYNER* (1839), 9 Ad. & El. 936, Ex. Ch.; & *restg.* (1835), 4 Ad. & El. 1.

*Annotations*:—*Distd.* *George v. Rieley* (1839), 2 Curt. 1. *Appl.* *Hudson v. Parker* (1844), 1 Rob. Eccl. 14. *Distd.* *Barnes v. Vincent* (1845), 3 Notes of Cases, 628. *Expld.* *Vincent v. Sodor & Man* (Bp.) (1851), 4 De G. & Sm. 294. *Appl.* *Newton v. Ricketts* (1861), 9 H. L. Cas. 263. *Reid.* *Curtels v. Kenrick* (1838), 3 M. & W. 461; *Ricketts v. Loftus* (1841), 4 Y. & C. Ex. 519; *Roberts v. Phillips* (1855), 4 E. & B. 450; *Shamun Patter v. Abdul Kadir Ravuthan* (1912), 28 T. L. R. 583.

**233.** ————]—A will, in order to be a good exercise of a power, was required to be signed & published by the donee in the presence of & attested by two or more credible witnesses. The donee made a will which was signed by him & was attested thus: "We, the undersigned, attest to have seen the above testator sign the above will"—*Held*: that clause was in effect an attestation to the publication as well as the signature of the will, & consequently the power was well exercised.—*BARTHOLOMEW v. HARRIS* (1845), 15 Sim. 78; 15 L. J. Ch. 106; 9 Jur. 1070; 60 E. R. 546.

*Annotation*:—*Reid.* *Vincent v. Sodor & Man* (Bp.) (1851), 4 De G. & Sm. 294.

**234.** ————]—By a settlement of 1813, stock was settled upon trust in the events which happened, for such persons as a married woman should, during & notwithstanding coverture, among other modes, by the last will & testament in writing, or any writing purporting to be, or in the nature of, a will to be by her duly signed, sealed & delivered in the presence of & to be attested by two or more credible witnesses, give, direct, limit & appoint. The husband of the donee died in 1819 & the donee in 1840. After the death of the donee of the power a writing was found in the form of a letter, & sealed on the outside only, purporting to bear date Aug. 20, 1816, & to be made in execution of the power, & concluding thus, "as witness my hand & seal" with a signature purporting to be that of the donee & two other names

& proportions as husband & wife should by any deed in writing direct:—*Held*: not to be well executed by appointment by the will of the husband,

with a written indorsement thereon made by the wife after his death expressing her approbation. Nor would it have been better if the

wife had ratified it at the time of the execution, it being revocable by the husband during his life.—*BUSHELL v. BUSHELL* (1803), 1 Sch. & Lef. 96.—*IR.*

**Sect. 3.—Requisites of valid execution: Sub-sect. 3, A., B. & C. (a), (b) & (c); sub-sect. 4.]**

in other handwriting, but with no memorandum of attestation. On a reference to the master 1847, as to the form & manner of the execution of this paper, no evidence could be produced but such as was afforded by the document:—*Held*: the document was not shown to be a due execution of the power.—*BURNHAM v. BENNETT* (1847), 1 De G. & Sm. 513; 63 E. R. 1172.

*Annotations*:—*Appl. Re Illingworth, Bevir v. Armstrong*, [1909] 2 Ch. 297. *Reid. Cogan v. Duffield* (1876) 34 L. T. 593.

**235. ————.]—Power to appoint by will "to be signed & published by testator in the presence of & attested by three or more credible witnesses."**

Testator made & published his will, which was signed by him in the presence of & attested by the three witnesses; but the attestation took no notice of the publication:—*Held*: the power was well executed.—*Re WREY'S TRUST* (1850), 17 Sim. 201; 19 L. J. Ch. 183; 60 E. R. 1106.

**236. ————.]—By a marriage settlement, a freehold estate, held for lives, was limited, after the death of the husband, to the use of such persons as a married lady, notwithstanding coverture, should, by will, "to be by her signed & published in the presence of & attested by" two witnesses, appoint. The lady, by will, devised "the estate comprised in the said settlement," after her husband's death, to certain persons, & signed & sealed the will, which purported to be "signed & sealed" in the presence of "two witnesses":—*Held*: a will cannot be made without being published, it is not necessary to mention the word "published" in the attestation, & the power was validly executed.—*VINCENT v. SODOR & MAN (BP.)* (1851), 4 De G. & Sm. 294; 20 L. J. Ch. 433; 18 L. T. O. S. 3; 15 Jur. 365; 64 E. R. 839.**

*Annotations*:—*Reid. Johns v. Dickinson* (1849), 8 C. B. 934; *Morris v. Ithydydefed Colliery Co.* (1858), 3 H. & N. 885.

**237. ———— Signature.]—JONES v. DALE** (1728), 1 Barn. K. B. 130; 94 E. R. 91.

*Annotation*:—*Reid. Doe d. Spilsbury v. Burdett, Doe d. Spilsbury v. Skynner* (1839), 9 Ad. & El. 936.

**238. ————.]—SANDERS v. FRANKS,** No. 226, *ante*.

**239. ———— Publication.]—Limitation of stock to the use of such person as S. should by her last will, or any writing or appointment in nature of a will, to be by her signed & published in the presence of & attested by two or more credible witnesses, appoint. An appointment by will was thus made: "These my last bequests, signed by me this 4th Feb. 1812, S.; witness B. H. & J. H." Testatrix told each of the witnesses that that paper was her will:—*Held*: this was not a sufficient execution of the power.—*MOODIE v. REID* (1817), 7 Taunt. 355; 129 E. R. 142; *subsequent proceedings*, 2 Madd. 156.**

*Annotations*:—*Folld. Stanhope v. Keir* (1824), 2 L. J. O. S. Ch. 166. *Appl. Buller v. Burt* (1829), 6 Nev. & M. K. B. 281. *Distd. Lempiere v. Valpy* (1832), 5 Sim. 108; *Burdett v. Spilsbury* (1843), 10 Cl. & Fin. 340. *Reid. Allen v. Bradshaw* (1835), 1 Curt. 110; *Curtels v. Kenrick* (1838), 3 M. & W. 481; *Vincent v. Sodor & Man (BP.)* (1849), 8 C. B. 905.

**240. ————.]—Where a power was to be executed by a will, signed & published in the presence of, & attested by three witnesses:—*Held*: a will concluding with this declaration: "this is my last will & testament," & expressed to be signed by testatrix, in the presence of the three attesting witnesses, was not a good appointment, because the publication was not attested.—**

**STANHOPE v. KEIR** (1824), 2 Sim. & St. 37; 2 L. J. O. S. Ch. 166; 57 E. R. 259.

*Annotations*:—*Consol. Re Wrey's Trust* (1850), 17 Sim. 201. *Reid. Ward v. Swift* (1832), 1 Cr. & M. 171; *Allen v. Bradshaw* (1835), 1 Curt. 110; *Burdett v. Spilsbury*, *Skynner v. Spilsbury* (1843), 10 Cl. & Fin. 340.

**241. ————.]—A power over personal property was required to be executed by a will signed & published in the presence of, & attested by, two witnesses. The donee professed to exercise the power by a will which was signed by her, & she acknowledged her signature to the two witnesses, but did not sign it in their presence, & the witnesses at different times signed an attestation that testatrix had signed & delivered the will in their presence:—*Held*: though delivery was equivalent to publication, the power was not well exercised.—*SIMEON v. SIMEON* (1831), 4 Sim. 555; 58 E. R. 208.**

*Annotations*:—*Folld. Curtels v. Kenrick* (1838), 3 M. & W. 461. *Reid. Burdett v. Spilsbury*, *Skynner v. Spilsbury* (1843), 10 Cl. & Fin. 340; *Vincent v. Sodor & Man (BP.)* (1851), 4 De G. & Sm. 294.

**242. ————.]—A power in a feme covert, to dispose of personal property by will, "to be by her signed & published in the presence of, & to be attested by two or more credible witnesses":—*Held*: not to be sufficiently exercised by a writing purporting to be her will, & to be signed, but omitting to state that it was published by her in the presence of two witnesses; extrinsic evidence of the fact of publication not being admissible.—*ALLEN v. BRADSHAW* (1835), 1 Curt. 110; 163 E. R. 37.**

*Annotations*:—*Reid. Tatnall v. Hankey* (1838), 2 Moo. P. C. C. 342; *Burdett v. Spilsbury*, *Skynner v. Spilsbury* (1843), 10 Cl. & Fin. 340; *Barnes v. Vincent* (1845), 3 Notes of Cases, 628.

**243. ————.]—Delivery is equivalent to publication of a will.**

A married woman had power, under her marriage settlement, to appoint certain lands to uses by her last will & testament, "signed & published in the presence of, & attested by, three or more credible witnesses." The reversion in the same lands, subject to certain life estates, was also vested in her. She made a will, containing a devise of all her property real & personal but not referring to the power. The attestation stated the will to be signed, sealed, & delivered by testatrix in the presence of three witnesses, whose names were subscribed:—*Held*: (1) the will was a due execution of the power.

(2) This case falls within that last class referred to by ALEXANDER, C.B., in *Roake v. Denn*, No. 595, *post*. (*PARKER, B.*)—*CURTEIS v. KENRICK* (1838), 3 M. & W. 461; 1 Horn & H. 120; 7 L. J. Ex. 169; 150 E. R. 1226; *subsequent proceedings* (1840), 9 Sim. 443.

*Annotations*:—*As to* (1) *Reid. Ricketts v. Loftus* (1841), 4 Y. & C. Ex. 519; *Burdett v. Spilsbury*, *Skynner v. Spilsbury* (1843), 10 Cl. & Fin. 340. *As to* (2) *Appl. Sheldford v. Acland* (1856), 23 Beav. 10. *Reid. A.-G. v. Wilkinson* (1866), 14 W. R. 910.

**244. ————.]—Where an attestation clause is not required the mere circumstance that there is an attestation clause specifying certain things does not exclude evidence that other things were done besides those which are attested.**

A married woman having power under her marriage settlement to dispose of personal estate by a will to be signed & published by her in the presence of two or more credible witnesses, made her will in pursuance of the power & signed her name at the foot of it. Then followed the signatures of three witnesses, & below those signatures was a memorandum in the handwriting of testatrix, to the effect that the will had been signed & sealed by her in the presence of the above



three witnesses. Upon the examination of the witnesses after the death of testatrix two of them deposed to testatrix having signed the will in the presence of all the witnesses, but the third stated her belief that the will had been signed before the witnesses entered the room:—*Held*: (1) coupling the memorandum with the testimony of the witnesses there was sufficient evidence of signing in the presence of the witnesses, or two of them to satisfy the requisition of the power in that respect; (2) testatrix calling the witnesses to attest her will, sealing it, & declaring it to be her act, which circumstances were given in evidence, thereby published her will within the meaning of the power; (3) as no attestation clause was required by the power, the omission of any statement as to publication in the memorandum, considered as an attestation clause, was immaterial, therefore, under all the circumstances of the case that the will was a due execution of the power.

(4) Legacies of stock given by a married woman by her will, executed in pursuance of a power:—*Held*: notwithstanding the stock was misdescribed to be specific, & the costs of a suit instituted by the extrices, who were also the residuary legatees of testatrix for the purpose of having the trusts administered directed to be borne ratably by the specific legacies.—*WARREN v. POSTLETHWAITE* (1845), 2 Coll. 108; 14 L. J. Ch. 422; 5 L. T. O. S. 387; 9 Jur. 721; 63 E. R. 658.

*Annotations*:—*As to* (3) *Expld. Vincent v. Sodor & Man* (Bp.) (1849), 8 C. B. 905. *As to* (4) *Fold. Re Orford, Noville v. Cartwright, Cartwright v. Duc Del Balzo* (1895), 73 L. T. 681. *Reid. Moore v. Dickson* (1880), 29 W. R. 12.

**245.** ————]—A power was reserved to a married woman to dispose of personal property by her last will & testament in writing, to be by her duly made & published in the presence of, & to be attested by, two or more credible witnesses. The donee, by her will, without any reference to the power, or to the subject matter, bequeathed to her husband "all that she did & should or would thereafter be entitled to, or should possess"; concluding thus: "Signed by me, E. J., Feb. 24, 1831, in the presence of two witnesses," & then followed the signatures of the two witnesses:—*Held*: this was not a due execution of the power.—*JOHNS v. DICKINSON* (1849), 8 C. B. 934; 137 E. R. 775.

**246.** ————]—*Delivery*.—A power given to A. to appoint by any deed or instrument in writing, with or without power of revocation, to be by her signed, sealed, & delivered in the presence of two or more credible witnesses:—*Held*: to be well exercised by an appointment by the will of A., not expressed to be delivered, but stated in the attestation clause to be "signed, sealed, published, & acknowledged & declared to be her last will," in the presence of the attesting witnesses.—*SMITH v. ADKINS* (1872), L. R. 14 Eq. 402; 41 L. J. Ch. 628; 27 L. T. 90; 20 W. R. 717.

**247. Memorandum incorporated in will**—*Memorandum not duly executed*.—An appointment made under a power not duly executed was held to be incorporated into a will by a reference to it, the appointment having been found enclosed in a packet together with the will.—*In the Goods of BOSANQUET* (1850), 16 L. T. O. S. 6; 14 Jur. 904.

**248. Provisions of Wills Act, 1837 (c. 26)**—*Applicable to powers created after as well as before Act*.—A will executed with the formalities prescribed by above Act, is not a valid exercise of a power to appoint by any instrument in writing signed, sealed, & delivered in the presence of, & attested by, two or more witnesses.

If either before or since above Act, a power be created to appoint real estate by deed or will to

be respectively signed, sealed & delivered in the presence of & attested by three credible witnesses, it is clear that a will executed in manner prescribed by above Act, would be a good execution of the power (*LORD WESTBURY, C.*).—*TAYLOR v. MEADS* (1865), 4 De G. J. & Sm. 597; 5 New Rep. 348; 34 L. J. Ch. 203; 12 L. T. 6; 11 Jur. N. S. 166; 13 W. R. 394; 46 E. R. 1050, L. C.

*Annotations*:—*Consd. Re Barnett, Dawes v. Ixer*, [1908] 1 Ch. 402. *Mentd. Hall v. Waterhouse* (1865), 6 Giff. 64; *Troutbeck v. Boughhey* (1866), L. R. 2 Eq. 534; *Allen v. Walker* (1870), L. R. 6 Exch. 187; *Pride v. Bubb* (1871), 7 Ch. App. 64; *Bishop v. Wall* (1876), 3 Ch. D. 194; *Cooper v. Macdonald* (1877), 7 Ch. D. 288; *Symonds v. Hallett* (1883), 49 L. T. 380; *Re Armstrong, Ex p. Gilchrist* (1886), 17 Q. B. D. 167; *Re Curry, Gibson v. Way* (No. 2) (1887), 56 L. T. 80; *Johnson v. Johnson* (1887), 56 L. J. Ch. 326; *Re Drummond & Davis's Contract*, [1891] 1 Ch. 524; *Bates v. Kesterton*, [1896] 1 Ch. 159; *Carter v. Carter*, [1896] 1 Ch. 62; *Johnson v. Clark*, [1908] 1 Ch. 303; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578.

**249.** ————]—The provision of above Act, s. 10, making good the execution of powers by will if executed as provided by above Act with respect to wills, relates to powers created since as well as to powers created before above Act.—*HUBBARD v. LEES & PURDEN* (1866), L. R. 1 Exch. 255; 4 H. & C. 418; 35 L. J. Ex. 169; 14 L. T. 367; 30 J. P. 603; 12 Jur. N. S. 435; 14 W. R. 694.

**250.** ————]—*Must be complied with—Attestation*.—A power of appointment exercisable by deed or writing duly executed or by will is not validly exercised by testamentary documents executed by the donee, but attested by one witness only, & containing no reference to the power or to the property subject to it.—*Re EDMONSTONE, BEVAN v. EDMONSTONE* (1901), 49 W. R. 555; 45 Sol. Jo. 258.

— *Power exercised by "writing."*—*See Nos. 286–292, post.*

#### B. Power Exercisable "in writing" Exercised by Will.

*See Nos. 286–292, post.*

#### C. Conflict of Laws.

##### (a) In General.

*See CONFLICT OF LAWS*, Vol. XI., pp. 381, 382, 385, 386, Nos. 596–599, 622–626.

##### (b) Power Executed by Will made according to Foreign Law.

*See CONFLICT OF LAWS*, Vol. XI., pp. 383–385, Nos. 611–621.

##### (c) Power Executed by Will in English Form of Person Domiciled Abroad.

*See CONFLICT OF LAWS*, Vol. XI., pp. 382, 383, Nos. 600–610.

#### SUB-SECT. 4.—WHERE CONSENT TO EXERCISE REQUIRED.

**251. Necessity for consent required by terms of power**.—A. having a power of disposing of land with consent of trustees, devises the lands by her will, this being without the consent of the trustees, is void.—*HUTTON v. SIMPSON* (1716), 2 Vern. 722; 23 E. R. 1074; *sub nom. SIMPSON v. HORNBY*, Gilb. Ch. 120; *sub nom. SYMPSON v. HORNBY*, Prec. Ch. 452; *sub nom. SYMPSON v. HUTTON*, 2 Eq. Cas. Abr. 439, L. C.

*Annotations*:—*Mentd. Hopkins v. Hopkins* (1734), Cas. temp. Talb. 44; *Gulliver v. Wickott* (1745), 1 Wils. 105; *Potter v. Potter* (1750), 1 Ves. Sen. 437; *A.-G. v. Downing* (1769), Amb. 571; *Hodgson v. Ambrose* (1780), 1 Doug. K. B. 337; *White d. White v. Warner* (1781), 3 Doug.



**Sect. 3.—Requisites of valid execution: Sub-sects. 4 & 5. Sect. 4.]**

**K. B. 4; Curtis v. Curtis** (1789), 2 Bro. C. C. 620; **Pickering v. Stamford** (1797), 3 Ves. 332; **Pigott v. Waller** (1802), 7 Ves. 98; **Dyer v. Dyer** (1816), 1 Mer. 414; **R. v. Ringstead** (1839), 9 B. & C. 218; **Lett v. Randall**, **Lett v. Dormer** (1855), 3 Sm. & G. 83; **Thompson v. Watts** (1862), 8 Jur. N. S. 760; **Ralph v. Carriek** (1879), 11 Ch. D. 873; **Re Willatts**, **Willatts v. Artley**, [1905] 1 Ch. 378.

**252. — Effect of death of party whose consent required.]—**A feoffment to uses, with a proviso, that on payment of twelvepence & procuring the assent of the feoffees, the uses should cease, gives them an authority; & therefore if one of them die, performance to the surviving feoffees is not a revocation.—**ATWATERS v. BIRT** (1601), Cro. Eliz. 856; 78 E. R. 1082.

**Annotations:—Mentd.** **Lawrence v. Dodwell** (1698), 1 Ld. Raym. 438; **Roe d. Wilkinson v. Tranmarr** (1757), Willes, 682; **Bell v. Holtby** (1873), L. R. 15 Eq. 178.

**253. — Consent by power of attorney—Given before exercise of power.]—**Where in a marriage settlement made by tenant in tail, he settled the same to himself for life & to the children of the marriage in strict settlement: with a proviso, that it should be lawful for him by deed or instrument in writing attested by three witnesses, & to be enrolled with the consent in writing of certain trustees, to revoke the old & declare new uses:—**Held**: a deed of revocation executed by him & all the trustees in person except one, & the consent of that one being given by means of a general power of attorney before made by him to the settlor to consent to any such deed he might think proper to make, by virtue of which the settlor executed the deed for & in the name of such trustee, is bad, though properly attested & enrolled: & another deed of revocation properly executed & assented to, but not enrolled till after the settlor's death, was also void; for that every thing required to be done in the execution of such a power must be strictly complied with, & must be completed in the lifetime of the person by whom it is to be executed.—**HAWKINS v. KEMP** (1803), 3 East, 410; 102 E. R. 655.

**Annotations:—Revd.** **Wright v. Wakeford** (1812), 4 Taunt. 213; **Hallewell v. Morrell** (1840), 1 Scott, N. R. 309; **Cooke v. Crawford** (1842), 13 Sim. 91. **Mentd.** **R. v. Austrey** (1817), 6 M. & S. 319; **Laird v. Pym** (1840), H. & W. 11.

**254. — Though not required in express terms.]—**Settlor vested certain lands of which he was seised in fee simple, in three sets of trustees, upon certain trusts. The term vested in the first set was one of ninety-nine years, for securing a jointure of £200 *per annum* for wife of settlor; that vested in the second set was one of five hundred years, for raising £5,000; that vested in third set was one of six hundred years, for raising £2,000. The settlement also contained a clause enabling the settlor, his heirs or assigns, to release & discharge the premises from the payment of the annuity & sums of money, or any of them, by charging such annuity & such sums, or any of them, upon any other estate of competent value, with the consent & approbation of the respective trustees. Settlor, deft., by indentures of lease & release, expressed to be made between him & the three sets of trustees, conveyed to B., C. & their heirs certain premises to the uses, upon the trusts, etc., contained in the original settlement, to the intent that the premises conveyed by the latter indentures might be charged with the jointure, & the two sums of £5,000 & £2,000 in lieu of, & as a substitution for, such or so many of the premises contained in the settlement. These deeds of release & substitution were signed by the two trustees of the first term of ninety-nine years for securing the jointure, only by one of the

trustees of the term of five hundred years, for securing £5,000; & they were signed by neither of the trustees of the term of six hundred years, for raising £2,000:—**Held**: (1) the power of substitution of new premises for those charged with the respective sums of £2,000, & £5,000, & of causing a cesser of the terms of five hundred & six hundred years, was not well executed, in as much as the deeds were signed only by one trustee of the one term, & by neither trustee of the other; the premises contained in the original settlement were only released, & those substituted were only burdened as to the term of ninety-nine years, for securing the jointure, the deed as to this term having been signed by the two trustees; (2) where the nature & object of the power, & the circumstances of the case, point to a previous consent, there such previous consent is necessary, although not required by the terms of the power.—**GREENHAM v. GIBBESON** (1834), 10 Bing. 363; 4 Moo. & S. 198; 3 L. J. C. P. 128; 131 E. R. 944; *previous proceedings* (1832), 2 L. J. Ch. 36, L. C. **Annotation:—Generally,** **Mentd.** **Gilbey v. Rush**, [1906] 1 Ch. 11.

**255. — Consent to be by deed—Parol consent followed by deed.]—**A settlement contained a power which was to be executed by A., with the consent of B., "such consent to be signified by some deed to be duly executed by him, & not otherwise," to release certain estates from charges in favour of the younger children of A., & substitute others in their stead. The donee of the power executed it by deed, which was not, however, executed by B. till nine months after its execution by A., but evidence was produced that a draft of the deed, purporting to be an execution of the power by A., had been shown to B. before it was executed by A., & that B. had then given his parol consent thereto:—**Held**: the power had been validly executed.—**OFFEN v. HARMAN** (1859), 1 De G. F. & J. 253; 29 L. J. Ch. 307; 1 L. T. 315; 6 Jur. N. S. 487; 8 W. R. 129; 45 E. R. 355, L. JJ.

**256. — Consent of trustees.]—**Under a settlement, a general power of appointment over the settlement funds was, in the events which happened, conferred upon C., the tenant for life, who at the date of the settlement was a person of unsound mind not so found by inquisition. The power was to be exercised with the consent & concurrence of the settlement trustees, not being less than three, or of a majority of three of four trustees. C. having recovered & being no longer subject to lunacy jurisdiction, subsequently, in Apr. 1918, by deed made between himself of the one part & three of the four settlement trustees of the other part, with the consent & concurrence of the three trustees parties thereto testified by their execution of those presents, appointed that the settlement trustees should after his death stand possessed of the trust funds in trust for such person or persons & purposes as he should by will or codicil appoint. By a subsequent codicil referring to the power contained in the deed of Apr. 1918, C. appointed that the settlement trustees should pay & transfer the settlement funds as therein mentioned:—**Held**: on the true construction of the power, the trustees were not required to approve of the persons who were to benefit under the exercise of the power or of the extent to which they were to benefit, but the exercise of the power was merely made conditional upon the consent & concurrence therein of the trustees; & the deed of Apr. 1918, was a valid exercise of the power.—**Re DILKE, Re DILKE'S SETTLEMENT TRUSTS, VEREY v. DILKE**, [1921]

1 Ch. 34; 90 L. J. Ch. 89; 124 L. T. 229; 37 T. L. R. 13, C. A.

**SUB-SECT. 5.—COMPLIANCE WITH STATUTE OF FRAUDS.**

*See, now, Law of Property Act, 1925 (c. 20), s. 58.*

**257. Appointment of realty.]—**Power to appoint a use of land by deed or will. A will attested by two witnesses not a good appointment; because in such case "by a will" must be intended such a will as is proper to dispose of land. So, though the words are, "or other writing in nature of a will."—*LONGFORD v. EYRE* (1721), 1 P. Wms. 740; 24 E. R. 593, L. C.

**258. —.]—**Father tenant for life, & two sons, article to charge with a sum for younger children after father's death, as he by will duly executed should direct: he directs by will with two witnesses only: a good execution of the power, nothing passing from the father: otherwise if by owner of the estate.

Where the owner of an estate in land either in law or equity reserves to himself a power to dispose of it to such uses as he shall by will appoint, that must be such a will as within Stat. Frauds would be proper for a devise of land (*STRANGE, M.R.*).—*JONES v. CLOUGH* (1751), 2 Ves. Sen. 365; 28 E. R. 234.

**259. —.]—***MARLBOROUGH (DUKE) v. GODOLPHIN (LORD)*, No. 22, *ante*.

**260. Appointment of personality.]—***MARLBOROUGH (DUKE) v. GODOLPHIN (LORD)*, No. 22, *ante*.

**261. —.]—**A power to appoint personality amongst a class, may, if no formality be required, be executed by merely naming the parties to be benefited.—*BAILEY v. HUGHES* (1854), 19 Beav. 169; 52 E. R. 313.

**262. —.** *Appointment bad quoad realty.]—*Will made under a power, but not duly attested to pass real estate, a good execution of the power *quoad* the personality.—*DUFF v. DALZELL* (1782), 1 Bro. C. C. 147; 28 E. R. 1044, L. C.

**SECT. 4.—EXERCISE BY INSTRUMENTS SPECIFIED BY AUTHOR OF POWER—CONSTRUCTION OF TERMS.**

**263. By deed—Exercise by will.]—**Power to make provision for children by deed is well executed by will.—*SNEED v. SNEED* (1747), Amb. 64; 27 E. R. 37.

**264. —.]—**Common law power to appoint by deed executed in the presence of two witnesses, ill executed by a will. Otherwise, if the power had been to appoint by any writing or instrument, or other general term.—*DARLINGTON (EARL) v. PULTENEY* (1775), 1 Cowp. 260; 98 E. R. 1075.

*Annotations:—**Reid, Doe d. Nowell v. Roake* (1825), 2 Bing. 497; *Re Bolton Estates, Russell v. Meyrick*, [1903] 2 Ch. 461. *Mentd. Re Vardon's Trusts* (1884), 28 Ch. D. 124; *In the Goods of Crofton* (1897), 13 T. L. R. 374.

**265. —.** *Exercise by agreement in writing.]—*Husband & wife having a joint power of appoint-

ment by deed, over the wife's estate, agree in writing to sell it. *Semble*: a specific performance cannot be compelled against them.

Where the instrument is not executed according to the power, it is nothing but an agreement signed by a married woman, & as an agreement it is invalid (*PLUMER, M.R.*).—*MARTIN v. MITCHELL, MARTIN v. PEILE* (1820), 2 Jac. & W. 413; 37 E. R. 685.

*Annotations:—**Consd. Heather v. O'Neill* (1858), 2 De G. & J. 399. *Reid. Jones v. Davies* (1878), 8 Ch. D. 205. *Mentd. Laythorpe v. Bryant* (1836), 2 Hodg. 25; *Morgan v. Holford* (1852), 1 Sm. & G. 101; *Reuss v. Pickaley* (1866), L. R. 1 Exch. 342; *Re National Savings Bank Assocn., Hebb's Case* (1867), L. R. 4 Eq. 9.

**266. By will—Exercise by writing in nature of will.]—**If a man agree, upon his marriage, that his wife shall dispose of money by her will, a disposal by writing in the nature of a will is good.—*TYLLE v. PEIRCE* (1634), Cro. Car. 376; 79 E. R. 927.

*Annotation:—**Consd. Compton v. Collinson* (1790), 1 Hy. Bl. 334.

**267. —.** *Deed in nature of will—With covenant not to revoke.]—*Fund settled upon a married woman to her separate use for life, with a power of appointment by will. The husband & wife assign the fund, & the wife makes an appointment by deed in the nature of a will, which the husband & wife covenant she shall not revoke, to the trustee of the wife, for the actual value of the fund at the time of sale—it selling for an inferior sum on account of the claims on the title:—*Held*: the wife had only power to dispose of her life estate; testator intended she should dispose of the reversion by a revocable instrument, & interposed the trustee for that purpose, who failed in his duty by purchasing; & as the transaction was one & the consideration one entire sum, the ct. interfered by setting the whole aside.—*SCOTT v. DAVIS* (1838), 4 My. & Cr. 87; 2 Jur. 1057; 41 E. R. 34, L. C.

*Annotations:—**Consd. Re Ross's Trust, Ex p. Collins* (1851), 1 Sm. N. S. 196; *Baker v. Bradley* (1855), 7 De G. M. & G. 507.

**268. —.** *Exercise by nuncupative will.]—*One seised in fee of lands limits a term to trustees for a hundred years, upon such trust as he by deed or will [in writing] should appoint, & for want of such appointment to attend the inheritance; & afterwards by a nuncupative will gives all, all to S., & being a bastard dies without issue, this will not pass the trust of the term.—*THURXTON v. A.-G.* (1685), 1 Vern. 340; 23 E. R. 507, L. C.

*Annotations:—**Consd. Downe v. Morris* (1841), 3 Haro. 394. *Mentd. Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Edm. 177; *M'Hardy v. Hitchcock* (1818), 11 L. T. O. S. 170; *Barrow v. Wadkin* (1857), 24 Beav. 1.

**269. —.** *Exercise by instrument taking effect in donee's lifetime.]—*An express estate for life, with a power to dispose by will, does not give the absolute interest, so as to preclude the necessity of executing the power. An execution by will revoked by a subsequent conveyance upon a sale by the tenant for life, having obtained the legal estate; & that not being an execution within the intent of the power, the estate passed under a general residuary devise against the purchaser.—*REID v. SHERGOLD* (1805), 10 Ves. 370; 32 E. R. 888, L. C.

*Annotations:—**Apld. Re Parkin, Hill v. Schwarz.* [1892] 3 Ch. 510; *Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 799.

*LANEY v. DELANEY* (1912), 11 E. L. R. 512.—*CAN.*

*a. —.* *Appointor's death intestate.]—*Testator left his three nieces, M., E. & R., all his property, of every kind whatsoever during their joint & several lives, but subject to legacies,

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**PART IV. SECT. 4.**

**263.1. By deed—Exercise by will.]—***Re WALSH'S TRUSTS* (1878), 1 L. R. Ir. 320.—*IR.*

**266.1. By will—Exercise by writing in nature of will.]—**Where the donee of a power of appointment attempted  
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to make such appointment by a writing intended to be a will, but inoperative as such by reason of defective execution under Wills Act, s. 8, the instrument cannot be treated as a "deed or instrument in writing duly executed in the language of the indenture creating the power."—*DE-*

**Sect. 4.—Exercise by instruments specified by author of power—Construction of terms.]**

**270.** ————]—Where a sum of money is bequeathed in terms that give an absolute interest to the legatee, the mere addition by subsequent words of a power to dispose of the legacy by will during the continuance of a prior life interest in the money, does not by implication exclude the right of the legatee to dispose of it by deed *inter vivos* during the same period.—**COMBER v. GRAHAM** (1830), 1 Russ. & M. 450; 39 E. R. 173.

**271.** Instrument in nature of will—Compliance with formalities of will.]—**MARLBOROUGH (DUKE) v. GODOLPHIN (LORD)**, No. 22, *ante*.

**272.** “By any writing in nature of or purporting to be will or codicil”—Exercise by document not admitted to probate.]—A. had a power to appoint “by his will or any writing in the nature of or purporting to be his will, or any codicil thereto.” On his death, the third & fourth sheets of a will were alone discovered, & which were in the handwriting of & signed by A., & were attested by two witnesses; one of them contained, in words, a perfect appointment. Probate having been refused:—*Held*: this was not a valid execution of the power to appoint by writing “purporting to be a will.”—**GULLAN v. GROVE** (1858), 26 Beav. 64; 53 E. R. 820.

**273.** By deed, or other instrument—Exercise by will.]—**TURNER v. TURNER**, No. 448, *post*.

**274.** “By deed, instrument or will”—Exercise by any writing—If free from ambiguity.]—(1) A bequest of personal property to three trustees, A., B. & C., “upon trust to dispose of the same in whatever way A. shall, by any deed or deeds, instrument or instruments, or by his will, appoint; provided that no such deed, instrument or will shall be taken to be an execution of this power, unless the deed, instrument or will be executed after my decease”; & subject thereto, upon trust for A. for life:—*Held*: to be a power exercisable by an instrument in writing, whether a deed or not, if such instrument sufficiently referred to the power or to the property subject to it, or if it made a general gift & the appointor had no property of his own to which it could refer.

(2) A written order, directed to the trustees of the fund, would be a good exercise of this power.

(3) If the donee of the power was also the sole trustee of the fund a cheque upon a banker where the fund was lying would be a good appointment, if he had no money of his own there.

(4) So, also, would a letter from him referring to the power or to the property, & accompanying a gift of money, which it stated to be in pursuance of the power or out of the property.

(5) In the case of a series of appointments of this kind one letter stated only that the payment which it accompanied was made “in fulfilment of the known wishes” of the donor of the power:—*Held*: this was an ambiguity that might be explained by reference to other documents which showed that the gift was intended to be in exercise of the power.—**BRODRICK v. BROWN** (1855), 1 K. & J. 328; 69 E. R. 484.

*Annotations*:—As to (1) *Reid*. *Re Waterhouse*, *Waterhouse v. Ryley* (1907), 98 L. T. 30. *Generally*, *Reid*. *Hall v. Bromley* (1887), 35 Ch. D. 642.

**275.** ————]—Order to trustees.]—**BRODRICK v. BROWN**, No. 274, *ante*.

& added: “In leaving my property to my three nieces, as co-heirs, it is my wish that if my grand-nephew J. C. conducts himself to their satisfaction they shall leave him the property as I now leave it to them.”

J. C. died in the lifetime of two of the nieces, M. & E., who both died intestate:—*Held*: the power could only be exercised by will.—**MOORE v. FROLIOT** (1887), 19 L. R. Ir. 498.—IR.

**276.** ————]—Cheque drawn on bankers—Donee having no other fund at same bank.]—**BRODRICK v. BROWN**, No. 274, *ante*.

**277.** ————]—Letter referring to power or property—Accompanying gift of money.]—**BRODRICK v. BROWN**, No. 274, *ante*.

**278.** ————]—Testamentary documents not admitted to probate.]—*Re EDMONSTONE*, **BEVAN v. EDMONSTONE**, No. 250, *ante*.

**279.** ————]—Codicil to will.]—**BOWYER v. RYCROFT** (1844), 2 L. T. O. S. 514.

**280.** ————]—Appointment by deed referring to will—Appointment by will—Will executed before deed.]

—By a settlement certain real estate was conveyed to trustees, upon trust to sell, & to pay the proceeds of sale to such persons as A. should by deed or will appoint. By a second deed of settlement A. appointed that the trustees of the first settlement should stand possessed of the sale moneys in trust for such persons as she should by will appoint. By her will, made previous to the second settlement, A., “in pursuance of” the power contained in the first settlement, appointed the property comprised therein, describing it as real estate, to her three sons. *Semble*: the will was revoked by the second settlement:—*Held*: the will, if not revoked, did not operate as an execution of the power contained in the second settlement.—**THOMPSON v. SIMPSON** (1881), 50 L. J. Ch. 461; 44 L. T. 710.

**281.** “By deed or writing”—Exercise by will.]—**MOSS v. HARTER**, No. 460, *post*.

**282.** ————]—Observation of specified solemnities.]—Where lands are limited to such uses as A., by any deed or writing under his hand & seal, attested by two or more credible witnesses, shall direct; a will with a memorandum of attestation, that it was signed, only, in the presence of the subscribing witnesses, is not a good execution of the power; & the defect is not cured by calling one of the subscribing witnesses to prove that, in fact, the will was sealed, as well as signed, in their presence.—**DOE d. HITCHKISS v. PEARCE** (1815), 2 Marsh. 102; 6 Taunt. 402; 128 E. R. 1090.

*Annotations*:—*Apld*. *Allen v. Bradshaw* (1835), 1 Curt. 110. *Reid*. *Burdett v. Spilsbury*, *Skyner v. Spilsbury* (1843), 10 Cl. & Fin. 340.

**283.** ————]—An estate is settled to the use of such person, etc., as J. shall by any writing, etc., signed, sealed & delivered by him in the presence of two or more witnesses, direct, limit & appoint. J. may execute this power by his will, signed, sealed & delivered in the presence of three witnesses.—**DOE d. DELEGAL v. HOLLOWAY** (1816), 1 Stark. 431; 171 E. R. 520, N. P.

**284.** ————]—Testator had power, under his marriage settlement, to divide £2,000 between his children as he should direct “by any deed or writing, to be sealed & delivered in the presence of two witnesses.” By his will, which was “sealed, signed, published, & declared” in the presence of three witnesses, testator recited the power, & divided the £2,000 between his three children living at his death, & the survivor of them, excluding a deceased child, & then amongst their issue; & in default of issue of his three children, then to his nephews & nieces:—*Held*: the power was well executed amongst the children, & the survivor of them: but, beyond that, the residue to go as in default of appointment.—**DE LA HOOKE v. HILL** (1840), 4 Jur. 765.

**273 i.** By deed, or other instrument—Exercise by will.]—**MARJORIBANKS v. HOVENDEN** (1843), 6 I. Eq. R. 238; *Drury temp. Sug.* 11.—IR.

**b.** By deed instrument or will—Exercise by any writing.]—When a

**285.** ————]—A power to a married woman to appoint at any time or times during her life by any deed or instrument in writing, to be sealed & delivered in the presence of two or more witnesses, is well executed by an appointment by will before the Wills Act, 1837 (c. 26), sealed & delivered, as well as signed & published in the presence of three witnesses.—*ORANGE v. PICKFORD* (1858), 4 Drew. 363; 27 L. J. Ch. 808; 4 Jur. N. S. 649; 6 W. R. 738; 62 E. R. 140.  
*Annotation:—Reid. Taylor v. Meads* (1865), 34 L. J. Ch. 203.

**286.** ————]—**Effect of Wills Act, 1837 (c. 26).**—Where a power of appointment given to a *feme covert* by a settlement in 1781, was to be executed by "any deed or deeds, instrument or instruments in writing, to be sealed & delivered":—*Held*: her will of 1839, "sealed & delivered," purporting to execute the appointment, with a codicil of 1845, varying the disposition in the will, not sealed or delivered, were entitled to probate.—*GOLDIE v. GOLDIE* (1845), 4 Notes of Cases, 354.

**287.** ————]—(1) By a deed, made since above Act, certain trust funds were appointed to trustees, in trust for such person or persons, for such interest or interests, & chargeable with such sum or sums of money, & for such intents & purposes, & in such manner, in all respects, as the appointor should, by any deed or deeds, writing or writings, with or without power of revocation & new appointment, to be by her sealed & delivered in the presence of, & attested by, one witness or more, direct or appoint. The appointor afterwards made her will, which was duly executed & attested according to the above Act, & thereby bequeathed part of the trust funds:—*Held*: the will was a writing within the terms of the power.

(2) The mere fact that a party, having a power by deed to revoke & make a new appointment of trust funds, has attempted to make such revocation & new appointment by will, owing to her having forgotten the restrictions of the power, & being at the time unable to procure the deeds, is not a ground upon which equity will supply the formal execution required by the terms of the power, or give to the will the effect of a deed, or convert the trustees of the property into trustees for the persons who would be appointees if the will were a good execution of the power.—*BUCKELL v. BLENKHORN* (1846), 5 Hare, 131; 6 L. T. O. S. 412; 11 Jur. 866; 67 E. R. 857.

*Annotations:—As to (1) Apld. Collard v. Sampson* (1853), 16 Beav. 543. (See 16 Beav. p. 546, n.) *N.F. West v. Ray* (1854), Kay, 385. *Consd. Orange v. Pickford* (1858), 4 Jur. N. S. 649. *N.F. Taylor v. Meads* (1865), 4 De G. J. & Sm. 597. *Consd. Smith v. Adkins* (1872), L. R. 14 Eq. 402.

**288.** ————]—It is not so settled that a power to appoint "by deed or deeds writing or writings under hand & seal" can now be well exercised by an unsealed will, that a purchaser can be forced to take a title depending on that proposition.—*COLLARD v. SAMPSON* (1853), 4 De G. M. & G. 224; 1 Eq. Rep. 262; 22 L. J. Ch. 729; 21 L. T. O. S. 234; 17 Jur. 641; 43 E. R. 493, L. JJ.

*Annotations:—Apld. West v. Ray* (1854), Kay, 385; *Taylor v. Meads* (1865), 4 De G. J. & Sm. 597. *Consd. Mullings v. Trinder* (1870), L. R. 10 Eq. 449. *Reid. Orange v. Pickford* (1858), 4 Jur. N. S. 649.

**289.** ————]—Where a power of appointment is to be exercised by a writing under the hand & seal of the donee, it cannot be exercised

by a will executed with only the formalities required by Wills Act, 1837 (c. 26), because the essential requisition of the power is, that it should be exercised under hand & seal, & the statute applies to a power of which the essential requisition is, that it should be exercised by will, & the formalities are comparatively unimportant.

The reason that such a power would have been held duly exercised before the new Wills Act by a will under hand & seal was, because, under the general word "writing," it was indifferent by what kind of instrument the power was exercised, provided the essential solemnities were complied with.—*WEST v. RAY* (1854), Kay, 385; 2 Eq. Rep. 431; 23 L. J. Ch. 447; 23 L. T. O. S. 9; 2 W. R. 319; 69 E. R. 163.

*Annotations:—Apld. Taylor v. Meads* (1865), 4 De G. J. & Sm. 597. *Consd. Re Barnett, Dawes v. Ixer*, [1908] 1 Ch. 402. *Reid. Hubbard v. Lees* (1866), 4 H. & C. 418.

**290.** ————]—*TAYLOR v. MEADS*, No. 248, *ante*.

**291.** ————]—Under a settlement dated in 1848, a married woman had a power of appointment amongst her children exercisable by any deed or deeds, writing or writings, with or without power of revocation & new appointment, to be by her sealed & delivered in the presence of & attested by two or more credible witnesses, or by her last will or testament, "or any writing in the nature of or purporting to be a will or codicil." She signed a written document which was expressed to be her "last will," & which, if valid as a testamentary instrument, would have operated as an execution of the power. This document, having been insufficiently executed, was not admitted to probate:—*Held*: although the document might not be "in the nature of" a will, yet, as it clearly "purported to be" the will of the donee of the power it was a valid execution of the power.—*Re BROAD, SMITH v. DRAEGER*, [1901] 2 Ch. 86; 70 L. J. Ch. 601; 84 L. T. 577.

*Annotation:—N.F. Re Barnett, Dawes v. Ixer*, [1908] 1 Ch. 402.

**292.** ————]—B. assigned a policy of assurance on her own life to trustees by a settlement which contained a proviso that it should be lawful for her at any time during her life "by any deed or deeds writing or writings with or without power of revocation to be by her duly executed in the presence of two or more credible witnesses to revoke all any or either of the" provisions of the settlement, & to appoint other trusts in their place. She subsequently signed a document by which she did not in terms revoke any of the provisions of the settlement, but purported to make certain dispositions of (*inter alia*) the property the subject of the settlement in testamentary form. This document was signed by her in the presence of two credible witnesses, but, inasmuch as her signature was not placed at the foot or end thereof, it could not be admitted to probate as a will. The question now raised was whether the document operated as an exercise of the power of appointment:—*Held*: the document was a "writing in the nature of a will in exercise of a power" & by above Act, s. 1, a "will" within above Act; it was therefore an "appointment made by will" within the first sentence of above Act, s. 10, & inasmuch as it was not executed as a will in accordance with above Act, s. 9, it was invalid as an execution of the power.—*Re BARNETT, DAWES v. IXER*, [1908] 1 Ch. 402; 77 L. J. Ch. 267; 98 L. T. 346; 52 Sol. Jo. 224.

contract or will confers a power to appoint to certain funds by a writing to be executed in a manner prescribed, the power cannot be exercised by a

writing not so executed.—*CAMPBELL'S TRUSTEES v. CAMPBELL* (1903), 5 F. (Ct. of Sess.) 366; 40 Sc. L. 335; 10 S. L. T. 589.—*SCOT*.

*S.* ————]—*EWING'S TRUSTEES v. EWING*, [1909] S. C. 409; 46 Sc. L. R. 316; [1909] 1 S. L. T. 104.—*SCOT*.

**Sect. 4.—Exercise by instruments specified by author of power—Construction of terms. Sect. 5.]**

**293. — Joint power — Instructions by one to prepare deed.]—**A husband & wife being donees of a joint power to be exercised by deed or writing, the husband drew up written instructions for a solr. to prepare a proper deed. There was evidence from other sources of the wife's consent to the instructions, but none on the document itself; nor was there any written authority by the wife. The husband died before the draft could be prepared:—**Held:** as the power required a joint authority during the coverture, the instructions could not be made to operate as a valid execution.—**HAWKE v. HAWKE** (1877), 26 W. R. 93.

**294. By any instrument in writing — Exercise by will.]—****DARLINGTON (EARL) v. PULTENEY**, No. 264, *ante*.

**295. By writing—Exercise by letter — Stated formalities not observed.]—**Where, on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, & attested by two witnesses, & for default of appointment to the children of the marriage, & the trustees part with the trust fund upon the joint application of the husband & wife, by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children.

The ceremonies required by the settlement were introduced for the express purpose of protecting the wife against the influence of the husband, & are matters of substance, & not of form (**LEACH, M.R.**).—**HOPKINS v. MYALL** (1830), 2 Russ. & M. 86; 39 E. R. 327.

**Annotations:—****Reid**, *Thackwell v. Gardiner* (1851), 5 De G. & Sm. 58; *Fletcher v. Groom* (1864), 3 New Rep. 626.

**296. — Exercise by will — No attestation.]—**A testamentary instrument, signed but invalid for want of attestation, is not a good execution of a power to appoint by writing signed or by will.—**Re DALY'S SETTLEMENT** (1858), 25 Beav. 456; 27 L. J. Ch. 751; 31 L. T. O. S. 278; 4 Jur. N. S. 525; 6 W. R. 533; 53 E. R. 711.

**297. — Observance of stated formalities.]—****SMITH v. ADKINS**, No. 246, *ante*.

**298. Donee empowered to give "at her decease to whom she pleases" — Exercise of power by will.]—**Testator devised freeholds to his daughter H., a married woman, for her life; & as to certain land at K., which formed a portion of those freeholds, he directed that she or her husband, should she marry, should not have power to mortgage, sell, or give away during her life, but at her decease she might give it to whom she pleased:—**Held:** the power of appointment conferred upon H. as to the land at K. was exercisable by will only.—**Re FLOWER, EDMONDS v. EDMONDS** (1885), 55 L. J. Ch. 200; 53 L. T. 717; 34 W. R. 149.

**SECT. 5.—EXERCISE BY SUCCESSIVE INSTRUMENTS.**

**299. Validity of appointment by several instruments.]—****LEE'S CASE** (1571), 1 And. 67; 123 E. R. 357.

**Annotation:—****Reid**, *Digges' Case* (1600), 1 Co. Rep. 173 a.

**300. —.]—**£4,000 settled on marriage in trust after the decease of the husband & wife to pay among all & every the child & children other than an eldest or only son at such times & in such proportions as he, or she, or the survivor, should appoint by deed or will; for want of appointment,

among such child & children, other than, etc., equally to be divided; if but one, to that one; payable at twenty-one or marriage, or as soon after, as the life interest should drop; the shares of any dying before payable in the £4,000, or so much, as should not be appointed, to go to the survivors at the same time: There were four younger children: the marriage settlement of one recited, that she was entitled to £1,000 part of this fund; one-fourth of it was appointed to another on his marriage; & to a third £1,000 as her share of that portion; the fourth died above twenty-one before his father, who survived his wife, & died without any further appointment:—**Held:** £3,000 was well appointed; & the remainder vested in all equally according to the direction for want of appointment.

I am glad that I have been furnished with the determination in *Bristow v. Warde*, No. 146, *ante*; which is an express authority, that under such a power, whether in the ultimate distribution each child must be included for some share or not, the party may exercise his power by separate deeds, which do not give to each child a share (**LORD ALVANLEY, M.R.**).—**WILSON v. PIGGOTT** (1794), 2 Ves. 351; 30 E. R. 668.

**Annotations:—****Cond.** *Minchin v. Minchin* (1871), 19 W. R. 993. **Reid**, *Kemp v. Kemp* (1801), 5 Ves. 849; *Brodrick v. Brown* (1855), 1 K. & J. 328; *Bulteel v. Plummer* (1870), 6 Ch. App. 160. **Mentd.** *Doe d. Simpson v. Simpson* (1838), 5 Scott, 770; *Foster v. Cantley* (1855), 6 De G. M. & G. 55.

**301. —.]—**Property was settled, subject to an estate for life to the parents, to the use of all & every the child & children of the marriage, as the parents should by deed appoint, & in default, equally. There were nine children, & one-eighth was duly appointed to one of such children, who afterwards died. After the death of four of the other children, the remaining seven-eighths were appointed to the surviving four children:—**Held:** this appointment was good; & the property having been appointed by two deeds, formed no objection to the due execution of the power.—**COLSTON v. PEMBERTON** (1836), *Donnelly*, 19; 5 L. J. Ch. 181; 47 E. R. 199.

**302. —.]—**Testator empowered his exors. for the time being to advance to his nephew any sum or sums of money not exceeding £30,000. The exors. exercised the power to the extent of £20,000:—**Held:** they were not precluded thereby from making a further advance to the nephew.—**WEBSTER v. BODDINGTON** (1848), 16 Sim. 177; 60 E. R. 840.

**303. —.]—**Where a father was, by his marriage settlement, empowered to divide at discretion the funds in which the children had an expectant interest:—**Held:** (1) he could not deal or negotiate with them in executing the power.

Here the child was not of full age. She was only eighteen & she had to look to the parent, & to that parent only for protection. . . . According to any system of law that can be administered in any civilised country, it could not be admitted that a parent, without the fullest evidence of such being the intention, & the circumstances of the case warranting the intention & warranting the transaction, should become the purchaser of an unascertained interest in the child (**LORD HATHERLY, C.**).

(2) Releases or discharges granted by the children to the father, in consideration of money payments made by him, formed no bar to their subsequent claims under the settlement, such releases or discharges notwithstanding.

(3) The donee of a power may execute it without referring to it, & without taking the slightest

Testator by his will gave all his real & personal estate to trustees upon trust to sell & convert & to invest the proceeds in certain investments which did not include mtgs. of leaseholds, & he directed them to pay the income of the trust estate to his wife for life, & after her death to hold the trust estate upon trust for such of his nine children as his wife should by will or codicil appoint, & in default of appointment upon trust to divide the same among his nine children in equal shares. Testator's widow by her will, in exercise of the power given her by testator's will, appointed certain sums to her daughters in respect of their one-ninth shares, & declared that the trustees of testator's will might invest the moneys subject to the trusts of that will in certain securities which were not within the range of investments thereby



**Sect. 5.—Exercise by successive instruments. Sect. 6: Sub-sects. 1 & 2.]**

authorised, including mtges. of leaseholds. By a codicil to her will the widow, in further exercise of the power, declared that the trustees of testator's will should hold two of the one-ninth shares of the trust estate upon trusts in favour of certain objects of the power, & subject to a slight modification in the amounts of the sums appointed by her will, made by a second codicil, she allowed the bulk of the trust estate to pass under testator's will in default of appointment. After her death the trustees of testator's will invested part of the trust estate upon mtge. of certain leasehold premises:—*Held*: the trustees of testator's will had no power to invest upon leasehold security funds representing shares subject to the trusts of the will passing in default of appointment.—*Re FALCONER'S TRUSTS, Re FALCONER'S TRUSTS, PROPERTY & ESTATES CO., LTD. v. FROST*, [1908] 1 Ch. 410; 77 L. J. Ch. 303; 98 L. T. 536.

**SECT. 6.—CONTINGENT POWERS.**

**SUB-SECT. 1.—POWERS TO BE EXERCISED ON A CONTINGENCY.**

**313. Validity of exercise before contingency arises.]**—Devise of testator's estates to trustees, for the use of his daughter, for life, remainder to the use of her son in fee, but in case he should die without issue in the lifetime of the daughter, & there should be no other issue of her body then living, then to the use of such persons as she should by deed or will appoint; & there being no other issue, the mother & son executed an appointment & conveyance to A. in fee:—*Held*: the power of appointment was well executed, notwithstanding the execution by the mother, in the lifetime of her son.—*DALBY v. PULLEN* (1824), 2 Bing. 144; 9 Moore, C. P. 300; 2 L. J. O. S. C. P. 121; 130 E. R. 261.

*Annotations*:—*Reid. Logan v. Bell* (1845), 1 C. B. 872; *Hanbury v. Bateman*, [1920] 1 Ch. 313. *Mentl. Casamajor v. Strode* (1833), 2 My. & K. 706; *Croome v. Lediard* (1834), 2 My. & K. 251.

**314. —.]**—(1) It is no objection to a power that the party exercising it has a fee or other interest in the land.

(2) By a deed of settlement preparatory to the marriage of A. & B., lands were conveyed to C. & his heirs, to the use of B. & her heirs, until the marriage should be solemnised; & from & immediately after the solemnisation thereof, to the use of such person or persons, for such estate or estates, & upon such trusts, etc., as B., notwithstanding coverture, & whether covert or sole, & without consent, etc., should, by any deed or writing under seal, or by her last will, or any writing in the nature of, or purporting to be, her last will, or any codicil thereto, limit, direct, or appoint, etc.; & in default of & until such appointment, to the use of C., during the joint lives of A. & B.; & after the decease of either of them, to the use of B., her heirs & assigns, for ever. After the execution of the settlement, & before the marriage, B., by a codicil to a will made by

her some months previously, in terms referring to the power contained in the settlement, devised the lands in trust for the children of the marriage, & in default or failure of children, in trust for A. for life:—*Held*: this was a good execution of the power, though made before the marriage, & notwithstanding the event upon which it was to take effect, viz. the marriage of A. & B. was contingent.—*LOGAN v. BELL* (1845), 1 C. B. 872; 14 L. J. C. P. 276; 5 L. T. O. S. 346; 135 E. R. 786.

**315. —.]**—A power to operate upon a contingent event, like that of a death, may be exercised in the lifetime of the party upon whose death alone that contingency can take effect: otherwise you might never exercise it at all (*LORD ST. LEONARDS, C.*).—*EDEN v. WILSON* (1852), 4 H. L. Cas. 257; 10 E. R. 461; *affg. sub nom. WILSON v. EDEN* (1850), 12 Beav. 454.

*Annotations*:—*Consd. Sheffield v. Coventry* (1852), 2 De G. M. & G. 551; *Hanbury v. Bateman*, [1920] 1 Ch. 313. *Mentl. Monypenny v. Dering* (1850), 7 Hare, 568; *Abbott v. Middleton, Ricketts v. Carpenter* (1853), 7 H. L. Cas. 68; *Swift v. Swift* (1859), 1 De G. F. & J. 160; *Stanley v. Stanley* (1862), 2 John. & H. 491; *Prescott v. Barker* (1874), 9 Ch. App. 174; *Butler v. Butler* (1884), 28 Ch. D. 66.

**316. —.]**—An appointment to an object of a power for life with remainder to his next of kin will take effect if at the death of the tenant for life his next of kin are objects of the power.—*Re COULMAN, MUNBY v. ROSS* (1885), 30 Ch. D. 186; 55 L. J. Ch. 34; 53 L. T. 560.

*Annotation*:—*Reid. Re Witty, Wright v. Robinson*, [1913] 2 Ch. 666.

**317. —.]**—A power given to a designated person for his own benefit, & expressed to be dependent on a contingency, is, as a rule, capable of being exercised either before or after the happening of the contingency, the ct. being inclined to treat the contingency as a condition of the operation of the appointment rather than as a condition of the exercise of the power.—*HANBURY v. BATEMAN*, [1920] 1 Ch. 313; 89 L. J. Ch. 134; 122 L. T. 765.

**318. Covenant to exercise on happening of contingency—Equivalent to equitable execution.]**—The donee of a power of appointment, to be exercised on attaining twenty-five years of age, & "not before," married at twenty-three; & by her marriage settlement covenanted that she should appoint when of the prescribed age. The donee attained the age of twenty-five years, but died without having executed any appointment:—*Held*: the covenant was in equity a valid execution of the power.—*JOHNSON v. TOUCHET* (1867), 37 L. J. Ch. 25; 17 L. T. 191; 16 W. R. 71.

**Contingency void for remoteness.]**—*See PERPETUITIES*, pp. 108, 109, Nos. 416–421, *ante*.

**SUB-SECT. 2.—POWERS TO ARISE ON A CONTINGENCY.**

**319. Necessity that event should happen or condition be fulfilled.]**—Testator bequeathed certain funds in trust for his wife, during her widowhood, & after giving her a power to appoint them by deed or will, provided she did not marry again, directed, that, upon her second marriage,

**PART IV. SECT. 6, SUB-SECT. 1.**

**313 i. Validity of exercise before contingency.]**—When a power is given to a designated person, to be executed upon a contingency, it may be executed before the happening of the contingency, & the execution of it will be valid on the subsequent happening of the event; *a fortiori* where the happen-

ing of the contingency cannot be ascertained, till the moment of the donee's death. A clause in the instrument executing the power reciting incorrectly that the contingency has already happened will not invalidate the execution.—*WANDSFORDE v. CARRICK* (1871), 5 I. R. Eq. 486.—*IR.*

**PART IV. SECT. 6, SUB-SECT. 2.**

**319 i. Necessity that event should happen or condition be fulfilled.]**—*CHRISTIE v. SAUNDERS* (1856), 5 Gr. 464.—*CAN.*

**319 ii. —.]**—*CAULFIELD v. MA-GUIRE* (1845), 2 Jo. & Lat. 141.—*IR.*

**319 iii. —.]**—*Re VERSCHOYLE'S TRUSTS* (1879), 3 L. R. Ir. 43.—*IR.*



or her death without having exercised her power, they should sink into the general residue of his estate; the widow executed a deed, purporting to be an appointment of the property to the residuary legatees in the same proportions in which they would have been entitled to it under the residuary estate; & she & they concurred in assigning the funds upon trust for the residuary legatees: the ct. refused to act upon the appointment & assignment during the widow's life.

While [the widow] lives it cannot be known whether she has any such power to exercise: her power being suspended till her death no alleged exercise of it can be recognised by the ct. during her life (*PLUMER, M.R.*).—*GOLDSMID v. GOLDSMID* (1823), *Turn. & R.* 445; 37 *E. R.* 1172.

320. —[.]—By a Scottish settlement a sum of stock was settled on the husband & wife for their lives, & after the death of the survivor on their children, & failing children, on the nearest heirs of the wife; & she was empowered, at any time in her life, & even on deathbed, to bequeath or dispose of the stock to any person & in any manner she might think proper:—*Held*: the power was not intended to be available, except in the event of there being a failure of children of the marriage.—*PEDDIE v. PEDDIE* (1833), 6 *Sim.* 78; 58 *E. R.* 524.

321. —[.]—Testator gave a fund to trustees for his daughter for life, & after her death, in trust to transfer it to his niece, her exors., etc., in case she should be then unmarried; but in case she should be then married, in trust to transfer the same to such persons as she, whether sole or married, should, by deed or will, appoint, & in default of appointment, in trust to pay the dividends to her, for her separate use, for life, & subject to the trusts aforesaid, the capital to be in trust for her, her exors., etc. The niece married after testator's death; & during her coverture, & in the lifetime of testator's daughter, she made a will purporting to be an execution of the power given to her by testator:—*Held*: the will was a good exercise of the power.—*ASHFORD v. CAPE* (1836), 7 *Sim.* 641; 5 *L. J. Ch.* 109; 58 *E. R.* 984.

322. —[.]—Stock was transferred to trustees in trust for such persons as A. & his wife should jointly appoint; & in default of appointment, in trust, during their joint lives, for the separate use of the wife; & in case A. should die first, in trust for his wife absolutely; but if she should die first, in trust for him for life, & subject thereto, in trust for such persons as his wife, notwithstanding her coverture, should by will appoint, & in default of such appointment, in trust for her next of kin. The wife, in A.'s lifetime, made a will in exercise of the last-mentioned power. A. died before her. On her death, her will was admitted to probate, but the probate was limited to the property which she had power to dispose of:—*Held*: the will was inoperative.—*PRICE v. PARKER* (1848), 16 *Sim.* 198; 17 *L. J. Ch.* 398; 60 *E. R.* 849.

*Annotations*:—*Distd. Thomas v. Jones* (1862), 2 *John. & H.* 475. *Reid. Trimmell v. Fell* (1853), 16 *Beav.* 537; *Willcock v. Noble* (1875), *L. R.* 7 *H. L.* 580. *Mentd. In the Goods of Smith* (1858), 27 *L. J. P. & M.* 39; *Noble v. Phelps* (1871), *L. R.* 2 *P. & D.* 276.

323. —[.]—T. B. devised his G. estates to trustees for the use of his nephew in strict settlement. The remainder to the use of T. R. B. & his wife for their lives; & after the decease of the survivor to such son as the survivor should appoint in tail male. Remainder to W. L. & his wife with the like limitations. Remainder "to the use of L. W. or such person as she shall first intermarry with, if any, if before she attain the

age of twenty-one by & with the consent & approbation of the trustees; & which person shall also previously make a competent settlement upon her to the like approbation of the trustees, for their lives or the life of the survivor," with the like power of appointment and limitations as in the case of T. R. B. & his wife, and W. L. & his wife. Testator devised other estates upon the same trusts, & in the like terms as the G. estates. He then charged all except the G. estates with two rentcharges. One for the use of W. L. & his wife for life, & upon the death of the survivor to the use of such son as the survivor should appoint: & for default of such issue, etc., or in case W. L. or his wife should inherit the estate, then the rentcharge to sink into the estate. The other "for the use of L. W. & her assigns until she shall marry, under & with the restriction above-mentioned, or for & during the term of her natural life," & when & so soon as she shall marry as aforesaid, then upon such trusts with the like powers, for such estates & interests, & subject to the same contingencies, etc., as before declared concerning the rentcharge devised to W. L. & his wife. L. W. married under age without the consent of trustees, & had issue. After the death of her first husband she, being then of full age, married again, & then appointed the rentcharge after her death to her eldest son by her first husband:—*Held*: the power of appointment of the rentcharge devised as above, vested in her; & being well exercised conferred a valid title upon the appointee.—*BEAUMONT v. SQUIRE* (1852), 17 *Q. B.* 905; 21 *L. J. Q. B.* 123; 19 *L. T. O. S.* 44; 16 *Jur.* 591; 117 *E. R.* 1528.

324. —[.]—Trust funds were limited to a married woman absolutely if she survived her husband, but, if she predeceased him, she was to have a general power of appointment by will. The wife survived her husband:—*Held*: the power had not arisen, & therefore, her will, made during the coverture, was inoperative.—*TRIMMELL v. FELL* (1853), 16 *Beav.* 537; 22 *L. J. Ch.* 954; 21 *L. T. O. S.* 29; 51 *E. R.* 887.

*Annotations*:—*Reid. Jones v. Southall* (1861), 30 *Beav.* 187; *Willcock v. Noble* (1875), *L. R.* 7 *H. L.* 580. *Mentd. In the Goods of Smith* (1858), 27 *L. J. P. & M.* 39.

325. —[.]—Testator, after making specific devises of his property real & personal, thus provided for the disposal of his residuary estate: "As to all the residue, etc., not hereinbefore specifically bequeathed, I give, etc., to my exors., their heirs, etc., upon the trusts following," to pay debts & legacies, to permit his nephew, C., to receive the rents for life, & "after the death of my nephew, provided he shall leave any child or children him surviving, etc., I direct that my exors., etc., shall stand seised of my residuary estate upon trust for such persons & for such ends & purposes as my nephew shall by his last will direct, appoint, or devise; but if my said nephew shall die without leaving any child or children him surviving, etc., & my nephew shall not previous to his decease make any such appointment as aforesaid, then my exors. shall stand possessed of my residuary estate, etc., upon trust for B., Y. & R., their heirs, etc." The nephew died without ever having had a child, leaving a will in which he recited his uncle's will, & declaring himself thereby entitled to appoint, he appointed the residue to E. & J.:—*Held*: the nephew never having had a child, the condition on which the power to appoint was founded had not occurred, & the power to appoint never came into existence; the nephew's appointment was therefore invalid, & the residuary estate went, under the uncle's

**Sect. 6.—Contingent powers: Sub-sect. 2, 3 & 4.]**

will, to B., Y. & R.—*EARLE v. BARKER* (1865), 11 H. L. Cas. 280; 13 L. T. 29; 11 E. R. 1340, H. L.; *affg. sub nom. BARKER v. YOUNG* (1864), 33 Beav. 353.

**326.** —[—A married woman having separate estate, & having under her marriage settlement a power of appointment in the event of her dying in the lifetime of her husband, made a will with the assent of her husband, & survived her husband:—*Held*: though the will passed the separate estate, it did not execute the power of appointment, nor pass property acquired by the wife after the death of her husband.—*NOBLE v. WILLOCK* (1873), 8 Ch. App. 778; 42 L. J. Ch. 681; 29 L. T. 194; 21 W. R. 711; *affd. sub nom. WILLOCK v. NOBLE* (1875), L. R. 7 H. L. 580, H. L.

*Annotations*:—*Reid. Parkinson v. Townsend & Townsend* (1875), 44 L. J. P. & M. 32; *Re Anstis, Chotwynd v. Morgan, Morgan v. Chotwynd* (1886), 54 L. T. 742. *Mentd. Re Wilson's Estate, Monteath v. Campbell* (1878), 26 W. R. 848; *Re Price, Stafford v. Stafford* (1885), 28 Ch. D. 709; *Smart v. Tranter* (1888), 40 Ch. D. 165; *Re Smith, Bilke v. Roper* (1890), 45 Ch. D. 632; *Re Bowen, James v. James*, [1892] 2 Ch. 291; *Re Atkinson, Waller v. Atkinson*, [1899] 2 Ch. 1.

**327.** —[—By a settlement executed on a marriage in 1863 the wife's property was limited, in default of issue, upon trust for her absolutely if she survived her husband, but, if she should die in his lifetime, then upon such trusts as she should by will appoint, & in default of appointment, for her next of kin. The wife, during coverture, made a will dated in 1886, by which, if she should die in her husband's lifetime, she appointed the fund to trustees upon certain trusts, & she bequeathed to them upon the same trusts all the property she could dispose of by will. She survived her husband, & died without republishing her will, & without having had any issue:—*Held*: the will did not dispose of the settled property.—*Re CUNO, MANSFIELD v. MANSFIELD* (1889), 43 Ch. D. 12; 62 L. T. 15, C. A.

*Annotations*:—*Mentd. Re Drummond & Davie's Contract*, [1891] 1 Ch. 524; *St. Michael Bassishaw (Rector, etc.) v. Parishioners of Same*, [1893] P. 233; *Lee v. Hawtry*, [1898] P. 63; *Banister v. Thompson*, [1908] P. 362; *R. v. Dibdin*, [1910] P. 57.

**328.** — **Condition only partly fulfilled.**—[Testator empowered his widow, if his children should conduct themselves to her satisfaction up to the age of twenty-five, & marry with her approbation, but not otherwise, to give them £1,000 each, for the purpose of setting out in the world:—*Held*: she had a discretionary power which she might exercise after a child attained twenty-five, though unmarried.—*DAVIDSON v. ROOK* (1856), 22 Beav. 206; 52 E. R. 1087.

**Contingency void for remoteness.**—[*See* *PERPETUITIES*, pp. 109, 110, Nos. 422–427, *ante*.

### SUB-SECT. 3.—EXERCISE OF POWERS BY CONTINGENT PERSONS.

**329. Special powers.—To survivor of two persons**—[**Validity of exercise by deed of both.**—*MAC-ADAM v. LOGAN*, No. 197, *ante*.

**330.** — **Exercise in joint lifetime by one ultimately proving survivor.**—[Devise of all his real & personal estate wheresoever & whatsoever equally to his sisters M. & E., or to the survivor of them, & to be disposed of by the survivor as she may by will devise:—*Held*: the sisters did not take as tenants in common in fee; nor supposing them to be tenants in common for life with a contingent remainder in fee to the

survivor, or with a power to the survivor to dispose of the fee by will, was it such a contingent remainder as was devisable by a will made by one in the lifetime of both the sisters, or was the power well executed by such will.—*DOE d. CALKIN v. TOMKINSON* (1813), 2 M. & S. 165; 105 E. R. 344.

*Annotations*:—*Distd. Thomas v. Jones* (1862), 1 De G. J. & Sm. 63. *Reid. Milman v. Lano* (1901), 85 L. T. 180.

**331.** —[—Where a power to appoint among children was in default of any joint appointment by the husband & wife to be exercised by the survivor after the death of the other:—*Held*: a will made during their joint lives by the one who survived did not speak at his death, so as to be an execution of the power.—*CAVE v. CAVE* (1856), 8 De G. M. & G. 131; 2 Jur. N. S. 295; 44 E. R. 339, L. JJ.

*Annotations*:—*Apld. Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch. D. 75; *Re Illingworth, Bevir v. Armstrong*, [1909] 2 Ch. 297.

**332.** —[—A sum of money was settled, after the death of A. & B., in trust for their children according as A. & B. during their joint lives, by deed, or as the survivor, by deed or will, should appoint, & in default of appointment for the children absolutely. During the joint lives of the parties A. made a will whereby, after certain bequests, he gave all the real estate & residue of the personal estate of or to which he was or should at his decease be possessed or entitled, or have power to dispose of by will to his wife; but in case, which happened, she should die in his lifetime then upon trust for his son for life, remainder for testator's grandson, an infant; & if his grandson should die under twenty-one without issue, then for a stranger to the power, with executory devises over. Upon the question being raised as to whether the will operated as a valid exercise of the power of appointment contained in the settlement:—*Held*: the power being special & given to the survivor of two persons, was not well exercised by a will made during the lives of both the persons by that individual who afterwards proved to be the survivor; & even had testator at the date of his will been actually survivor, the words of the will were not sufficient to include property over which he had only a special power of appointment.—*Re MOIR'S SETTLEMENT TRUSTS* (1882), 46 L. T. 723.

**333.** — **Effect of codicil confirming appointment.**—[An ante-nuptial settlement of personal estate gave the survivor of husband & wife, in the events which happened, "after the decease of the other of them" a testamentary power of appointment among their children. During the life of the wife the husband made a will containing a residuary devise & bequest in favour of his children of all property he "might be possessed of or over which he might have power of bequest or disposal" at the time of his death. After the death of his wife the husband made a codicil confirming his will:—*Held*: though he could not execute the power in his wife's lifetime, the effect of the codicil was to reiterate the words of the will & the power had been duly executed.—*Re BLACKBURN, SMILES v. BLACKBURN* (1889), 43 Ch. D. 75; 59 L. J. Ch. 208; 38 W. R. 140.

*Annotations*:—*Reid. Re Boyd, Nield v. Boyd* (1890), 63 L. T. 92. *Mentd. Re Hardyman, Teesdale v. McOintock*, [1925] Ch. 287.

**334.** — **Husband & wife.—When survivorship commences.**—[Testator gave his residuary estate after the death of his son or in case he should die leaving a widow, then as to one-half

from the death of his son, & as to the other half from the death of such widow, upon trust for such of the children of the marriage as the son & his wife should jointly appoint, & in default of any such appointment as the survivor of the son & his wife should appoint & in default for the children equally. Testator died in 1872 & his son in 1899 married & there were two children of the marriage. The son & his wife did not exercise their joint power of appointment & the wife having died in 1922 the son desired to exercise the power of appointment given by testator to the survivor of the son & his wife. On the question whether the son could at the present time validly exercise the power, or whether he was a contingent person with a limited power of appointment which could not be exercised until it was ascertained whether he was the survivor of himself & any wife whom he might thereafter marry:—*Held*: the son at the present time was not a contingent person within the meaning of the rule but the person to whom the power of appointment had been given, otherwise the son could never exercise the power since he might always marry again & therefore not be the survivor of himself & his wife; as the husband & wife of the first marriage had power to appoint the whole of the fund to the children of the first marriage to the exclusion of any other children, & the wife if she had been the survivor would have had the same power the son must be able to appoint in the same manner; "survivor" meant the survivor of any marriage that the son might enter into & so long as he was the survivor & before he married again he was not a contingent person & could therefore exercise the power.—*Re MILLER, MILLER v. WALCOTT* (1923), 129 L. T. 666; 67 Sol. Jo. 767.

**335. ——— Execution by anticipation—Power not created at time of execution.**—(1) H. H. the younger, by his will dated in 1884 & confirmed by a codicil dated in Mar. 1893, gave "all the residue of the property over which at the time of my death I shall have a disposing power" to trustees upon trust for sale, conversion, & investment, & directed them to pay the yearly income arising from his trust estate to his wife for life or widowhood, & subject to the trust aforesaid to stand possessed of his trust estate upon trusts for his children. H. H. the elder, the father of H. H. the younger, by his will, dated in June 1893, empowered each child of his by his or her will, or any codicil thereto, to appoint in favour of his or her wife or husband the whole or any part of the yearly income of his or her share of his, testator's, residuary estate for the life of such wife or husband, & directed that a sum of £4,000 thereby directed to be raised should be held upon the same or the like trusts, & subject to the same or the like powers & provisions as were thereinbefore declared with respect to the share of his son H. H. the younger in the residue. H. H. the elder died in 1895, & H. H. the younger in 1899 leaving a widow & three children. H. H. the younger had no power of appointment exercisable in favour of his widow other than the power contained in the will of his father:—*Held*: the language of the will of H. H. the younger was not sufficient to show an intention to execute a non-existent special power, & accordingly his will did not operate as an appointment under the power given him by the will of his father.

*Qu.*: whether it is possible, as a matter of law, to execute by anticipation a special power not created until after the alleged execution.

(2) The intention to exercise a special power must be gathered from the whole will (*ROMER, L.J.*).—*Re HAYES, TURNBULL v. HAYES*, [1901] 2

Ch. 529; 70 L. J. Ch. 770; 85 L. T. 85; 49 W. R. 659; 17 T. L. R. 740; 45 Sol. Jo. 722, C. A.

*Annotations*:—*As to* (1) *Distd. Re Waterhouse, Waterhouse v. Hyley* (1907), 98 L. T. 30. *Reid. Re Walpole's Marriage Settlement, Thomson v. Walpole*, [1903] 1 Ch. 928; *Re Paul's Settlement, Trusts, Paul v. Nelson*, [1920] 1 Ch. 99. *As to* (2) *Consd. Re Weston's Settlement, Neeves v. Weston*, [1906] 2 Ch. 620.

**336. General power—To two persons & survivor of them—Exercise in joint lifetime—By one ultimately proving survivor.**—*THOMAS v. JONES*, No. 461, *post*.

#### SUB-SECT. 4.—EXERCISE OF DETERMINABLE POWERS.

**337. Necessity for exercise before determining event.**—*PARSONS v. PARSONS* (1744), 9 Mod. Rep. 464; 88 E. R. 577, L. C.

*Annotations*:—*Cor. ad. Stroud v. Norman* (1854), Kay, 313. *Distd. Haswell v. Haswell* (1860), 28 Beav. 26. *Reid. Wickham v. Wing* (1865), 2 Hem. & M. 436; *Re Stone's Estate* (1869), 18 W. R. 222; *Re Master's Settlement, Master v. Master*, [1911] 1 Ch. 321.

**338. ———**—A trust term, created by a marriage settlement, to raise a sum of money on the decease of the survivor of the husband & wife in case there should be no issue of the marriage living at her death & to be paid as the wife, at any time or times during her coverture, & notwithstanding the same, by any deed or writing, etc., should appoint or devise. The power cannot be exercised during widowhood or a second marriage.—*HORSEMAN v. ABBEY* (1819), 1 Jac. & W. 381; 37 E. R. 420.

*Annotations*:—*Apld. Morris v. Howes* (1846), 16 L. J. Ch. 121. *Reid. Holloway v. Clarkson* (1843), 2 Harv. 521.

**339. ———**—II. a widow, with six children, on her second marriage, executed a settlement, whereby, after reciting that the rents, issues, & profits of the property to be thereby settled should be to the separate use of II. for life, & after her decease, for the further purpose of making of the reversion & principal thereof a provision for the children of her former marriage, certain real & personal property then belonging to II. was vested in a trustee, in trust to pay the income to H. for her separate use for life; & after her decease, in trust for such persons & in such manner as she, in & by her last will & testament, or instrument testamentary, or in the nature of a will, in writing to be signed & published by her in the presence of three or more credible witnesses, upon testamentary consideration only, during her intended coverture, should direct or appoint:—*Held*: the power of appointment was confined to the coverture & consequently on appointment made by H., after her husband's death, was not valid.—*HALLIDAY v. OVERTON* (1852), 20 L. T. O. S. 12; 16 Jur. 751, L. J.J.; *affg. S. C. sub nom. HOLLIDAY v. OVERTON*, 14 Beav. 467.

*Annotations*:—*Mentd. Lucas v. Brandreth* (1860), 28 Beav. 274; *Tatham v. Vernon* (1861), 29 Beav. 604; *Re Hudson, Kühne v. Hudson* (1895), 72 L. T. 892.

**340. ———**—By marriage settlement a power was given to husband & wife during their joint lives, by deed, with or without power of revocation & new appointment, or to the survivor, by deed or will, to appoint amongst children of the marriage. This power was exercised by both in favour of a daughter, but the deed of appointment contained a power enabling husband & wife, or the survivor of them, by deed or deeds, "from time to time during their joint lives," to revoke that appointment, & to appoint new trusts, as to the husband & wife should seem fit. The wife having died before any exercise of the power of revocation, the husband, purporting to act in exercise of that

**Sect. 6.—Contingent powers: Sub-sect. 4. Sect. 7: Sub-sects. 1 & 2.]**

power, revoked the trusts declared by the appointment, & re-appointed the fund to trustees, for certain purposes:—*Held*: this second appointment was inoperative, for it was reasonably possible to give due effect to the words "from time to time during their joint lives" by reading the power reserved as one which might be exercised by husband & wife jointly, or by the one who should prove to be the survivor, if the revocation were made by that one during the lifetime of the other.—*Re TWISS'S SETTLEMENT TRUSTS* (1867), 16 L. T. 139; 15 W. R. 540, L. J.J.

**341. — Appointment by will—Occurrence of determining event before will operative.]**—Testator gave an estate upon trust for sale, with power of pre-emption to his younger children, & the proceeds were to be held upon such trusts as his widow, by deed or instrument sealed & delivered before the youngest child attained the age of twenty-five years, should appoint, & in default for his children, except the eldest son, equally. Testator's widow, by deed poll executed within the prescribed period, appointed the proceeds of the estate among all the children equally; but reserved a power of revocation. By her will, which was also executed before the youngest child attained twenty-five, but came into operation by her death after the prescribed period, she appointed the estate by name to the eldest son:—*Held*: the will, having come into operation after the prescribed period, could not take effect as a new appointment under the power; & this was not such a defective execution as would be relieved against in equity.—*COOPER v. MARTIN* (1867), 3 Ch. App. 47; 17 L. T. 587; 16 W. R. 234, L. J.J.

*Annotations*:—*Apld.* Potts v. Britton (1871), L. R. 11 Eq. 433. *Consd.* *Re* Moses, Beddington v. Beddington, [1902] 1 Ch. 100. *Expld.* *Re* Illingworth, Bevir v. Armstrong, [1909] 2 Ch. 297. *Distd.* *Re* Safford's Settlement, Davies v. Burgess, [1915] 2 Ch. 211. *Refd.* Cooper v. Cooper (1874), 30 L. T. 409; *Re* Wells' Trusts, Hardisty v. Wells (1889), 42 Ch. D. 640; *Re* Parkin, Hill v. Schwarz, [1892] 3 Ch. 510; *Re* Lawley, Zalscr v. Lawley, [1902] 2 Ch. 673.

**342. — — — — —.]**—Under a settlement a fund was held upon trust for such persons as G. & B. should jointly appoint, & subject thereto upon trust for G. for life, with remainder to B. for life, subject to determination as thereafter mentioned, with remainder to such of a certain class as B. should by deed or will appoint; & it was provided that if B. should commit any of certain acts, his life estate should be determined & the trust fund should go as if B. were actually dead, & all the powers therein contained should thenceforth be exercised as if he were then dead, without prejudice to his right to exercise jointly with G., either before or after the determination of the trust in his favour, the joint power reserved to them. B. committed an act of forfeiture, & afterwards died:—*Held*: the sole power of appointment reserved to him was not effectually exercised by a will made prior to the forfeiture.—*POTTS v. BRITTON* (1871), L. R. 11 Eq. 433; 24 L. T. 409; 19 W. R. 651.

*Annotations*:—*Consd.* *Re* Illingworth, Bevir v. Armstrong, [1909] 2 Ch. 297.

**343. — — — — —.]**—By a marriage settlement, made in 1878, the trustees were to hold the

trust funds upon trust, after the death of the wife, for such persons as she should "during coverture by will or deed appoint," & in default of appointment, then in trust for her statutory next of kin. By her will, made in 1884, in the lifetime of her husband, she appointed the settled funds to her five brothers & sisters in equal shares as tenants in common. The husband died in 1886. In 1898 the widow made a codicil to her will, appointing ptfs. to be exors. of her will & in other respects confirming her will. She died in 1908, discover:—*Held*: the execution by the lady of her will while under coverture, operated as a good exercise, of the power of testamentary appointment contained in the settlement, notwithstanding that she died discover:—*Re* ILLINGWORTH, BEVIR v. ARMSTRONG, [1909] 2 Ch. 297; 78 L. J. Ch. 701; 101 L. T. 104; 53 Sol. Jo. 616.

*Annotation*:—*Consd.* *Re* Safford's Settlement, Davies v. Burgess, [1915] 2 Ch. 211.

**344. — — — — —.]**—By a marriage settlement trust funds were settled by the wife's father upon the usual trusts during the joint lives of the husband & wife & the life of the survivor, & after the death of the survivor for the children of the marriage, & in case there should be no issue of the marriage "upon trust for such person or persons & for such interest & generally in such manner as" the wife "shall by will during the continuance of the intended coverture direct or appoint," & in default of & subject to any such appointment upon trust for the settlor, his exors., administrators, & assigns. There was no issue of the marriage. The wife made a will during the coverture whereby she appointed the settled funds. She survived her husband & died without having altered the appointment so made:—*Held*: there was no reason for implying a condition that the wife should not only make her will but should also die during the coverture; what she had done satisfied the requirements of the deed in reference to the manner of execution of the power; & the power had been well & validly exercised.—*Re* SAFFORD'S SETTLEMENT, DAVIES v. BURGESS, [1915] 2 Ch. 211; 84 L. J. Ch. 766; 113 L. T. 723; 31 T. L. R. 529; 59 Sol. Jo. 666.

**SECT. 7.—POWER OF APPOINTMENT AMONG A CLASS.**

**SUB-SECT. 1.—LIMITATIONS IN DEFAULT OF APPOINTMENT.**

**345. Limitation to same object in default of appointment—Only one object—Whether power exercisable.]**—Power under a marriage settlement to give to the children of the marriage, in such shares, etc., & for such estate, etc., & there is but one child of the marriage, such child must have the whole estate which was settled.—*ROE d. BUXTON v. DUNT* (1767), 2 Wils. 336; 95 E. R. 843.

*Annotations*:—*Consd.* Houstoun v. Houstoun (1831), 4 Sim. 611; Bray v. Bree (1834), 8 Bl. N. S. 568. *Refd.* Robinson v. Harcourt (1788), 2 Term Rep. 241.

**346. — — — — —.]**—Power of appointment to or among one or more younger children, in default of appointment, equally. One of two objects being removed by the effect of an express

**PART IV. SECT. 7, SUB-SECT. 1.**

**d. Limitation to same object in default of appointment—Effect of.]**—*CAMPBELL v. SANDYS* (1803), 1 Sch. & Lef. 281.—*IR.*

**e. — — — — —.]**—*CLUNE v. APJOHN* (1866), 17 L. Ch. R. 95.—*IR.*

**f. — — — — —.]**—A fund was limited by a settlement, in trust, after the death of survivor of husband & wife, for the benefit of the child or children, or other issue of the marriage, then in being as the husband & wife should jointly appoint by deed & in default of such appointment, as the

survivor should by deed or will appoint, & in default of any appointment, to pay the fund to such of the children of the marriage as should be living at the decease of the survivor of the husband & wife, at twenty-one, or marriage:—*Held*: those children only who survived both persons were

satisfaction, by way of advancement, the other takes the whole, as in the case of death, by analogy to the Customs of *London & York*. Joint-tenancy for life; the words of severance being confined to the subsequent limitations.

Before the power ever arose there ceased to be objects . . . the consequence is that, one of two objects being removed, the other must of necessity take the whole; the party having the power of disposition losing that power (GRANT, M.R.).—*FOLKES v. WESTERN* (1804), 9 Ves. 456; 32 E. R. 679.

*Annotations* :—*Consd.* Noel v. Walsingham (1824), 2 Sim. & St. 99; *Bray v. Bree* (1834), 8 Bl. N. S. 568; *Douglas v. Willes* (1849), 7 Hare, 318. *Distd.* Foster v. Cantley (1855), 6 De G. M. & G. 55. *Consd.* Lee v. Head (1855), 1 K. & J. 620; *Ford v. Tynte* (1861), 10 Jur. N. S. 1193.

347. —————.]—Testator gave to his widow a life interest in a fund, with a power of appointment, amongst all his children living at her death; &, in default of appointment, directed the fund to be divided amongst all such children, with a gift over to the widow, in case all the children died before their shares became payable. The widow appointed the fund to the two surviving children; one of them died in her lifetime :—*Held* : the only surviving child took, upon the widow's death, the whole of the fund.—*BRELEFIELD v. RECORD* (1828), 2 Sim. 354; 57 E. R. 821.

348. —————.]—Power not confined to limiting proportion of shares.]—*BOYLE v. PETERBOROUGH* (Bp.), No. 352, *post*.

349. —————.]—By indenture of settlement, a fund was assigned to trustees upon trust for all & every the child & children of a marriage, in such shares, at such age or ages, & subject to such conditions & limitations, as the wife, in case she survived the husband, should appoint. There was one child only of the marriage, & the wife surviving the husband, appointed the fund to that child for her separate use for life, & after her decease to such persons as the child should appoint, & in default of appointment, to the child's exors. or administrators. The child by her will appointed to the fund, & died :—*Held* : the power in the settlement was well exercised by the wife, & the child's appointment by her will carried the fund to her appointee after the death of the wife.—*BRAY v. BREE* (1834), 2 Cl. & Fin. 453; 8 Bl. N. S. 568; 6 E. R. 1225, H. L.; *affg.* S. C. *sub nom.* *BRAY v. HAMMERSLEY* (1830), 3 Sim. 513.

*Annotations* :—*Apld.* Phipson v. Turner (1838), 9 Sim. 227. *Consd.* Ewart v. Ewart (1853), 11 Hare, 276; *Neatherway v. Fry* (1853), Kay, 172. *Apld.* Morse v. Martin (1865), 34 Beav. 500. *Reff.* Goldsmid v. Goldsmid (1842), 2 Hare, 187; *Jebb v. Tugwell* (1855), 24 L. T. O. S. 321; *Re Teague's Settlement* (1870), L. R. 10 Eq. 564.

350. —————.]—Testator bequeathed £1,700 stock to trustees, in trust to pay the dividends to J. & S. his wife, during their lives, & the life of the survivor, & after their decease, then in trust to transfer or pay over the stock unto their children, in such shares & proportions as the survivor of them, J. & S. his wife, by his or her last will should direct or appoint. At the death of testator, J. & S. had three children living. After the deaths of S. & two of those children J., by will, appointed the whole fund to the only

surviving child :—*Held* : a good appointment.—*WOODCOCK v. RENNECK* (1842), 1 Ph. 72; 11 L. J. Ch. 110; 6 Jur. 138; 41 E. R. 558, L. C. *Annotations* :—*Consd.* Paske v. Haselfoot (1863), 33 Beav. 135; *Lambert v. Thwaites* (1866), L. R. 2 Eq. 151. *Reff.* *Pattison v. Pattison* (1855), 19 Beav. 638.

351. —————.]—Only defeated if appointment takes effect.]—An appointment, limiting an estate to a son in fee, & in case he dies before twenty-one, & without issue, over to another, is not supported by the powers in a settlement, whereby a wife is entitled, if there should be issue, to distribute the estates amongst them, at her own discretion, &, in default of issue, to devise the same to whosoever she shall appoint.—*DOE d. BROWNSMITH v. DENNY* (1756), 1 Keny. 280; 2 Wils. 337, n.; 96 E. R. 993.

*Annotations* :—*Apld.* Roe d. Buxton v. Dunt (1767), 2 Wils. 336. *Consd.* Houstoun v. Houstoun (1831), 4 Sim. 611.

#### SUB-SECT. 2.—FAILURE OF MEMBER OF CLASS.

*See, now, Law of Property Act, 1925 (c. 20), s. 158.*

352. *Validity of appointment to remaining members.*]—Devise of personal estate for life, then among all children of devisee in such shares & manner, for such interests, with such survivorship, & to vest at such time, as devisee for life should by deed or will appoint : in default of appointment of the whole or part, equally, if but one, to that one, payable at twenty-one; nevertheless the shares of any attaining twenty-one in life of devisee for life to be vested; but payment to be postponed till her death : that clause, vesting an interest at twenty-one, held to relate only to the case of default of appointment; & one of two children being dead without issue after twenty-one, & without receiving any share, that circumstance will not prevent an appointment of the whole fund to the survivor.

[The question is] whether the power has not lost its opportunity of being exercised by the death of the son; or whether there is a capacity of appointing where only one child is left; & if at all, whether it must not be with reference to the clause, which provides for its going in case of no appointment. . . . If there was no appointment, the consequence is, each would be entitled to a moiety, because there was no appointment. In respect of that clause, she had a power to appoint to one only; for though that is not a distribution, it is an expression that it shall go by appointment, & not transmit for want of it (LORD DUNLOW, C.).—*BOYLE v. PETERBOROUGH* (Bp.) (1791), 1 Ves. 299; 3 Bro. C. C. 243; 30 E. R. 353, L. C.

*Annotations* :—*Foll.* Butcher v. Butcher, Gooday v. Butcher (1812), 1 Ves. & B. 79. *Apld.* M'Ghie v. M'Ghie (1817), 2 Madd. 368; *Houstoun v. Houstoun* (1831), 4 Sim. 611; *Bray v. Bree* (1834), 8 Bl. N. S. 568. *Foll.* Colston v. Pemberton (1836), Donnelly, 19. *Apld.* Ricketts v. Loftus (1841), 4 Y. & C. Ex. 519; *Fry v. Capper* (1853), 2 W. R. 136. *Distd.* Neatherway v. Fry (1853), Kay, 172. *Apld.* Lee v. Head (1855), 1 K. & J. 620. *Consd.* Lee v. Olding (1856), 25 L. J. Ch. 580. *Apld.* Paske v. Haselfoot (1863), 33 Beav. 125; *Re Ware, Cumberlege v. Cumberlege-Ware* (1890), 45 Ch. D. 289. *Reff.* Noel v. Walsingham (1824), 2 Sim. & St. 99; *Lancashire v. Lancashire* (1847), 1 De G. & Sm. 288; *Joel v. Mills, Harvey v. Mills* (1857), 3 K. & J. 458.

fund—the appointment being made by indenture which was also executed by H.:—*Held* : H. was not precluded from claiming her distributive share in the ultimately unappointed residue of the fund.—*CLOSE v. COOTE* (1880), 7 L. R. Ir. 564.—IR.

1. —————.]—When class ascertained.]—*Re GUN, SHERK v. NUGENT*, [1915] 1 L. R. 42.—IR.

objects of the power.—*COONEY v. HOLLAND* (1866), 17 I. Ch. R. 201.—IR.

DONOGHUE  
*BROOKE* (1875), 9 I. R. Eq. 489.—IR.

h. —————.]—*FLETCHER v. FLETCHER* (1880), 7 L. R. Ir. 40; 9 L. R. Ir. 301.—IR.

k. —————.]—Where by a settlement containing no hotchpot clause, a

fund was settled, after the usual life interests, on the children of the marriage as their mother J. should appoint, & in default of appointment, equally; & J. by a deed in 1855, after reciting a desire to appoint to her daughter H. £2,000, part of the fund, "as & for her full share & proportion thereof," accordingly appointed to her "the sum of £2,000, part of & as & for her full share or proportion of & in" the

*Sect. 7.—Power of appointment among a class: Sub-sect. 2. Sect. 8.]*

**353.** —.]—Under a general power of appointment among all the children by deed or will from time to time, etc., in default of appointment, equally at twenty-one, etc., the death of one above that age does not prevent an appointment to the survivors. Appointment void as far as it exceeds the power: *viz.* to grandchildren under a power to appoint to children.—**BUTCHER v. BUTCHER, GOODAY v. BUTCHER** (1812), 1 Ves. & B. 79; 35 E. R. 31, L. C.; *aff.* (1804), 9 Ves. 382.

*Annotations:—***Consd.** *M'Ghie v. M'Ghie* (1817), 2 Madd. 368; *Houstoun v. Houstoun* (1831), 4 Sim. 611; *Colston v. Pemberton* (1836), Donnelly, 19; *Fry v. Capper* (1853), 2 W. R. 136. *Refd.* *Ricketts v. Loftus* (1841), 4 Y. & C. Ex. 519; *Paske v. Haselfoot* (1863), 9 L. T. 75. *Mentd.* *Mocatta v. Lonsdale* (1806), 12 Ves. 123; *Bax v. Whitbread* (1809), 16 Ves. 15; *Queensberry Leases Case* (1819), 1 Bl. 339; *Fowler v. Hunter* (1829), 3 Y. & J. 506; *Faversham Corp'n. v. Ryder* (1854), 2 Eq. Rep. 749.

**354.** —.]—Testator bequeathed £12,000 stock to trustees for his son for life, then for the son's wife for life, then unto & amongst his wife & children in such shares, for such interests, etc., as the son should appoint, & in default of appointment, unto the children equally, & if there should be no child, then to the son's next of kin, in blood; & testator bequeathed his residue to his son & his, testator's, two other children, their exors., etc., equally; & he directed that the share of his son should be held by his trustees for the benefit of him & his children, upon the same trusts, & subject to the same limitations, etc., as the £12,000 stock, but that the son's wife should not take any interest in that share. The son died leaving his wife surviving, but never having had a child:—*Held*: an appointment made by the son of part of the stock to his wife was good; but the son, in the events that had happened, was not entitled to the share of the residue absolutely, but his next of kins in blood were entitled to it.—**HOUSTOUN v. HOUSTOUN** (1831), 4 Sim. 611; 1 L. J. Ch. 50; 58 E. R. 229.

*Annotations:—***Apld.** *Paske v. Haselfoot* (1863), 33 Beav. 125. *Refd.* *Ricketts v. Loftus* (1841), 4 Y. & C. Ex. 519.

**355.** —.]—**COLSTON v. PEMBERTON**, No. 301, *ante*.

**356.** —.]—(1) A father, upon his second marriage, settled lands to the use of the children of his first marriage naming them, for such estates, & in such shares & proportions, manner & form, as he should from time to time by deed or will appoint, & in default of appointment to the use of the said children, except the eldest, as tenants in common in tail. All the children except two, namely, the eldest son & a daughter, died in the lifetime of the settlor. By his will, reciting the power, the settlor appointed a rent-charge out of the estates to the daughter, & the estates, subject to the rentcharge, to the son in fee:—*Held*: the appointment so made to the surviving children was a valid execution of the power.

(2) Where by the terms of a power the instrument by which it is executed is to be sealed & delivered in the presence of & attested by two or more credible witnesses, it is sufficient *prima facie* evidence of attestation if on the instrument there appears an indorsement to the effect that it had been sealed & delivered in the presence of two persons, although such two persons are not named as witnesses, either in the body of the instrument or the attestation.—**RICKETTS v. LOFTUS** (1841), 4 Y. & C. Ex. 519; 160 E. R. 1112.

*Annotations:—**As to (1)* **Consd.** *Re Ware, Cumberlege v. Cumberlege-Ware* (1890), 45 Ch. D. 368. *Refd.* *Ricketts v. Loftus* (1841), 4 Y. & C. Ex. 519; *Boulcott v. Boulcott* (1853), 23 L. J. Ch. 87; *Paske v. Haselfoot* (1863), 9 L. T. 75.

**357.** —.]—A power to appoint by will enables the donee of the power to appoint to such objects of the power as shall be alive at the donee's death.—**Fry v. Capper** (1853), as reported in 2 W. R. 136.

*Annotations:—***Mentd.** *Re Teague's Settltmt.* (1870), L. R. 10 Eq. 564; *Re Cunynghame's Settltmt.* (1871), L. R. 11 Eq. 324; *Re Ridley, Buckton v. Hay* (1879), 11 Ch. D. 645; *Re Errington, Bawtree v. Errington*, [1887] W. N. 23; *Shute v. Hogge* (1888), 58 L. T. 546; *Whitby v. Mitchell* (1899), 42 Ch. D. 494; *Re Tancred's Settltmt.*, *Somerville v. Tancred, Re Selby, Church v. Tancred* (1903), 88 L. T. 164.

**358.** —.]—(1) A power was given to B. to appoint a fund, by will, to his wife alone, or to his wife & such of his children as he should direct. The wife died, & B. appointed the fund exclusively to five out of his seven children:—*Held*: the appointment was valid.

(2) Where there is a power to divide a fund amongst the members of a particular class, the death of some of the members of that class, before the exercise of the power, will not prevent its exercise in favour of the survivors.—**PASKE v. HASELFOOT** (1863), 33 Beav. 125; 2 New Rep. 568; 9 L. T. 75; 9 Jur. N. S. 1047; 11 W. R. 1089; 55 E. R. 314.

**359.** —.]—An appointment since the 11 Geo. 4 & 1 Will. 4, c. 48, under a non-exclusive power, of an entire fund unto & amongst the objects, " & the survivors & survivor of them, & if only one should survive, then unto that one ":—*Held*: valid.—**Re CAPON'S TRUSTS** (1879), 10 Ch. D. 484; 48 L. J. Ch. 355; 27 W. R. 376.

**360.** —. **Non-exclusive power.**—] Where power is given by will to appoint a fund among several objects, with a gift, in default of appointment, to the same objects *nominalim*, & all the objects survive testator, the power remains as to the whole fund, notwithstanding the death of one of the objects in the lifetime of the donee of the power.—**Re WARE, CUMBERLEGE v. CUMBERLEGE-WARE** (1890), 45 Ch. D. 269; 59 L. J. Ch. 717; 63 L. T. 52; 38 W. R. 767; 6 T. L. R. 388.

**361. Right of estate of deceased member.**—] **FOX v. GREGG** (*circa* 1811), Sugden on Powers, 8th ed. App. 946.

*Annotations:—***Distd.** *Neatherway v. Fry* (1853), Kay, 172; *Re Voale's Trusts* (1876), 4 Ch. D. 61.

**362.** —.]—Devise in trust to dispose of the premises unto & amongst the devisee's four children, in such manner, shares, etc., as he should by deed or will appoint; one dying in the life of his father, before appointment, was held entitled to a fourth; the father after that child's death having appointed three-fourths to his three surviving children respectively.—**READE v. READE** (1801), 5 Ves. 744; 31 E. R. 836, L. C.

*Annotations:—***Apld.** *Casterton v. Sutherland* (1804), 9 Ves. 445. *Distd.* *Butcher v. Butcher, Gooday v. Butcher* (1812), 1 Ves. & B. 79. *Distd.* *Ricketts v. Loftus* (1841), 4 Y. & C. Ex. 519. **Consd.** *Fry v. Capper* (1853), 2 W. R. 136. *Refd.* *Paske v. Haselfoot* (1863), 9 L. T. 75.

**363.** —.]—A power to appoint a sum of money in such shares as the appointor should think proper amongst his children; the money so appointed to be paid to sons at twenty-one, & to daughters at that age or marriage, if the appointor should be then deceased; or if living three months after his death. Two of the children having attained twenty-one, died before the appointor:—*Held*: no interest vested in them.—**M'GHIE v. M'GHIE** (1817), 2 Madd. 368; 56 E. R. 370.

*Annotation:—***Consd.** *Ricketts v. Loftus* (1841), 4 Y. & C. Ex. 519.

**364.** —.]—A., by his will, bequeathed his residuary personal estate to trustees, upon trust



for his wife for life, & after her death the principal to be divided among all his children, including his child B., if then alive, in such manner & proportions as his wife should appoint, provided that the share assigned to B. should not be smaller than the share assigned to any one of his other children; & in default of appointment, to be divided equally among all the children living at his wife's death, including B., if then alive; moreover, if any child should die before his wife, but leaving a child or children, such child or children should have the part or share of their late parent; & if all the children should die under age or without leaving children, then for the wife. The wife, by will, appointed the fund among such of the children, including B., as should be living at her death. B. died in the wife's lifetime, leaving children:—*Held*: the appointment was good; but only the surviving children could take & B.'s children were excluded.—*NEATHERWAY v. FRY* (1853), Kay, 172; 23 L. J. Ch. 222; 69 E. R. 73.

365. —.] — *MARTIN v. SWANNELL*, No. 1230, *post*.

366. Failure of only member of class — Death subsequent to appointment.]—J. L. S. by his will, dated Mar. 23, 1849, after giving an annuity to his wife & certain specific legacies, gave all the residue of his real & personal estate to trustees upon trust to pay the income thereof unto his daughter E. L. S. during her life, & after her decease to pay the income to his son-in-law J. L. A. S. during his life, & after the decease of the survivor of them upon trust for such one or more of the children or more remote issue of E. L. S. as the survivor of them, E. L. S. & J. L. A. S. should by deed or will direct or appoint, & in default of such appointment upon trust for the child & all the children if more than one of E. L. S. living at the decease of the survivor of them, E. L. S. & J. L. A. S., if more than one child equally between them as tenants in common. Provided nevertheless & testator thereby declared it to be his will & mind that in case any child of his daughter should die in the lifetime of E. L. S. & J. L. A. S. or in the lifetime of the survivor of them leaving issue that then such issue should be entitled to the same share in the trust property as his, her or their parent would have had if surviving the survivor of them, E. L. S. & J. L. A. S. Provided always & testator thereby declared it to be his will & mind & did thereby give & devise in case there should be no child or remoter issue of E. L. S. at the decease of the survivor of them, E. L. S. & J. L. A. S., one-third part of his trust estate real, & personal unto his niece M. A. S., one-third part unto his brother C. T. S., & one-third part unto the children of his brother J. S. equally between them as tenants in common. Testator J. L. S. died on May 11, 1849; his daughter E. L. S. died on Oct. 3, 1851. E. L. S. had only one child, namely E. J. S. On Feb. 4, 1873, J. L. A. S. by two deeds poll of that date exercised his power of appointment under the will in favour of E. J. S. E. J. S. died on Oct. 22, 1901, predeceasing J. L. A. S.:—*Held*: nevertheless, the appointment of Feb. 4, 1873, stood, & was not defeated by the last recited proviso of the will.—*Re SIMMONS, DENNISON v. ORMAN* (1902), 87 L. T. 594.

#### SECT. 8.—APPOINTMENT BY WAY OF MORTGAGE.

367. Operation of appointment on equity of redemption—Whether limitations on which property held are altered.]—Where the lands of A. upon her marriage were settled to the use of husband & wife successively for life, remainder in strict settlement, remainder to the wife & her heirs, with a power of revocation & appointment of new uses; & she joined with her husband in a mtge., & by the deed to load the uses of a fine which the husband & wife afterwards levied, according to covenant, the lands after the determination of the term, created to secure the repayment of the money borrowed, were limited to the husband & wife, & survivor for life, remainder in tail special; remainder, for default of such issue, to the right heirs of the survivor of husband & wife. The wife having died without issue, leaving the husband survivor:—*Held*: this was more than a mere mtge. transaction; there was evidence of an intention to effect a change of the beneficial interest; & there was upon the face of the deed a clear manifestation of such intention, equivalent to a declaration; & consequently the husband & his heirs, & not the heirs of the wife, were entitled to the equity of redemption.—*JACKSON v. INNES* (1819), 1 Bl. 104; 4 E. R. 38, H. L.

*Annotations*:—*Consd.* *Reeve v. Hicks* (1825), 2 Sim. & St. 403; *Walker v. Armstrong* (1856), 21 Beav. 284; *Atkinson v. Smith* (1858), 3 De G. & J. 186; *Dawson v. Bank of Whitehaven* (1877), 6 Ch. D. 218; *Jones v. Davies* (1878), 8 Ch. D. 205. *Refd.* *Clark v. Burgh* (1845), 2 Coll. 221; *Hipkin v. Wilson* (1850), 15 L. T. O. S. 559; *Plowden v. Hyde* (1852), 2 De G. M. & G. 684; *Eddleston v. Collins* (1853), 3 De G. M. & G. 1; *Whitbread v. Smith* (1854), 3 De G. M. & G. 727; *Hoather v. O'Neill* (1858), 27 L. J. Ch. 512; *Hastings v. Astley* (1861), 30 Beav. 260. *Mentd.* *Mondley v. Felton* (1888), 14 App. Cas. 61.

368. —.] — N. being entitled to certain lands as issue in tail, conveyed them in 1749 by lease & release to a mtgee. in fee to secure £800 borrowed, & levied a fine of the lands pursuant to covenant for the purpose of perfecting the security. In 1762 N. borrowed £450 & charged it upon the same lands by deed poll. N. died in 1764, leaving the charge upon the lands of the aggregate sum of £1,250, with an arrear of interest, & he by his will devised all his lands to M. his wife. In 1766, M. having married A., they by lease & release reciting the mtge., & that A. had paid the interest, granted & confirmed the mtged. lands to the mtgee., reserving the equity of redemption to A., his heirs, etc. By a deed in 1789, £300, an arrear of interest, was added to the principal, & the aggregate sum of £1,550 was charged on the lands, subject to redemption as by the former deed. M. died in 1794, leaving H., a son by the first husband, her heir-at-law. In 1797 A. sold part of the mtged. lands, & in consideration of £2,000 principal & interest, paid to the mtgee. & £600 paid to A., he & the mtgee. conveyed such part of the lands to R., the purchaser. The rest of the lands was conveyed by the mtgee. to A. who died in 1799. Under these circumstances the heir-at-law of M. filed a bill in the exchequer to redeem the lands, & the ct. decreed that he was entitled to redeem on payment of the principal money due upon the mtge., & interest calculated from the death of A. Upon appeal to the House of Lords from this decree, it

#### PART IV. SECT. 8.

m. Appointment by registered holder of appointment — Married woman.] — A married woman being registered

as the proprietor of an estate for life in certain land, with a general power of appointment in fee, executed a memorandum of mtge. to

secure advances to her husband, in the following terms: "I being registered as the holder of a power of appointment over an estate in fee



**Sect. 8.—Appointment by way of mortgage. Sect. 9: Sub-sect. 1.]**

was declared that H., as heir-at-law of M., was entitled, notwithstanding the proviso for redemption reserved to A. by the deed made between him & the mtgee., to redeem the lands "on payment of the principal money & interest, due at the death of M. on the aggregate sum of £1,250. Such interest to be computed according to the proviso in the indenture of release & mtge." A., being entitled in equity to have the interest due at the death of his wife added to the principal, & considered as an aggregate sum with the principal, A. & M. his wife not being bound to keep down the interest during her life for the benefit of her heir-at-law, etc., & that an account should be taken of what was due for principal & interest on the mtge. at the death of M. The decree of the exchequer being varied according to this order, it was referred to the master to take the accounts so directed, & it appeared in evidence before him that A., & M. his wife, during her life, paid to the mtgee. on account of interest, £1,500; that the master in his report did not include this sum, but reported that there was due upon this account for principal £1,250 & for interest at the death of M. £286 9s. 2d. On this ground exceptions were taken to the report, which being in this respect confirmed, & a decree made upon further directions accordingly, a further appeal was presented to the House of Lords. But the decree was affirmed, the House being of opinion that the representative of the husband was not entitled, as against the heir of the wife, to an allowance of interest actually paid by the husband during the life of his wife, & that the former order of the House, directing the account of interest due on the mtge. at the death of M. meant interest actually due.—**RUSCOMBE v. HARE** (1828), 2 Bli. N. S. 192; 4 E. R. 1103.

**369. ———.]**—A., tenant in tail, under his brother's will, with remainders over, suffers a recovery to such uses as he should appoint by deed or will, & subject thereto to the uses of the will. He afterwards makes a mtge. of part of the estate in fee, & limits the equity of redemption to the prior uses. He then joins in a transfer of the mtge., & reserves the equity of redemption to himself in fee.—**Held**: the equity of redemption did not revert to the old uses.—**ANSON v. LEE** (1831), 4 Sim. 304; 58 E. R. 136.

**Annotations:—***Apld.* **Whitbread v. Smith** (1853), 1 Drew. 531 (*See* 23 L. T. O. S. 2.). *Dhdt.* **Walker v. Armstrong** (1856), 21 Beav. 284. *Consd.* **Atkinson v. Smith** (1858), 32 L. T. O. S. 47. *Refd.* **Plomley v. Felton** (1888), 14 App. Cas. 61.

**370. ———.]**—A limitation of the equity of redemption in a mtge. under a general power by tenants for life, to the mtgor. in fee, does not afford evidence of intention to destroy the remainder.—**EXTON v. KNIGHT** (1838), 2 Jur. 8.

**371. ———.]**—By a marriage settlement, the lands of the wife were limited to such uses as she should, notwithstanding her coverture, by deed or will appoint; & in default of appointment, to the use of the children of the marriage. After the husband's death, the wife, by way of appointment under the power contained in the settlement, executed three successive mtges. of the property in fee. Each mtge. deed contained a trust for sale, in default of repayment of the mtge. money; but the language of the two latter deeds differed from that of the former, not only as

to the trust for sale, but as to the proviso for reconveyance, & in other respects.—**Held**: having regard to the construction of the latter deeds taken by themselves, & also in comparison with the former, the wife must be considered as having intended to devote the whole property to purposes beyond those of mere mtge. securities, & consequently by the latter deeds, or one of them, the power was exhausted.—**BARNETT v. WILSON** (1843), 2 Y. & C. Ch. Cas. 407; 12 L. J. Ch. 428; 1 L. T. O. S. 385; 7 Jur. 593; 68 E. R. 182.

**Annotation:—***Refd.* **Whitbread v. Smith** (1854), 3 De G. M. & G. 727.

**372. ———.]**—Lands were limited to a father for life, with remainder as the father & his son should appoint, with remainder to the son in tail, with remainder to the father & son in fee. The father & son appoint in fee, by way of mtge. with a proviso, that, on repayment of the mtge. money, the mtgees. should convey the hereditaments to the father & son, their heirs or assigns, or as they should direct; & it was declared, as between the father & son, that the father should, during his life, keep down the interest on the mtge. debt.—**Held**: the course of limitation of the estate was not changed by this proviso.—**HIPKIN v. WILSON** (1850), 3 De G. & Sm. 738; 19 L. J. Ch. 305; 15 L. T. O. S. 559; 14 Jur. 1126; 64 E. R. 684.

**373. ———.]**—The owner of an estate limited to the usual uses to bar dower, mortgaged it in fee, & by the proviso for redemption, the estate was agreed to be reconveyed to him, his heirs, appointees, or assigns, or to such other persons, to such uses, & in such manner as he or they should direct. After executing this mtge. testator made his will, devising the estate, & subsequently paid off the mtge., taking a reconveyance to the same uses, in bar of the dower, as the estate was subject to before the mtge., the dower trustee being the same person in both deeds. Testator died before Wills Act, 1837 (c. 20), came into operation.—**Held**: the will was not revoked as to the estate in question.—**FLOWDEN v. HYDE** (1852), 2 De G. M. & G. 684; 21 L. J. Ch. 790; 20 L. T. O. S. 18; 16 Jur. 823; 42 E. R. 1040, L. JJ.

**Annotations:—***Consd.* **Whitbread v. Smith** (1854), 3 De G. M. & G. 727. *Refd.* **Jones v. Davies** (1878), 8 Ch. D. 205; **Jacob v. Jacob** (1898), 78 L. T. 825.

**374. ———.]**—A surrender was expressed to be to such uses in favour or for the benefit of the husband his heirs & assigns, & with such powers of sale & other powers & provisos, & chargeable with such sums as a mtgee., to whom a conditional surrender had some time previously been made to secure £50 should, at the request & by the direction of the husband appoint, & subject thereto to the use of the mtgee. & his heirs, with a proviso for making the surrender void on payment of the sum of £100 then advanced by the mtgee. to the husband.—**Held**: the destination of the equity of redemption was completely changed by the last-mentioned surrender, & was not merely affected to the extent required for the purposes of the security thereby created.—**EDDLESTON v. COLLINS** (1853), 3 De G. M. & G. 1; 20 L. T. O. S. 298; 43 E. R. 1; *sub nom.* **EDLESTON v. COLLINS**, 22 L. J. Ch. 480; 17 Jur. 331; 1 W. R. 169, L. C. & L. JJ.

**Annotations:—***Refd.* **Flack v. Downing College** (1853), 13 O. B. 945. *Mentd.* **Re Boton's Trust Estates** (1871), L. R. 12 Eq. 553.

simple . . . do hereby appoint by this instrument, to be registered under the Act, by way of mtge. to, etc., all my estate & interest as such registered

holder of a power of appointment as fore-said in all that," etc.—**Held**: a sufficient execution of the power of appointment in favour of the mtgees.

for the purposes of the mtge.—*Ex p.* **NEWCASTLE BUILDING & INVESTMENT CO.** (1905), 5 S. R. N. S. W. 237; 22 N. S. W. N. 101.—**AUS.**

375. ———.] — (1) Real estate was settled on A. for life, remainder to his wife for life, remainder to the heirs of the body of the wife, remainder to the right heirs of A.; A. & his wife barred the wife's estate tail; & by that & other deeds it was settled to such uses as A. should appoint; A. appointed by a deed of July, 1817, to such uses as he & his wife should jointly appoint & in default to himself for life, remainder to his wife for life, remainder to his son in fee. A. & his wife made several mtges. all except one limiting the equity of redemption upon or consistently with the uses of the deed of 1817. In 1832 they made under the power in the deed of 1817 another mtge., which limited the equity of redemption to A. & his wife "their heirs or assigns or to such other persons, etc., as they should direct," & by a deed of even date certain terms were assigned to attend the inheritance according to the uses of the mtge. deed of even date. The wife having died the husband claiming to be seised in fee sold. On a bill filed against the purchaser by parties claiming under the son to redeem:—*Held*: the proviso for redemption in the deed of 1832 was not intended to vary the limitation of the equity of redemption & did not defeat the limitation of the fee in the deed of 1817.

(2) A. & his wife by deed limited the estate to such uses as A. alone should by deed or will appoint; on the next day A. by deed poll appointed to such uses, etc., as he & his wife should jointly appoint with remainder in default of appointment to the son in fee; & on the day after by a deed A. & his wife appointed the estate by way of mtge.; after this last deed had been engrossed it was considerably altered & interlined, the wife not having been originally made a party to it:—*Held*: under the circumstances the three deeds must be presumed to have formed but one transaction.—*WHITBREAD v. SMITH* (1854), 3 De G. M. & G. 727; 2 Eq. Rep. 377; 23 L. J. Ch. 611; 23 L. T. O. S. 2; 18 Jur. 475; 2 W. R. 177; 43 E. R. 286, L. C. & L. J.

*Annotations*:—*As to* (1) *Reid*, *Heather v. O'Neill* (1858), 2 De G. & J. 399. *Generally*, *Mentel*, *Shurshaw v. Gibbs* (1854), *Ky*, 333.

376. ———.] — Lands of a wife were settled to such uses as she & her husband should appoint & subject thereto to the use of the husband for life, with remainder to the wife for life, with remainder to the children of the marriage. Two days afterwards the husband & wife, in exercise of the power, appointed the lands to the use of trustees upon such trusts as the husband alone should appoint, & subject thereto in trust for the husband for his life, or till his bkpcy., with remainder in trust for the wife for life, & after her death on the trusts declared by the former deed. Some months afterwards the husband executed a mtge. reciting merely an agreement for a loan, & thereby appointed that the trustees should hold the lands upon trusts for sale, & securing the repayment of the mtge. money, & subject thereto upon trust for the husband & his heirs:—*Held*: the equity of redemption was effectually resettled, & belonged to the husband in fee.—*HEATHER v. O'NEIL* (1858), 2 De G. & J. 399; 27 L. J. Ch. 512; 31 L. T. O. S. 125; 4 Jur. N. S. 957; 6 W. R. 484; 44 E. R. 1044, L. C. & L. J.

*Annotations*:—*Appld.* *Re Byron's Settlements*. *Williams v. Mitchell*, [1891] 3 Ch. 474. *Reid*, *Atkinson v. Smith* (1858), 3 De G. & J. 186; *Jones v. Davies* (1878), 8 Ch. D. 205.

#### PART IV. SECT. 9, SUB-SECT. 1.

379 i. *Intention of donee paramount.*] — In order to execute a power there must be an intention to execute the

power or to do the specific thing authorised by the power.—*Re MORGAN* (1857), 7 L. Ch. R. 18, P. C.—*IR.*

379 ii. ———.] — *BURKE v. LAMBERT*

377. ———.] — By a marriage settlement land of the husband was conveyed, "for making a provision" for the wife & the issue of the intended marriage, to such uses as the husband & wife should during their joint lives by deed appoint, remainder to the use of the husband for life, remainder to the use of the wife for life, remainder to the use of the children of the marriage as the husband & wife should by deed jointly appoint, or as the survivor should by deed or will appoint, & in default of appointment, to the use of the children in equal shares as tenants in common in fee, & if but one child, to the use of that one child in fee, with an ultimate remainder in default of children to the use of the heirs & assigns of the husband. There was a proviso that the grantees to uses & the survivor of them, & the exors. & administrators of the survivor, their or his assigns, should, after the death of the survivor of the husband & wife, & during the respective minorities of any of their children, receive the rents of the share of such child or children, & should, after providing for his, her, or their maintenance & education, invest the surplus, if any, as therein mentioned, & accumulate the same in trust for the persons who should ultimately become absolutely entitled to the shares from which the same should have proceeded. No money fund, other than these accumulations, was included in the settlement, & it contained no power of sale. Some years after the solemnisation of the marriage the husband & wife mortgaged the property. The mtge. deed contained a recital of the settlement, & a recital that the husband & wife had requested the mtgee. to lend them £600 on the security of the property, which he had agreed to do, but it contained no other recital, & by it the husband & wife, in exercise of their joint power, appointed the property to the use of the mtgee. in fee, but subject to a proviso for redemption on payment of the mtge. money. The proviso was for reconveyance of the property to the uses of the settlement. The mtge. contained a power for the mtgee. to sell the property, & a declaration that, in case the property or any part of it should be sold under the power, the mtgee. should, after paying the expenses of sale & the principal & interest due upon the mtge., pay over the surplus, if any, to the husband, his heirs, exors., administrators, or assigns. After the death of the husband the mtgee. sold the whole of the property, & after payment of expenses & the mtge. debt & interest, there remained a surplus in his hands:—*Held*: there was no resulting trust of the surplus, but the husband's personal representative was entitled to it as part of his personal estate.—*JONES v. DAVIES* (1878), 8 Ch. D. 205; 47 L. J. Ch. 654; 38 L. T. 710; 26 W. R. 554.

*Annotation*:—*Reid*, *Re Grange, Chadwick v. Grange* (1907), 76 L. J. Ch. 220.

378. ———.] — *Re BYRON'S SETTLEMENT, WILLIAMS v. MITCHELL*, No. 429, *post*.

### SECT. 9.—EXPRESSION OF INTENTION TO EXERCISE POWERS.

#### SUB-SECT. 1.—IN GENERAL.

379. *Intention of donee paramount.*] — In order to the effectual exercise of the power, there must be evidence of the intention to exercise it.

(1867), 15 W. R. 913.—*IR.*

379 iii. ———.] — *PERCIE v. McNEALE*, [1894] 1 I. R. 118.—*IR.*

379 iv. ———.] — Where it is manifest,

**Sect. 9.—Expression of intention to exercise powers :**  
**Sub-sect. 1.]**

A general assignment of all a man's estate & interest will not pass property over which he has a general power of appointment, unless the intention be shown by the extraneous circumstance that he has no other property upon which the instrument could be intended to operate except that which is subject to the power (PAGE-WOOD, V.-C.).—*EWART v. EWART* (1853), 11 Hare, 276; 1 Eq. Rep. 536; 17 Jur. 1022; 1 W. R. 406; 68 E. R. 1278.

**Annotations:—***Reid*, *Ramsden v. Smith* (1854), 2 Drew. 298; *Re Lawley, Zalser v. Lawley*, [1902] 2 Ch. 673. **Mentd.** *Carter v. Carter* (1869), L. R. 8 Eq. 551.

**380. —**—Where an intention is established to pass property which is the subject of a power, a ct. of equity will give effect to the disposition, & hold that the property passes under it, although the intention to dispose of it by means of the power is not shown.

A married lady had a power to appoint under a deed of 1807. An invalid & fraudulent deed of 1813 purported to give to her & her husband a joint power of appointment over the same property. They executed the latter power in 1820, reserving a power of revocation & new appointment to the lady. In 1829, after the death of her husband, she professed to execute the power contained in the deed of 1820, & all powers in the deeds therein recited, & all other powers enabling her, & she confirmed the appointment of 1820, which was in favour of legitimate objects of the power under the deed of 1807. The deed of 1807 was recited in the deed of 1820:—**Held:** the deed of 1829 was a valid execution of the power contained in the deed of 1807.—*CARVER v. RICHARDS* (1859), 27 Beav. 488; 29 L. J. Ch. 109; 1 L. T. 257; 8 W. R. 157; 54 E. R. 193; *affd.* (1860), 1 De G. F. & J. 548, L. J.

**Annotations:—***Consd.* *Minchin v. Minchin* (1871), 19 W. R. 993; *Morgan v. Gronow* (1873), L. R. 18 Eq. 1; *Re Turner's Settlement* (1884), 52 L. T. 70. **Refd.** *Griffith-Boscawen v. Scott* (1884), 53 L. J. Ch. 571; *Cloutte v. Storey*, [1911] 1 Ch. 18.

**381. —**—Reference to power unnecessary.]—*CUNINGHAME v. ANSTRUTHER*, No. 303, *ante*.

**382. Informal mode of appointment as evidence of intention—Terms of settlement.]**—A widow of a freeman of London who left children, & died intestate, was entitled to four-ninths of his personal estate, & having by deed assigned over her four-ninths for her separate use in case of marriage, & to such persons as she should appoint, & for want of such appointment, then to her children; the widow intending to marry a second husband, by another deed to which the intended husband was party, in consideration of the intended marriage, & of a settlement made on her by him, recites that if she did not dispose of her four-ninths, the husband would be entitled thereto, & then assigns it over to trustees in trust for the intended husband during their joint lives, subject to her control & disposal by writing, & dies without disposing of it. Decreed the second husband is a purchaser, & the recital, that he would be entitled to it if the wife should not dispose of it, was a gift.

—*POULSON v. WELLINGTON* (1729), 2 P. Wms. 533; 24 E. R. 849, L. C.

**Annotations:—***Consd.* *Minchin v. Minchin* (1871), 19 W. R. 993; *Griffith-Boscawen v. Scott* (1884), 26 Ch. D. 358. **Refd.** *Goddard v. Snow* (1826), 1 Russ. 485; *St. George v. Wake* (1833), 1 My. & K. 610; *Re Farnell's S. E.* (1886), 33 Ch. D. 599. **Mentd.** *Strathmore v. Bowes* (1788), 2 Cox, Eq. Cas. 26.

**383. —**—Answer to chancery bill.]—*CARTER v. CARTER* (1730), Mos. 365; 25 E. R. 442.

**Annotations:—***Consd.* *Brodrick v. Brown* (1855), 1 K. & J. 328. **Refd.** *Harvey v. Harvey* (1739), Barn. Ch. 103; *Churchman v. Harvey* (1757), Amb. 335.

**384. —**—Recital.]—Settlement of lands to the use of children as the parents should appoint, & in default of appointment to the children, as tenants in common in tail.

There being only two children, a son & a daughter, the father on the daughter's marriage advanced her a sum exceeding in value her moiety of the lands; & by the settlement executed previous to her marriage, it was declared that such sum was advanced & agreed to be accepted & taken in lieu, bar & full satisfaction of all & every sum & sums of money, legal & beneficial estates & interests whatsoever, to which she then was or at any time thereafter should be entitled under the settlement made on the marriage of her parents:—**Held:** the daughter was absolutely barred of all estate & interest in the settled lands, & the whole of such lands became vested in the son as tenant in tail.

In such cases there is a presumption, liable however to be rebutted by evidence to the contrary, that the father in so advancing one child intends to clear the property of the claim, of that child for the benefit of his other children, nor of himself, & so as to let such other children have the benefit of the advanced child's share.—*LEE v. HEAD* (1855), 1 K. & J. 620; 3 Eq. Rep. 1046; 24 L. J. Ch. 569; 26 L. T. O. S. 12; 1 Jur. N. S. 722; 3 W. R. 591; 69 E. R. 608.

**Annotations:—***Consd.* *Ford v. Tynte* (1864), 2 Hem. & M. 324. **Refd.** *Foster v. Cautley* (1855), 6 De G. M. & G. 55.

**385. —**—Petition.]—Wife may by bill with her husband appoint her separate estate for his debts.—*ALLEN v. PAPWORTH* (1731), 1 Ves. Sen. 163; 27 E. R. 958, L. C.

**Annotations:—***Refd.* *Hulme v. Tenant* (1778), 1 Bro. C. C. 18; *Johnson v. Gallagher* (1861), 3 De G. & J. 494; *Shattock v. Shattock* (1866), 14 L. T. 452; *Re Armstrong, Ex p. Gliehrst* (1886), 17 Q. B. D. 521.

**386. —**—]—Power of appointment among three persons executed by a transfer of one-third to one under an order on petition stating, that the person having the power was desirous, that the fund might be equally divided. That person dying without any further execution, the ct. gave the two remaining thirds respectively to another of the objects & to the administratrix of the third; who was dead; but had survived the person having the power.—*FORTESCUE v. GREGOR* (1800), 5 Ves. 553; 31 E. R. 734, L. C.

**Annotations:—***Consd.* *Wombwell v. Hanrott* (1851), 14 Beav. 143; *Foster v. Cautley* (1855), 6 De G. M. & G. 55; *Lee v. Head* (1855), 1 K. & J. 620.

**387. —**—]—Legacy in trust to be laid out in stock: the dividends, as they come due, to A. for life; & after her decease to pay the principal

on the construction of a will, that testator intended to dispose thereby of property of his own & also of property over which he had a special power of appointment, & under the disposition made by the will the property, subject to the power, is given to a member of the class among whom it can be appointed, the property passes under the power, it being immaterial whether the testator supposed that the property passed by the power or by virtue of his

own interest therein.—*BYRNE v. CUL-LINAN*, [1904] 1 I. R. 42.—*IR.*

**379 v. —**—]—*Re TURNBULL* (1908), 16 N. Z. L. R. 449.—*N.Z.*

**379 vi. —**—]—*JELICOE v. LOMAX*, [1923] N. Z. L. R. 21.—*N.Z.*

**379 vii. —**—]—*DALZIEL v. DALZIEL'S TRUSTEES, DALZIEL v. HENDERSON'S TRUSTEES* (1906), 7 F. (Ct. of Sess.) 545; 42 Sc. L. R. 404; 12 S. L. T. 793.—*SCOT.*

**379 viii. —**—]—*ALEXANDER'S TRUSTEES v. ALEXANDER'S TRUSTEES*, [1917] S. C. 654; [1917] 2 S. L. T. 52.—*SCOT.*

**n. Recital in settlement.]**—*IRWIN v. IRWIN* (1859), 10 I. Ch. R. 29.—*IR.*

**o. No reference to power in will—Whether word "appoint" sufficient—To exercise special power of appointment.]**—*Re RICHARDSON'S TRUSTS* (1886), 17 L. R. R. 436.—*IR.*

according to her appointment by will or otherwise; with power to her to purchase with it an annuity with the approbation of the trustees, but not to sell it.

A. has an absolute power of disposition; & her bill was held a sufficient indication of her intention to take the whole; making a formal appointment or writing unnecessary.—*IRWIN v. FARRER* (1812), 19 Ves. 86; 34 E. R. 450.

*Annotations*:—*Apld.* *Reith v. Seymour* (1828), 4 Russ. 263. *Consd.* *Hughes v. Wells* (1852), 9 Harc. 749.

388. — [—]—*HOLLOWAY v. CLARKSON*, No. 57, *ante*.

389. — [—]—*CAMBRIDGE v. ROUS* (1858), 25 Beav. 409; 53 E. R. 693.

*Annotations*:—*Reid.* *Willott v. Flewitt* (1865), 11 Jur. N. S. 820; *Marriott v. Abell* (1869), L. T. 7 Eq. 478.

390. — *Change of investment.*—*REITH v. SEYMOUR*, No. 39, *ante*.

391. — *Power of attorney to dispose of stock.*—*HUGHES v. WELLS*, No. 924, *post*.

392. — *Deed of release by appointee*—*Coupled with expressions in will of appointor.*—A deed by a son, releasing his right to a sum which was the subject of settlement; coupled with expressions in the father's will:—*Held*: to amount to an appointment of the sum to the son.—*HOLMES v. HOLMES* (1830), 1 Russ. & M. 660; 8 L. J. O. S. Ch. 157; 39 E. R. 253.

393. — *Acceptance of part payment of compensation*—*On compulsory purchase.*—Lands were settled to such uses as M. & his son should by deed jointly direct, & subject thereto to M. & his son successively for life, with remainders over to the sons of the son in tail. A railway co. having under their Act power to take the lands thus settled, M. & his son contracted for the sale to them of a certain part of the lands, & the co. were let into possession on an agreement that the amount of compensation should be settled either by arb'n. or a jury as M. should choose: the co. also paid a sum of money to M. expressly on account of the compensation money to be ultimately fixed: M., however, died before anything further was done:—*Held*: under these circumstances, that there was no contract the specific performance of which the ct. could enforce or aid in carrying into effect as a defective execution of the joint power of appointment, at the instance of the son & against the parties entitled in remainder under the settlement.—*MORGAN v. MILMAN* (1853), 3 De G. M. & G. 24; 22 L. J. Ch. 897; 20 L. T. O. S. 285; 17 Jur. 193; 1 W. R. 134; 43 E. R. 10, L. C. & L. J.

*Annotations*:—*Reid.* *Haynes v. Haynes* (1861), 1 Drew. & Sm. 426; *Re Dykes' Estate* (1869), 17 W. R. 658; *Johnson v. Brugge*, [1901] 1 Ch. 28.

394. — *Partial appointment of fund.*—Under a marriage settlement, the husband & wife had a power of appointing a fund among their children, & in default of appointment, or so far as it did not extend the fund was to go to the children equally. There were three children of the marriage. An appointment of one-third of the fund was made in favour of one of the children, yet so as not to affect the same power further than to the extent specified, & also, in case of no complete exercise or execution of the same power or authority as to the share of the fund not affected by the appointment, so as not to prejudice or affect the right or contingent interests of the appointee under the proviso for accruer, in case of the death of any or either of the other children, in such manner as specified in the settlement, & notwithstanding that in case of no complete appointment the then "appointment was intended to be made in lieu of all claims & demands" of the appointee to or for any original

or principal share of the fund:—*Held*: the appointors must be taken by necessary implication to have appointed the other two-thirds to their two other children & the appointee was not entitled to share in such two-thirds.—*FOSTER v. CAUTLEY* (1855), 6 De G. M. & G. 55; 26 L. T. O. S. 249; 2 Jur. N. S. 25; 43 E. R. 1150, L. C.

*Annotation*:—*Cons.* *Walmsley v. Vaughan* (1857), 3 Jur. N. S. 497.

395. — *Memorandum with will.*—Testator had a power to appoint the produce of a policy on his life amongst his children, by writing or will. By his will he bequeathed all his personal estate to his daughter F. By a contemporaneous writing, unattested, & headed "memorandum," he gave directions to F. as to his property, & said, "the money from the Equitable Insurance Office I would have equally divided between my daughters F. G. & A." & it also expressed his wish that his two sons should have certain interests out of his own property:—*Held*: (1) testator must be assumed to have known that his will did not operate on the policy fund; (2) the memorandum was an execution of the power; (3) the words "I would have" were imperative, & not mere instructions to F.; (4) F., who was not shown to have obtained the benefits under the will on the faith of any promise to distribute testator's property according to the memorandum, was not bound to do so.

The principle which applies . . . is easily stated. . . Did testator intend this instrument to operate as an execution of the power? Did he simply intend the paper to be instructions (ROMILLY, M.R.).—*PROBY v. LANDOR* (1860), 28 Beav. 504; 30 L. J. Ch. 593; 6 Jur. N. S. 1278; 9 W. R. 47; 54 E. R.

*Annotation*:—*Generally.* *Reid.* *Topham v. Portland* (1862), 31 Beav. 525.

396. — *Gift inter vivos.*—Under a settlement certain jewels were assigned upon trust for such person as G., a married woman, should by writing direct or appoint, & in default of such appointment, upon trust for her during her life for her separate use, & to be at her absolute disposal, & her receipt, or that of the person to whom she should direct the jewels to be delivered, to be a good discharge. G., without any direction in writing, delivered the jewels as an absolute gift to V., who retained them in her possession. After the death of G., the question arose as to the validity of the gift to V.:—*Held*: G. had power to dispose of her whole interest in the jewels without any direction in writing, & under the gift & manual delivery V. was absolutely entitled to them.—*FARRINGTON v. PARKER* (1867), L. R. 4 Eq. 116; 15 W. R. 685; *sub nom.* *FARRINGTON v. PARKER*, 16 L. T. 258.

397. — *Appointment of trustees.*—A husband & wife, who jointly had a limited power of appointment over settled personalty, executed a deed purporting to appoint to persons not objects of the power. By the death of the husband, the wife became absolutely entitled to the property comprised in the settlement. She appointed a new trustee, & more than once wrote to the mother of the intended appointees about the settled property, & describing the deed of appointment as still standing. It was not shown that she knew of the invalidity of the deed of appointment:—*Held*: she had sufficiently declared a trust of the settled property in favour of the intended appointees.—*Re BENNETT'S SETTLEMENT TRUSTS* (1867), 17 L. T. 438; 16 W. R. 331.

398. — [—]—A. devised to trustees, their heirs & assigns, all his freehold & copyhold estates,

**Sect. 9.—Expression of intention to exercise powers :  
Sub-sects. 1 & 2, A.]**

upon trust to pay the rents thereof to C. for life for her separate use ; & after her death he directed them to stand seised of such estates in trust for such persons & purposes as she should by will appoint ; & in default of appointment, he devised the estates to her in fee.

After A.'s death, the trustees were admitted tenants of the copyholds ; & they all died during the lifetime of C.

By her will C. appointed certain persons her trustees, & directed them to sell the copyholds & assure them to the purchaser, his heirs & assigns. After C.'s death, her trustees sold the copyholds by auction, & declined to show the purchaser the devolution of the copyhold title from A.'s surviving trustee, on the ground that under A.'s will his trustees only took an estate for life of C., & that there was an executory devise to her in default of appointment, which had taken effect :—*Held* : (1) under A.'s will his trustees took an estate of inheritance in quasi fee simple ; (2) C.'s will operated as an exercise by her of her power of appointment ; & (3) the legal estate in the copyholds remained vested in the surviving trustee of A.'s will, & the title thereto must be deduced accordingly.—*Re TOWNSEND'S CONTRACT*, [1895] 1 Ch. 716 ; 64 L. J. Ch. 334 ; 72 L. T. 321 ; 43 W. R. 392 ; 39 Sol. Jo. 315 ; 13 R. 328.

*Annotation* :—*Generally, Re Brooke, Brooke v. Dickson*, [1923] 1 Ch. 360.

**399. — Appointment to executors.]—**Where a married woman, having a general testamentary power of appointment over personal property, appoints the whole property to trustees in such a manner as to show an intention to make it part of her general personal estate, any undisposed of beneficial interest will belong to those entitled *ab intesta*, not to those entitled in default of appointment.

*Semble* : an appointment to exors. *eo nomine* is *prima facie* evidence of such intention.—*BRICKENDEN v. WILLIAMS* (1869), L. R. 7 Eq. 310 ; 17 W. R. 441 ; *sub nom.* *BICKENDEN v. WILLIAMS*, 38 L. J. Ch. 222.

*Annotations* :—*Apld. Re Pinède's Settltmt.* (1879), 12 Ch. D. 607. *Consd. Re Van Hagan, Sperling v. Rochfort* (1880), 16 Ch. D. 18. *Reid. Bristow v. Skirrow* (1870), L. R. 10 Eq. 1. *Re Ickeringill, Hinsley v. Ickeringill* (1881), 39 W. R. 500 ; *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286.

**400. — Execution of deed of transfer.]—**R. being trustee of shares in an unlimited co. for Mrs. F., a married woman, joined with Mr. & Mrs. F. in a deed whereby the shares were assigned to L. upon trust for Mrs. F. during her life for her separate use, & after her death as she should by deed or will appoint. Shortly afterwards Mr. F. died, & subsequently R. transferred the shares to Mrs. F., who executed the deed of transfer :—*Held* : the deed of transfer was an exercise in favour of Mrs. F. of the power of appointment reserved to her.—*MARLER v. THOMAS* (1873), L. R. 17 Eq. 8 ; 43 L. J. Ch. 73 ; 22 W. R. 25.

**401. Presumption of intention to exercise—Words otherwise inoperative—Will.]—**A will must be taken to be an execution of a power where the words of it would otherwise have nothing to operate upon.

A *feme covert* had a general power of appointment over some personal estate of the value of about £2,600. By her will, made in 1841, without referring to any power or property, she gave her husband £2,600. There being no other property over which the will could operate :—*Held* : independently of Wills Act, 1837 (c. 26), s. 27, the will operated as an execution *pro tanto* of the power.—

*SHELFORD v. AGLAND* (1856), 23 Beav. 10 ; 26 L. J. Ch. 144 ; 28 L. T. O. S. 198 ; 3 Jur. N. S. 8 ; 5 W. R. 170 ; 53 E. R. 4.

*Annotations* :—*Consd. A.-G. v. Wilkinson* (1866), 14 W. R. 910. *Reid. Hurlstone v. Ashton* (1865), 11 Jur. N. S. 725.

**402. Donee joining in deed for other purpose—Ignorance of existence of power.]—**A married woman being, although unaware of it, the donee of a general power of appointment by deed or will over policy moneys payable upon her own death concurred with her husband in settling certain family estates by an indenture which treated the policy moneys as the husband's own property, & settled them also. Her concurrence in the settlement was for a purpose entirely unconnected with the policy moneys & under it she took a life interest in remainder after her husband's death in the estates, but no interest in the policy moneys. She survived her husband, received in respect of her life interest in the estates sums exceeding the amount of the policy moneys, & died, having by her will given all property over which she had any disposing power to certain beneficiaries :—*Held* : by her will she had exercised her general power so as to make the policy moneys her own assets, & having taken under the settlement, benefits exceeding the value of the policy moneys, she could not by the exercise of the power take the policy moneys out of the settlement, without making good to the settlement beneficiaries an equal amount from her own estate ; & accordingly the policy moneys must be paid to the settlement trustees. *Semble* : the concurrence of the donee of the power in the deed of settlement, for purposes unconnected with the policy moneys subject to the power, & in ignorance of the existence of the power, could not operate as an exercise of the power although the deed purported to pass the policy moneys.—*GRIFFITH-BOSCAWEN v. SCOTT* (1884), 26 Ch. D. 358 ; 53 L. J. Ch. 571 ; 50 L. T. 380 ; 32 W. R. 580.

*Annotation* :—*Consd. Re Horsfall, Hudleston v. Crofton*, [1911] 2 Ch. 63.

**403. —**]—Where a person joins as a party to a deed for a specific purpose, he cannot from that fact alone be considered as having joined for a totally different purpose, *e.g.*, that of disposing by the deed, or thereby recognising the disposal of property which is thereby purported to be dealt with by other parties to the deed. H., by his will made in 1855, specifically devised real estate in trust for his daughter E. for life, & gave her a power of appointment over the property amongst her children. He also bequeathed upon similar trusts one-half of his residuary personalty. E. married in 1858, & on her marriage part of the real estate so devised in trust was conveyed by H. upon trust for her for life, & on her death in favour of her children as she should by deed or will appoint. H. died in 1861, & in 1871, a part of the real estate so devised in trust which was not included in the settlement was sold under a power in the will, & the proceeds of sale were invested, the investments being held by the trustees of the will together with the investments representing the residuary personalty. In 1891, E. became one of the trustees of the will, & in 1896, immediately before the marriage of S. one of her daughters, E. appointed to S., subject to her own life interest, one-fifth part of her share in the residuary personalty. The deed contained an erroneous recital that by the settlement on E.'s marriage H. had conveyed all the specifically devised real estate upon the trusts contained in that settlement for the benefit of E. & her children. On the next day by the marriage settlement of S. & F. to which

they & E. were parties S. assigned the one-fifth share to which she was entitled in expectancy on the death of E., under the appointment, in the moiety of the residuary personalty & the investments representing the same, "which investments, so far as they comprise or include such moiety are specified in the schedule hereto," upon the trusts of the new settlement. The schedule included investments representing the proceeds of the part of the specifically devised real estate which had been sold. The settlement contained a covenant by E. to pay S. an annuity:—*Held*: the appointment by E. extended to a fifth of her moiety of the residuary estate only & not to any part of the proceeds of sale, & by the joinder of E. as a party to the settlement a share of the proceeds of sale was not appointed or disposed of.—*Re HORSFALL*, *HUDLESTON v. CROFTON*, [1911] 2 Ch. 63; 80 L. J. Ch. 480; 104 L. T. 590.

*Annotation*:—*Reid*. *Re Sugden's Trusts*, *Sugden v. Walker*, [1917] 2 Ch. 92.

**404. Exercise by will revoked by second will—Whether second will valid exercise.**—A., a widow having power of appointment among her children by deed or will over certain real estate, appointed it to her two children, a son & daughter, in moieties by will. She afterwards executed another will, revoking all former wills made by her, without special reference to the former will & appointment, & devised & bequeathed all her real & personal estate to her daughter absolutely. Her son died in her lifetime leaving issue one child, a son:—*Held*: the second will revoked the first, but did not amount to an execution of the power of appointment.—*HARVEY v. HARVEY* (1875), 32 L. T. 141; 23 W. R. 478.

*Annotation*:—*Consd. Re Kingston*, *Wilkins v. Pryor* (1886), 32 Ch. D. 604.

**405. — Use of word "appoint" in second will.**—Where testator, having made a will reciting a power of appointment & exercising or purporting to exercise that power, made a subsequent will, which contained no clause of revocation & no reference to the power, but by which he purported to "give, devise, bequeath, & appoint" all his real & personal estate:—*Held*: the word "appoint" was, under the circumstances, a sufficient exercise of the power, & the second will, by implication, revoked the first.—*KENT v. KENT*, [1902] P. 108; 71 L. J. P. 50; 86 L. T. 536; 18 T. L. R. 293; 46 Sol. Jo. 247.

## SUB-SECT. 2.—WHERE WILLS ACT APPLICABLE.

### A. In General.

See Wills Act, 1837 (c. 26), s. 27.

**406. Object of Wills Act, 1837 (c. 26)—Abolition of difference between property & power.**—Where testatrix has a general power of appointment over sums of money, a bequest by her of pecuniary legacies, held, to operate as an execution of the power under Wills Act, 1837 (c. 26), s. 27.

The enactment was intended to get rid of the difference between property & power & to make it

unnecessary in framing a will to refer to the instrument creating the power or to the actual subject of the power (*SELWYN, L.J.*).—*Re WILKINSON* (1869), 4 Ch. App. 587; 17 W. R. 839, L. JJ.

*Annotation*:—*Reid*. *Re Davies's Trust* (1871), 41 L. J. Ch. 97.

**407. — Abolition of necessity to refer to instrument creating power—Or subject of power.**—*Re WILKINSON*, No. 406, *ante*.

**408. General devise or bequest operates as exercise of power.**—Testatrix having a general power of appointment over property contained in her marriage settlement, & having also a power of appointing certain exchequer bills left to her subsequently to her marriage, executed the power by her will, which was reserved to her by the marriage settlement, & then disposed of the residue of her property:—*Held*: the residuary clause was sufficient to pass all property over which testatrix had a power of appointment, which would include the exchequer bills.—*HARRINGTON v. HARRINGTON* (1843), 13 Sim. 318; 12 L. J. Ch. 354; 60 E. R. 124.

**409. —**—A., having a power to appoint £1,000 by will & which in default of appointment was given over to B. duly appointed it to C. who died in testator's life. He afterwards made a codicil giving the residue & the dividends due at his death on the £1,000 to his wife:—*Held*: under Wills Act, 1837 (c. 26), the £1,000 passed to the wife under the residuary gift.—*BUSH v. COWAN* (1863), 32 Beav. 228; 9 L. T. 161; 9 Jur. N. S. 429; 11 W. R. 395; 55 E. R. 89.

**410. —**—*GRIFFITH-BOSCAWEN v. SCOTT*, No. 402, *ante*.

**411. —**—Under a marriage settlement £1,000 was settled upon trust for such persons as G. should by will or codicil, or any writing in the nature thereof, appoint. G. executed a document which he called a testamentary appointment, & thereby, in pursuance of his power of appointment under the settlement, he appointed the £1,000, subject to the payment of his debts, funeral & testamentary expenses, whether of his testamentary appointment or of any will or codicil affecting his general property, unto his four sons. G. afterwards by will, after making various specific bequests to his four sons & three daughters, gave, devised, & bequeathed all the rest, residue & remainder of his estate & effects whatsoever & whosoever unto all his children equally. Probate was granted of the will, but not of the testamentary appointment:—*Held*: by Wills Act, 1837 (c. 26), s. 27, the gift in the will operated as a revocation of the prior testamentary appointment, & as an execution of the power of appointment given by the marriage settlement.—*Re GIBBES' SETTLEMENT*, *WHITE v. RANDOLF* (1887), 37 Ch. D. 143; 57 L. J. Ch. 757; 58 L. T. 11; 36 W. R. 429.

**412. —**—A married woman who had a general testamentary power of appointment over a trust fund, which was subject to the life interests of herself & her husband, but had no separate property & no other power of disposition or appointment over property, by her will, dated in 1865, not referring to the power, bequeathed a

## PART IV. SECT. 9, SUB-SECT. 2.—A.

**408i. General devise or bequest operates as exercise of power.**—*NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. v. CROOKE* (1898), 24 V. L. L. 353.—*AUS.*

**408ii. —**—A general power of appointment may be well exercised by a will executed previously to the creation of the power & that, too, by a mere residuary gift.—*DINSHAW SORABJI v. DINSHAW SORABJI* (1907),

I. L. R. 31 Bom. 472.—*IND.*

**408iii. —**—*ALEXANDER v. ALEXANDER* (1909), 28 N. Z. L. R. 895.—*N.Z.*

**408iv. —**—*TARRANT'S TRUSTEES v. HASTINGS* (1904), 6 F. (Ct. of Sess.) 968; 41 So. L. R. 738; 12 S. L. T. 206.—*SCOT.*

**408v. —**—*BRAY v. BRUCE'S EXECUTORS* (1906), 8 F. (Ct. of Sess.) 1078; 43 So. L. R. 746; 14 S. L. T. 222.—*SCOT.*

**408vi. —**—*WATT'S TRUSTEES v. JAMIESON*, [1912] S. C. 1320.—*SCOT.*

*p. Devise uncertain & conditional—Power not well exercised.*—*RUSSELL v. RUSSELL* (1861), 12 I. Ch. R. 377.—*IR.*

*q. Testator without property of his own at death—No reference in will to power—Whether will good exercise of power.*—*Re HERDMAN'S TRUSTS* (1893), 31 L. R. Ir. 87.—*IR.*



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sum of £400, to her brother, & the residue of all her properties, of whatsoever kind, " & any properties which may have become to me, or may become to me hereafter by will or otherwise," to her husband whom she appointed exor. She died in 1886, leaving her husband & brother surviving. The will was not discovered until 1888. It was disputed by the brother, but was proved by the husband in 1889. The question was whether the legacy of £400 was presently payable:—*Held*: the will must be construed as an appointment of the reversionary fund, as to £400 part thereof to the brother, & as to the residue thereof to the husband; & therefore, the legacy of £400 was not payable until the reversionary fund actually fell into possession.—*Re LUDLAM, LUDLAM v. LUDLAM* (1890), 63 L. T. 330.

*Annotation*:—*Mentd. Re Walford, Kenyon v. Walford* (1911), 81 L. J. Ch. 128.

413. — *If no contrary intention shown.*—By a marriage settlement, leaseholds were settled upon trust for wife for life for her separate use, & after her decease upon trust as husband should by deed or will appoint, & subject thereto upon trust for such person, etc., as under Statutes of Distribution might be entitled thereto. The husband by his will in 1850, after making certain provision for his only child, as to all other his estate, property, & effects whatsoever & wheresoever, which he should be possessed of, interested in, or entitled to at his decease, subject, as to such parts thereof as were comprised in the settlement, to that settlement & the trusts thereby declared & which indenture he thereby ratified & confirmed in all respects, gave & bequeathed the same to his widow absolutely:—*Held*: the general residuary bequest operated as an execution of the power of appointment reserved by the settlement.

The presumption of law under the . . . Act [Wills Act, 1837 (c. 26)] is that a general devise or bequest shall operate so as to pass everything over which testator has power of appointing " unless a contrary intention shall appear by the will " (PAGE-WOOD, V.-C.).—*HUTCHINS v. OSBORNE* (1858), 4 K. & J. 252; 27 L. J. Ch. 421; 31 L. T. O. S. 281; 4 Jur. N. S. 830; 6 W. R. 426; 70 E. R. 105; *affd.*, 3 De G. & J. 142, L. J.

414. — *Testator came of age in 1914, & on Dec. 12 of that year, being then possessed of certain freehold & leasehold property, settled it by deed on trusts for sale & conversion & then for himself & his children & then for such persons as he should by deed or will appoint. Afterwards on the same day he made a formal will by which he exercised the power of appointment in favour of pltf.'s daughter, & left half of all his other real & personal estate to pltf. & the other half to pltf.'s wife, & appointed pltf. exor. On May 1, 1917, testator made a soldier's will, in which he said " I leave all I have " to deft. Testator died on May 17, 1917, & so far as was known he at that time possessed no real property :—*Held*: as no contrary intention appeared, the soldier's will operated as an execution of the general power of appointment & as a revocation of the appointment in the first will.—*NIXON v. PRINCE* (1918), 34 T. L. R. 444.*

415. — *Testator bequeathed £1,000,000 to his trustees & declared that so long as his son was living & under twenty-six years of age the income of the fund, & so long as he was living & under thirty years, the income of one moiety thereof, should form part of his residuary estate, & that after the son should attain twenty-*

*six years his trustees should pay to him the income of one moiety thereof until he should attain the age of thirty years or previously die, & after he should attain thirty years should pay to him the whole income thereof, during the remainder of his life & that after his death his trustees should stand possessed of the fund in trust for such person or persons as the son should by will or codicil appoint, & that in default of & subject to such appointment the fund should form part of his residuary estate.*

The son while an infant & an officer in the army on active service made his will, & thereby, after giving legacies to a large amount, he devised & bequeathed all his real & personal estate of or to which he should be seised, possessed or entitled, or over which he should have a general power of appointment, to certain persons. The son was killed in action while still an infant, & his will was admitted to probate as a soldier's will under Wills Act, 1837 (c. 26), s. 11. His estate was very small apart from the appointed fund. The question arose whether an infant could by a soldier's will exercise a general testamentary power of appointment:—*Held*: no " contrary intention " within the meaning of Wills Act, 1837 (c. 26), s. 27, appeared in the will of the son, but a clear intention of exercising every general power of appointment which he possessed; the power conferred upon him by the will of his father to appoint by will or codicil was thereby conferred upon him whenever he should be of testamentary capacity to make a will or codicil; a power to appoint by will might be validly exercised, by an infant if an infant could make a valid will; that right was preserved to infant soldiers by the combined effects of Wills Act, 1837 (c. 26), ss. 11, 27, & having regard to the provisions of 7 & 8 Vict. c. 58, s. 3, an infant soldier could validly appoint personal estate over which he had a general power of appointment.—*Re WERNHER, WERNHER v. BEIT*, [1918] 2 Ch. 82; 87 L. J. Ch. 372; 118 L. T. 388; 34 T. L. R. 391; 62 Sol. Jo. 503, C. A.

*Annotation*:—*Apld. Nixon v. Prince* (1918), 34 T. L. R. 444.

416. — *Necessity to show contrary intention—Former law distinguished.*—*Estates A. & B.* were so settled that testator had no power of appointment to deal with A., but had a power of appointment over B. By his will, made after Wills Act, 1837 (c. 26), he referred to the settlement & confirmed it, & then reciting that he had considerable freehold estates & might become possessed of more he devised all his real estates of which he might die possessed to certain persons as trustees for purposes totally different from those of the settlement: he had not at the date of his will or his death any other estates besides A. & B.:—*Held*: testator must be taken to have known that he had a power of appointment over estate B.; the confirmation of the settlement operated only upon the estate A., & the devise was a good execution of the power.

I will state generally what I consider the law to be as applicable to cases of this kind, where, if there is an appointment at all, it is an appointment without express reference to the power. It is clearly settled that a general devise or bequest will not independently of the [Wills Act, 1837 (c. 26)] operate as an execution of a power; but it is also settled that where testator disposes of real estate, not having any other than what is subject to the power, he is in such case to be taken as dealing with that estate, & that as to both realty & personalty, if the court is satisfied by the manner in which the particular property is referred to, that testator intended to deal with that property, the disposition will be a valid execution of the power.



... The statute provides as to general powers of appointment that they shall be deemed well executed by a devise, unless a contrary intention appears by the will. . . . It is now absolutely necessary to show a contrary intention to exclude his execution of the power, while under the old law it was needful to show the intention to exercise the power (LORD ST. LEONARDS, C.).—*LAKE v. CURRIE* (1852), 2 De G. M. & G. 536; 21 L. T. O. S. 26; 16 Jur. 1027; 42 E. R. 981, L. C. & L. J.J.

*Annotations*.—*Distd. Re Williams, Foulkes v. Williams* (1889), 42 Ch. D. 93. *Reid. Hutchins v. Osborne* (1858), 4 K. & J. 252. *Mentd. Biann v. Bell* (1852), 2 De G. M. & G. 775.

417. ——— **Residuary legatees entitled in default.**]—*A.-G. v. BRACKENBURY* (1863), 1 H. & C. 782; 1 New Rep. 334; 32 L. J. Ex. 108; 8 L. T. 22; 9 Jur. N. S. 257; 11 W. R. 380; 158 E. R. 1099.

*Annotation*.—*Reid. Milman v. Lane* (1901), 85 L. T. 180.

418. ——— **Will of married woman.**]—*Wills Act, 1837* (c. 26), s. 27, applies to married women having testamentary powers of appointment exercisable during coverture, equally with persons *sui juris*.—*BERNARD v. MINSHULL* (1859), John. 276; 28 L. J. Ch. 649; 5 Jur. N. S. 931; 70 E. R. 427.

*Annotations*.—*Consd. Thomas v. Jones* (1862), 2 John. & H. 475. *Reid. Noble v. Willock* (1873), 42 L. J. Ch. 321; *Re Kyre, Eyre v. Eyre* (1883), 49 L. T. 259. *Mentd. Irvine v. Sullivan* (1869), L. R. 8 Eq. 673; *Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348.

419. ———.]—A power to appoint to any persons by will only is a general power of appointment within *Wills Act, 1837* (c. 26), s. 27. Accordingly, a general devise or bequest will operate as an execution of such power. But such a general testamentary power of appointment given to a tenant for life, being a married woman, is not equivalent to ownership, so that, as regards the operation of the rule against perpetuities, the interests arising under the execution of the power by the will of the tenant for life, must be considered as created under the deed or will conferring the power. P. bequeathed a sum of stock to his married daughter H. for life, with remainder to such persons as she should by will appoint. By a general bequest not referring to the power H. appointed the stock to her daughter S. for life with remainder to her daughter's children who should attain twenty-one or marry:—*Held*: the will of H. must be construed as an execution of the power created by the will of P. according to *Wills Act, 1837* (c. 26), s. 27.—*Re POWELL'S TRUSTS* (1869), 39 L. J. Ch. 188; 18 W. R. 228.

*Annotations*.—*Consd. Itous v. Jackson* (1885), 29 Ch. D. 521. *Reid. Re Flower, Edmonds v. Edmonds* (1885), 55 L. J. Ch. 200; *Phillips v. Cayley* (1889), 38 W. R. 241.

420. **Powers not given forced construction**—To comply with *Wills Act, 1837* (c. 26).]—*MOSS v. HARTER*, No. 460, *post*.

421. **Powers must be equivalent to absolute property.**]—*MOSS v. HARTER*, No. 460, *post*.

422. **Power to survivor of two—Exercise by will of ultimate survivor—Will executed during joint lives.**]—*THOMAS v. JONES*, No. 461, *post*.

423. **Failure of specific devise by way of appointment—Falls into residuary devise if any.**]—*FREME v. CLEMENT*, No. 1, *ante*.

#### B. On What Powers Statute Operative.

##### (a) In General.

424. **General powers.**]—*Re POWELL'S TRUSTS*, No. 419, *ante*.

425. ——— **Possessed by testator at time of death.**]—*Testatrix bequeathed her residuary estate to such persons as B. should appoint by deed or will, & in default of appointment to his next of kin; B. made his will, but died before testatrix:—Held*: the will could not operate as an execution of the power, but the gift in default of appointment took effect, & the next of kin were entitled.—*JONES v. SOUTHALL* (No. 2) (1862), 32 Beav. 31; 1 New Rep. 152; 32 L. J. Ch. 130; 8 L. T. 103; 3 Jur. N. S. 93; 11 W. R. 247; 55 E. R. 12.

*Annotation*.—*Apld. Re Young, Public Trustee v. Walker*, [1920] 2 Ch. 427.

426. ———.]—*Testatrix bequeathed a legacy upon the ordinary trusts for a nephew for life & after his death for his children & failing children, as happened, upon trust for such persons as he should by will or codicil appoint, & she provided that in case the nephew should predecease her the legacy "should be held upon the same trusts & subject to the same powers & provisions so far as capable of taking effect as if" the nephew "had died immediately after me."* The nephew died in the lifetime of testatrix having by his will given unto his wife "all property & effects real & personal which may now or at any time hereafter belong to me":—*Held*: *Wills Act, 1837* (c. 26), s. 27, only relates to such general powers of appointment as testator possesses at the time of his death, & as the nephew never became donee of the power attempted to be given to him by the will of testatrix on the hypothesis of his surviving her, the general bequest of personal estate contained in his will did not operate to exercise the power.—*Re YOUNG, PUBLIC TRUSTEE v. WALKER*, [1920] 2 Ch. 427; 89 L. J. Ch. 614; 124 L. T. 59; 64 Sol. Jo. 615.

427. **Not special powers.**]—(1) Where testator having a special power of appointment over real estate makes a general devise in favour of an object of the power, the fact that he has no real estate of his own at the date of the will does not, since the *Wills Act, 1837* (c. 26), afford a presumption of an intention to execute the power.

(2) The donee of a special power by will to direct trustees to pay to his wife for life the income of settled real estate held by them on trust for sale & conversion, having no real estate of his own, by his will devised & bequeathed all his real & personal estate to his wife absolutely. The will contained no reference to the special power or to the property comprised therein:—*Held*: the general devise & bequest in the will did not operate as an exercise of the power.—*Re WILLIAMS, FOULKES v. WILLIAMS* (1889), 42 Ch. D. 93; 58 L. J. Ch. 451; 61 L. T. 58, C. A.

*Annotations*.—*As to* (2) *Consd. Re Hayes, Turnbull v. Hayes*, [1900] 2 Ch. 332. *Reid. Re Milner, Bray v. Milner*, [1899] 1 Ch. 563.

428. ——— **Power to appoint among children.**]—A power to appoint amongst children is not within *Wills Act, 1837* (c. 26), s. 27, & a mere general devise or bequest to a child will not operate as an execution of such a power.—*CLOVES v. AWDRY* (1850), 12 Beav. 604; 50 E. R. 1191.

*Annotation*.—*Reid. Re Williams, Foulkes v. Williams* (1889), 61 L. T. 58.

429. ———.]—By a settlement of 1862, real estate, then subject to a mtge. in fee, was conveyed by B. to trustees, upon trust to permit her daughter R., a married woman, to receive the rents for her separate use, & upon further trust "for such person or persons, not being her present husband,

#### PART IV. SECT. 9, SUB-SECT. 2.—B. (a).

4241. **General powers.**]—*Re WALLINGER'S ESTATE*, [1898] 1 I. R. 139.—*IR. r. Special powers.*]—*DILLON v. DILLON* (1809), 1 Ball & B. 77, 92.—*IR.*

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or any friend or relative of his, & for such estate or estates " as R. should by deed or will appoint ; & , in default of appointment, then over. In 1868 B. & R., by a deed containing no recitals, mortgaged the property in fee, subject to the prior mtge., the proviso for redemption reserving the right of reconveyance to R., " her heirs or assigns, or as she or they shall direct." In 1885 R., her husband being then dead, made a will consisting of a general devise of all her real & personal estate in favour of a sister & her children :—*Held* : (1) the power of appointment given to R. by the settlement of 1862 was not a power " to appoint in any manner she might think proper," within Wills Act, 1837 (c. 26), s. 27, & , therefore, was not exercised by her general devise ; (2) the limitations in the settlement were not altered by the form of the proviso for redemption in the mtge. of 1868 so as to confer upon R. an absolute estate in fee simple ; (3) *semble* : a power of appointment by deed or will in favour of any person or persons " except A." may be a general power through A. being dead at the time the power is exercised, & thus be exercisable by a general devise under Wills Act, 1837 (c. 26), s. 27.—*Re BYRON'S SETTLEMENT, WILLIAMS v. MITCHELL*, [1891] 3 Ch. 474 ; *sub nem. Re REYNOLDS, WILLIAMS v. MITCHELL*, 60 L. J. Ch. 807 ; 65 L. T. 218 ; 40 W. R. 11.

*(b) Powers Created after Execution of Will.*

*See Wills Act, 1837 (c. 26), ss. 21, 27.*

**430. Clear expression of intention to exercise required.]**—*HOPE v. HOPE* (1854), 5 Giff. 13 ; 23 L. T. O. S. 343 ; 18 Jur. 823 ; 2 W. R. 674 ; 66 E. R. 902.

*Annotations :—Reid. Re Toape's Trusts* (1873), L. R. 16 Eq. 442 ; *Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch. D. 76.

**431. Special power — Whether exercised by will executed prior to creation of power.]**—A., being entitled to a share of testator's residuary estate, bequeathed all the effects due to him from the estate to his nine children. The estate was then unadministered ; but it was afterwards administered, & certain debts due to it were allotted to A. as his share of the residue. After which he settled the debts in trust for himself for life, remainder in trust for his sons & daughters or any of them, or any of their children as he, from time to time by deed or writing, to be by him duly executed & attested, or by his will, should appoint :—*Held* : under the combined operation of Wills Act, 1837 (c. 26), ss. 24, 27, the will, though made before the power was created, was a good execution of it.—*STILLMAN v. WEEDON* (1848), 16 Sim. 26 ; 18 L. J. Ch. 46 ; 12 Jur. 992 ; 60 E. R. 782.

*Annotations :—Folld. Cofield v. Pollard* (1857), 3 Jur. N. S. 1203. *Consd. Thomas v. Jones* (1862), 2 John. & H. 475. *Distd. Elgood v. Cole* (1869), 21 L. T. 80 ; *Re Ruding's Settmt.* (1873), L. R. 14 Eq. 266. *Consd. Re Hayos, Turnbull v. Hayes*, [1900] 2 Ch. 332. *Reid. Cowper v. Mantell* (1856), 22 Beav. 223. *Mentd. Noble v. Willock* (1873), 42 L. J. Ch. 321.

**432. ———.]**—By a settlement made in 1842 on the marriage of a female infant, the husband & wife covenanted that as soon as the wife attained twenty-one certain real estate to which she was entitled as tenant in tail, & certain personal property belonging to her, should be conveyed, & assigned to trustees upon trust after the death of the wife, for the children of the marriage as the husband & wife by deed, or the survivor of them by deed with or without power of revocation & new appointment, or by will, should appoint, & in default of appointment in trust for the children

of the marriage in equal shares & by the same settlement the husband assigned a policy of assurance upon his own life to the trustees upon the same trusts. The joint power of appointment was never exercised, & the wife died in 1857, without having executed any disentailing assurance of the real estate. Her eldest son entered into possession of the real estate as tenant in tail. In 1864 the husband, by deed reciting that the eldest son was the heir in tail of his mother, appointed all the trust funds comprised in the settlement, other than the real estate, to the four younger children, & reserved to himself a power of revocation & new appointment by deed or will. The trustees then divided the trust funds with the exception of the moneys secured by the policy, between the four younger children. In 1869 the husband by will in express exercise of the power contained in the marriage settlement, appointed specific sums of money to the eldest son & three of the younger children, & appointed the residue of the settlement funds to the eldest son. In 1878, by deed, reciting the deed of 1864, the division amongst the four younger children, & that the moneys secured by the policy were the only fund remaining subject to the trusts of the settlement, the husband, in exercise of the power reserved by the deed of 1864, revoked the appointment thereby made, & appointed the policy moneys in equal fifths, between his eldest son, his three surviving younger children, & the three children of a deceased younger child, & again reserved to himself a power of revocation. In 1883, the husband by deed made the appointment of 1878 in favour of his eldest son, irrevocable, & in 1888 the husband died. Upon a summons to obtain the opinion of the ct., as to who were the persons entitled under the settlement :—*Held* : (1) the date of the husband's will being before that of the deed of 1878 there was sufficient evidence of " a contrary intention " within Wills Act, 1837 (c. 26), s. 24, & consequently the will did not speak from the death of testator so as to revoke the appointment by that deed ; (2) as the deed of 1878, although removing four-fifths of the fund from the operation of the will, did not purport to revoke it, the will under Wills Act, 1837 (c. 26), s. 19, remained in force, & operated as to the one-fifth ineffectually appointed by the deed of 1878 to the grandchildren of testator ; (3) having regard to the intention shown by the appointor in the deed of 1878, the eldest son was not bound to elect between the real estate, which devolved on him as tenant in tail, & the interest appointed to him by that deed ; but he was bound to elect between such real estate & the benefits derived by him under the will, inasmuch as the will took effect by the operation of law & independently of the intention of testator.

(4) An instrument which exercises a power of revocation & new appointment must show, not merely an intention to appoint, but an intention to revoke the subsisting appointment (*STIRLING, J.*).—*Re WELLS' TRUSTS, HARDISTY v. WELLS* (1889), 42 Ch. D. 646 ; 58 L. J. Ch. 835 ; 61 L. T. 588 ; 38 W. R. 220.

*Annotations :—Generally, Reid. Re Hayes, Turnbull v. Hayes*, [1900] 2 Ch. 332 ; *Re Barker's Settmt.*, *Knocker v. Vennor Jones*, [1920] 1 Ch. 527.

**433. ———.]**—*Re HAYES, TURNBULL v. HAYES*, No. 335, *ante*.

**434. General power—Exercised by will executed prior to creation of power.]**—In 1852, testatrix, by her will, gave the residue of her estate & effects, consisting of moneys at interest, shares in an assurance co., etc., to a trustee upon certain trusts. In 1856, she executed a settlement in anticipation

of marriage, by which two hundred & fifty shares in the said co., & two sums of money out at interest were settled, after certain interests for life, upon trust for all & every "the person or persons, child or children," as she should appoint, & in default, for her next of kin:—*Held*: the residuary gift in the will was a good execution of the power contained in the subsequent settlement. —*COFIELD v. POLLARD* (1857), 3 Jur. N. S. 1203; 5 W. R. 774.

*Annotation*:—*Distd. Re Ruding's Settlement*. (1872), L. R. 14 Eq. 266.

435. ———.]—J., by will in 1855, disposed of all his property; & by an indenture, dated in Feb. 1860, settled a sum of £5,072, upon trust for his wife for life, with remainder to himself for life reserving to himself power to appoint the same by will. In Dec. 1860, J., by a voluntary instrument, attested by one witness, & reciting the settlement of Feb. 1860, covenanted that his devisees or exors. would after his decease on being satisfied that all his debts, etc., were paid, convey, transfer & pay over to the trustees therein named, all the real & personal estate to which he should then be entitled or which he should then have disposed of by his will. J. died in his wife's lifetime. Upon suit for administration of J.'s estate:—*Held*: the will though dated prior to the deed of Feb. 1860, operated as an execution of the power of appointment contained in that deed.—*PATCH v. SHORE* (1862), 2 Drew. & Sm. 589; 1 New Rep. 157; 32 L. J. Ch. 185; 7 L. T. 554; 9 Jur. N. S. 63; 11 W. R. 142; 62 B. R. 743.

*Annotation*:—*Distd. Re Ruding's Settlement*. (1872), L. R. 14 Eq. 266.

436. ———.]—In 1845 testator disposed of his real estate by will. In 1849, real estate was settled to such uses as testator should by will appoint. Testator made a subsequent will, which did not pass real estate:—*Held*: upon the true construction of Wills Act, 1837 (c. 26), ss. 24 & 27, the disposition by the prior will was a good execution of the power contained in the subsequent settlement.—*HODSDON v. DANCER* (1868), 16 W. R. 1101.

*Annotation*:—*Distd. Re Ruding's Settlement*. (1872), L. R. 14 Eq. 266.

437. ———.]—On Dec. 20, 1881, prior to the marriage, solemnised in England, of a domiciled Englishwoman, a widow, with a domiciled Spaniard, real estate in England of the intended wife was vested by her in a trustee in fee, to such uses as the intended wife should by deed or will appoint, & subject thereto, to the use of the intended wife, for her separate use. The settlement was made with the approbation of the intended husband, & the deed contained a statement that this approbation was given in consideration of a renunciation the same day executed by the intended wife of any rights which she would otherwise have acquired by her marriage in respect of the property of the intended husband according to the law of Spain. The deed also contained a declaration that it was to take effect & be construed according to the law of England. The marriage was solemnised on the next day. On Feb. 23, 1882, the wife, being then domiciled in Spain, executed a deed poll, in accordance with the provisions of the settlement, whereby she, in exercise of the power given to her by the settlement, appointed the real estate to the use of herself in fee for her separate use. By another deed executed the same day, to which the husband was a party, she, with the consent of the husband, appointed & conveyed, & the husband conveyed, the real estate to the use of a trustee in fee, upon trust for sale, & out of the proceeds of sale to

pay certain specified debts, & subject thereto, in trust for such person or persons as the wife "shall at any time or times hereafter by any writing or writings from time to time appoint," & in default of any appointment & subject thereto, in trust for the wife absolutely for her separate use. Under this deed the trustee sold the property, & out of the proceeds of sale paid the specified debts, & there then remained a surplus in his hands. The wife died in June, 1882, having by a will, executed immediately after her marriage, & which purported to be made in exercise of the powers reserved to her by her marriage settlement, & of all other powers enabling her, directed, appointed, & declared that the real & personal estate over which she had any disposing power at the time of her death should be held & applied in the payment of certain legacies & annuities, & subject thereto, she gave four-fifths of her real & personal estate, in case she should leave no children, to her husband absolutely. She gave the remaining one-fifth of her property, charged with the before-mentioned annuities & legacies, to her brother & sisters, or to the children *per stirpes* of such of them as should die before her leaving children. Testatrix died without issue. The husband survived her. According to the law of Spain under such circumstances two-thirds of her property belonged to her father & mother, notwithstanding that she had left a will:—*Held*: whether the will was or was not a good exercise of the power reserved by the deed of Feb. 1882, it was a valid testamentary disposition by virtue of the limitation in default of appointment to the separate use of testatrix; it took effect according to English law, & the legatees named in it, including the husband, were entitled to the benefits given to them by it. *Semble*: the will was a valid exercise of the power of appointment given by the deed of Feb. 1882.—*Re HERNANDO, HERNANDO v. SAWTELL* (1884), 27 Ch. D. 284; 53 L. J. Ch. 865; 51 L. T. 117; 23 W. R. 252.

*Annotations*:—*Mentd. Re Mégret*, *Twoedle v. Maunder* (1901), 70 L. J. Ch. 451; *Re Mackenzie, Mackenzie v. Edwards-Moss*, [1911] 1 Ch. 578.

438. ———.]—P., a married woman, made a will the day after her marriage in the following terms: "In pursuance & exercise of the power of appointment vested in me by the settlement executed previously to my marriage & of every other power enabling me, I hereby appoint, give, & bequeath all the property settled by me on my marriage, & over which I have any disposing power unto my dear husband." After the execution of the will, but in the lifetime of P., O. died, having by will bequeathed £100, East Indian Railway Annuities, in trust for P., for life, with remainder as she should by will appoint, with remainders over:—*Held*: P.'s will was not confined to the property comprised in her marriage settlement, but operated to exercise the power given her by the will of O.—*Re OLD'S TRUSTS, PENGELLEY v. HERBERT* (1886), 54 L. T. 677.

439. ———.]—Testatrix, who had a general power of appointment over the A. property, by her will in 1854, after specific devises & bequests devised & bequeathed the residue of her estate to X. By a deed poll in 1855 she appointed the A. property upon such trusts as she by deed or her last will "should from time to time or at any time thereafter direct or appoint," & in default of appointment upon trust for Y. Testatrix died in 1857:—*Held*: reading together Wills Act, 1837 (c. 26), ss. 24, 27, the will operated as an exercise of the power given or reserved by the subsequent deed poll & passed the property to X.—

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**AIREY v. BOWER** (1887), 12 App. Cas. 263; 56 L. J. Ch. 742; 56 L. T. 409; 35 W. R. 657, H. L. *Annotations*.—*Distd.* *Re Wells' Trusts*, *Hardisty v. Wells* (1889), 42 Ch. D. 646. *Reid.* *Re Marsh*, *Mason v. Thorne* (1888), 38 Ch. D. 630; *Re Hayes*, *Turnbull v. Hayes*, [1900] 2 Ch. 332; *Re Mosse*, *Beddington v. Beddington*, [1902] 1 Ch. 100.

**440.** ———— **Unless contrary intention expressed.**—**THOMAS v. JONES**, No. 461, *post*.

**441.** ———— **—**—**PETTINGER v. AMBLER**, **BUNN v. PETTINGER**, No. 466, *post*.

**442.** ———— **—**—**By a settlement dated Jan. 6, 1858, the settlor declared that a sum of money should be held on trust as he should by deed or will appoint, & in default of appointment in trust as therein mentioned. A will made by the settlor five weeks before the settlement contained a general residuary bequest:—Held: although a general residuary bequest would operate as an execution of a power in a subsequent settlement, still the ct. had power in construing both instruments to consider the surrounding circumstances, which showed that the settlor never intended the settlement to be revoked by a prior will; & consequently the will was not an execution of the power.**—*Re RUDING'S SETTLEMENT* (1872), L. R. 14 Eq. 266; 41 L. J. Ch. 665; 20 W. R. 936.

*Annotations*.—*Distd.* *Boyes v. Cook* (1880), 14 Ch. D. 53. *Reid.* *Re Clark's Estate*, *Maddick v. Marks* (1880), 14 Ch. D. 422.

**443.** ———— **—**—**By a separation deed A. settled his property, reserving to himself a general power of appointment by will over one-third of it & declaring the trusts of the remaining two-thirds for his wife & children. By his will executed several months previously to the separation deed A. devised & bequeathed all his property to trustees upon trusts for his wife & children:—Held: the will was a good execution of the power; & the settlement & the circumstances under which it was executed could not be looked at to show a contrary intention.**—*BOYES v. COOK* (1880), 14 Ch. D. 53; 49 L. J. Ch. 350; 42 L. T. 556; 28 W. R. 754, C. A.

*Annotations*.—*Reid.* *Re Hernando*, *Hernando v. Sawtell* (1884), 27 Ch. D. 284; *Airey v. Bower* (1887), 12 App. Cas. 263; *Re Marsh*, *Mason v. Thorne* (1888), 38 Ch. D. 630; *Re Wells' Trusts*, *Hardisty v. Wells* (1889), 42 Ch. D. 646; *Re Hayes*, *Turnbull v. Hayes*, [1900] 2 Ch. 332. *Mentd.* *Re Layard*, *Layard v. Beesborough* (1916), 85 L. J. Ch. 505.

**C. On What Descriptions of Property Statute Operative.**

See Wills Act, 1837 (c. 26), s. 27.

**444. General description.**—**A. having a general power of appointment by deed or will over personal property, gave & bequeathed by her will "one moiety or half-part of her property which she might be possessed of & entitled to at the time of her decease":—Held: to be a valid exercise of her power of appointment.**—*FRANKCOMBE v. HAYWARD* (1845), 5 L. T. O. S. 36; 9 Jur. 344.

**445.** ———— **—**—**Testator devised all his real estate to such uses as A. by deed or will should appoint; in default, to A. for life, after the death of A. he directed that the Hunslet estate should be sold, & the produce fall into his general residuary personal estate, & as to the St. Catherine estate, & all his other real estate, devised them in strict settlement to B. & her issue. Testator gave his residue as A. should appoint by deed or will, & in default upon trusts for B. & her children. After testator's death A. appointed all the personal estate to herself for life, & afterwards to the trustees**

**of the will. On the marriage of B., A. revoked her own life estate, & appointed the personal estate to the trustees of the will, to hold £20,000 upon such trust as she, A., should appoint, & as to the remainder upon trust for B. & her children. After B. married, A. made her will, in 1851, giving all her real estate to trustees, upon the trusts of the St. Catherine estate:—Held: (1) the appointment of the personalty did not include the Hunslet estate; & (2) the will of A. was within the operation of Wills Act, 1837 (c. 26), & a general devise operated as an execution of the power over the St. Catherine estate.**—*WALKER v. BANKS* (1855), 25 L. T. O. S. 266; 1 Jur. N. S. 606.

**446.** ———— **—**—*Re JACOB, MORTIMER v. MORTIMER*, No. 468, *post*.

**447. Appointment of residuary legatee.**—**Testatrix having a general power of appointment over a sum of stock under the will of T., appointed the stock to her sons, Joseph & John, & her other children, equally; & she left any other sum of money or property to which she then was or might thereafter become entitled, under the will of T., to be divided amongst such of her children as might be living at her death; & she constituted Joseph her residuary legatee. John died before her:—Held: Joseph was entitled to the share of the stock intended for John.**—*Re SPOONER'S TRUST* (1851), 2 Sim. N. S. 129; 21 L. J. Ch. 151; 18 L. T. O. S. 269; 61 E. R. 289.

*Annotations*.—*Appl.* *Gale v. Gale* (1856), 21 Beav. 349. *Consd.* *Hawthorn v. Sheddin* (1856), 3 Sm. & G. 293. *Appl.* *Re Ellen*, *Thomas v. McKechnie* (1893), 68 L. T. 816. *Reid.* *Bush v. Cowan* (1863), 9 L. T. 161; *Re Mosse*, *Beddington v. Beddington* (1901), 85 L. T. 596.

**448. — "All real estate, money & securities" — "Rest, residue, & remainder of personal estate."**—**(1) Testator bequeathed certain property to A. for life, with remainder to such persons as A. should by any deed or deeds, instrument or instruments in writing, to be by her signed, sealed & delivered in the presence of, & attested by two or more witnesses, appoint. A. made a will, dated after the operation of the Wills Act, 1837 (c. 26):—Held: the will was an execution of the power.**

**(2) A. having a power of appointment over a sum of Consols, some leasehold ground rents, & some shares in an insurance co., made a will, by which she bequeathed all her real estate, money & securities for money to B., & all the rest, residue & remainder of her personal estate to C.:—Held: all the property subject to the power passed by the will, & B. was entitled to the Consols & C. to the shares & ground rents.**—*TURNER v. TURNER* (1852), 21 L. J. Ch. 843; 20 L. T. O. S. 30.

*Annotations*.—*As to (2) Distd.* *Butler v. Butler* (1884), 28 Ch. D. 66. *Foll.* *Re Jacob*, *Mortimer v. Mortimer*, [1907] 1 Ch. 445. *Generally, Mentd.* *Herbert v. Harrison* (1869), 17 W. R. 523.

**449. — "All stocks, shares & securities which I possess or to which I am entitled."**—*Re JACOB, MORTIMER v. MORTIMER*, No. 468, *post*.

**450. — "All my shares" in stock.**—**Where testatrix bequeathed "all my shares in the Halifax New Market Consolidated stock" to a legatee, & devised & bequeathed all her real estate & all the residue of her personal estate, including any property over which she might have a power of appointment, to her trustees upon certain trusts therein declared, & at the date of her will, & of her death, she owned some of this stock, & had a general power of appointment over a further sum of the same stock:—Held: the bequest of the stock was "a bequest of personal property described in a general manner," within Wills Act, 1837 (c. 26), s. 27, & operated as an execution of the general testamentary power, & accordingly, the further sum over which she had a general power**

of appointment passed to the legatee, & not under the gift of residue.—*Re DOHERTY-WATERHOUSE, MUGRAVE v. DE CHAIR*, [1918] 2 Ch. 269; 87 L. J. Ch. 630; 119 L. T. 298; 62 Sol. Jo. 636.

**451. — General pecuniary legacies.]—**General pecuniary legacies are bequests of personal property described in a general manner within the meaning of Wills Act, 1837 (c. 26), s. 27, where no particular fund was indicated for payment, & were therefore payable out of personal estate, which testatrix had power to appoint in any manner she might think proper, there being no assets of which testatrix was possessed as her own personal estate sufficient to pay the legacies.—*HAWTHORN v. SHEDDEN* (1856), 3 Sm. & G. 293; 25 L. J. Ch. 833; 27 L. T. O. S. 304; 2 Jur. N. S. 749; 65 E. R. 665.

*Annotations:—*Consd. *Hurlstone v. Ashton* (1865), 11 Jur. N. S. 725. *Apprvd. Re Wilkinson* (1869), 4 Ch. App. 587. *Consd. Re Seabrook, Gray v. Baddeley*, [1911] 1 Ch. 151. *Reid. Shelford v. Acland* (1856), 23 Beav. 10.

**452. — With appointment of executors.]—**D., who had, under the will of her late husband, a general power of appointment over a moiety of his residuary estate, by will in 1869, after directing that her debts should be paid, & giving pecuniary legacies, bequeathed the residue of her personal estate which she had any title to or interest in, unto her brothers & sisters, M. E., W., & J. equally, & appointed an exor. M. & J. died in the lifetime of the appointor:—*Held*: the next of kin of the husband were entitled to the shares which M. & J. would have taken if they had survived the appointor.

It seems settled by the cases of *Chamberlain v. Hutchinson*, No. 635, *post*, & *Wilkinson v. Schneider*, No. 656, *post*, authorities which are binding on me, that a testamentary appointment under a general power to A. in trust for B. which lapses as to the beneficial interest by B.'s death before the appointor operates as a good appointment in favour of A. who holds on the same trusts as if it had been the appointor's own property (*WICKENS, V.-C.*).—*Re DAVIES' TRUSTS* (1871), L. R. 13 Eq. 163; 41 L. J. Ch. 97; 25 L. T. 785; 20 W. R. 165.

*Annotations:—*Consd. *Re Van Hagan, Sperling v. Rochfort* (1880), 16 Ch. D. 18. *Distd. Re Ickeringill's Estate, Hinsley v. Ickeringill* (1881), 17 Ch. D. 151. *Consd. Re Scott, Scott v. Hanbury*, [1891] 1 Ch. 298. *Fold. Re Boyd, Kelly v. Boyd*, [1897] 2 Ch. 232; *Re Marton, Shaw v. Marton*, [1902] 1 Ch. 314. *Fold. Re Seabrook, Gray v. Baddeley*, [1911] 1 Ch. 151; *Re Russell Skinner, Marriott v. Ensor* (1924), 88 Sol. Jo. 440. *Reid. Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *Re Peacock's Settlement, Kelcey v. Harrison*, [1902] 1 Ch. 552; *Re Fearnside, Raines v. Chadwick*, [1903] 1 Ch. 250; *Re Dodson, Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284; *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286.

**453. — No residuary bequest of personalty.]—**The execution by the donee of a general power of appointment of a will containing no residuary bequest of personal estate but merely the appointment of exors. & bequests of general pecuniary legacies will, in the event of the donee's own estate proving insufficient to pay the debts & legacies, operate under Wills Act, 1837 (c. 26), s. 27, as an execution of the power to the extent of the amount necessary to enable both the debts & the legacies to be paid.—*Re SEABROOK, GRAY v. BADDELEY*, [1911] 1 Ch. 151; 80 L. J. Ch. 61; 103 L. T. 587.

**454. — Residuary bequest of personalty.]—**Testatrix, having a general power of appointment over personal property, by her will made after Wills Act, 1837 (c. 26), directed that her debts & funeral & testamentary expenses should be fully paid by her exor. out of her personal estate; she then gave several pecuniary legacies, with a direction that they should abate ratably

if, after payment of her debts & funeral & testamentary expenses, there should not be sufficient to pay them all in full, & she gave all the residue of her estate to certain persons:—*Held*: the will operated as an execution of the power in favour of the exor. for the purpose of paying testatrix's debts, funeral & testamentary expenses, & legacies, & only so much of the property, the subject of the power, as remained after making those payments, passed by the residuary bequest.—*WILDAY v. BARNETT* (1868), L. R. 6 Eq. 193; 16 W. R. 961.

*Annotation:—Fold. Re Wilkinson* (1869), 4 Ch. App. 587.

**455. — — — — —.]—***Re WILKINSON*, No. 406, *ante*.

**456. — — — — —.]—***Re DAVIES' TRUSTS*, No. 452, *ante*.

**457. — Specific & pecuniary legacies.]—**The donee of a general power of appointment over a sum of consolidated bank annuities, by will gave various specific & pecuniary legacies, including a gift of Indian Stock, & appointed exors., but the will did not contain any general gift or reference to the power:—*Held*: not an execution of the power under Wills Act, 1837 (c. 26), s. 27.—*HURLSTONE v. ASHTON* (1865), 11 Jur. N. S. 725.

*Annotation:—Distd. Wilday v. Barnett* (1868), L. R. 6 Eq. 193.

**458. — "Moneys I die possessed of."]**—*Re GREAVES' SETTLEMENT TRUSTS*, No. 482, *post*.

#### D. Contrary Intention Excluding Statute.

See Wills Act, 1837 (c. 26), s. 27.

**459. Necessity for showing contrary intention—**To defeat exercise of power.]—*LAKE v. CURRIE*, No. 416, *ante*.

**460. What amounts to contrary intention—**Bequest of estate "not otherwise effectually disposed of."—By a voluntary settlement in 1818, a settlor transferred a debt to a trustee in trust for such persons & purposes as the settlor should by any deed or instrument in writing appoint, & in default, to pay the income to the settlor for his life, & on his death to distribute the amount amongst specified persons. He afterwards executed an appointment by deed of part of the fund, & confirmed the trusts of the settlement as to the remainder. By his will, made in 1852, the settlor gave certain legacies, & then gave "all his personal estate not otherwise effectually disposed of" to trustees:—*Held*: (1) the settlor had sufficiently expressed his intention not to affect the unappointed property comprised in the settlement of 1818; & (2) even if no such intention appeared, Wills Act, 1837 (c. 26), s. 27, applied only to cases where the power of appointment was equivalent to absolute property.

*Semble*: the power of appointment contained in the deed did not authorise an appointment by will.

It is not the duty of the ct. to strain the words of a power of appointment, in order to bring them within Wills Act, 1837 (c. 26), s. 27, but to ascertain whether the power is in the widest & most general terms.—*MOSS v. HARTER* (1854), 2 Sm. & G. 458; 24 L. T. O. S. 19; 18 Jur. 973; 2 W. R. 540; 65 E. R. 480.

*Annotations:—As to (1) Distd. Bush v. Cowan* (1863), 32 Beav. 228. *Consd. Re Ruding's Settlement*, [1872], L. R. 14 Eq. 266. *Appld. Re Clark's Estate, Maddick v. Marks* (1880), 14 Ch. D. 422. *Reid. Re Marsh, Mason v. Thorne* (1888), 38 Ch. D. 630; *Re Stokes, Public Trustee v. Brooks*, [1922] 2 Ch. 406. *Generally, Consd. Phillips v. Cayley* (1889), 43 Ch. D. 222.

**461. — Tenor of will inconsistent with intention to exercise.]—**(1) A general power given to the survivor of two persons may, under Wills Act, 1837 (c. 26), be exercised by a general devise in a

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will executed by the ultimate survivor during the joint lives.

Wills Act, 1837 (c. 26), ss. 7, 8, preserve the previously existing incapacities arising from infancy & coverture respectively, but Wills Act, 1837 (c. 26), s. 8, does not preserve, in the case of married women, any incapacities not specially dependent on coverture, which are removed generally by other sects. of Wills Act, 1837 (c. 26), as, for example, those relating to after-acquired property or power. Therefore, where a general power was vested in the survivor of A., B., & C., a married woman with testamentary capacity, & C. ultimately became the survivor:—*Held*: the power was well exercised by a residuary devise in the will of C., made while under coverture & during the life of B.

(2) The circumstance that the devise contained limitations for the life of B.:—*Held*: not to be a conclusive indication of an intention not to exercise a power which would only come into existence in the event of B. predeceasing testatrix.—*THOMAS v. JONES* (1862), 2 John. & H. 475; 31 L. J. Ch. 732; 7 L. T. 154; 8 Jur. N. S. 1124; 10 W. R. 853; 70 E. R. 1145; *affd.*, 1 De G. J. & Sm. 63, L. C.

*Annotations*:—*As to* (1) *Consd.* *Willock v. Noble* (1875), L. R. 7 H. L. 580. *Appld.* *Re Waterhouse, Waterhouse v. Hyley* (1907), 77 L. J. Ch. 30. *Reid.* *Re Moir's Settltmt. Trusts* (1882), 46 L. T. 723. *Generally, Reid.* *Griggs v. Gibson, Maynard v. Gibson* (1866), 35 L. J. Ch. 458; *Cook* (1880), 14 Ch. D. 53. *Mentd.* *Noble v. P. & D.* 276.

—(1) Testator was under covenant to pay £2,000 to the trustees of his settlement, upon trust for his wife for life, with remainder to his general appointees by deed or will.

By his will, he directed the exors. to pay the £2,000 to the trustees, in order that they might invest it, & pay the income to the wife for life; & then bequeathed his residuary estate, subject to certain legacies, to the wife absolutely:—*Held*: the residuary bequest was a good execution of the power.

(2) There is no contrary intention within the meaning of the statute [Wills Act, 1837 (c. 26)] unless you find something in the will inconsistent with the view that the general devise was meant as an execution of the power (*PAGE-WOOD, V.-C.*). *SCRIVEN v. SANDOM* (1862), 2 John. & H. 743; 70 E. R. 1258.

—*Re Doherty-Waterhouse, Musgrave v. De Chair*, [1918] 2 Ch. 269. *Consd.* *Re Stokes, Public Trustee v. Brooks*, [1922] 2 Ch. 406. *Generally, Reid.* *Re Marten, Shaw v. Marten* (1901), 71 L. J. Ch. 203.

**463.** ———.]—*Re DOHERTY-WATERHOUSE, MUSGRAVE v. DE CHAIR*, No. 450, *ante*.

**464.** ———.]—Where an appointor under a power devised all the residue of her estate to X., & recited one power which, in the events which happened, did not arise & purported to exercise it, but did not recite another power which, in the events which happened did arise or purport to exercise it:—*Held*: there was no contrary intention within Wills Act, 1837 (c. 26), s. 27, & accordingly there was an effectual appointment by the will.—*Re ANDREWS, PUBLIC TRUSTEE v. VINCENT* (1922), 66 Sol. Jo. 284.

**465.** ———.]—Under her father's will testatrix had a general power of appointment in default of issue over the capital & income of a trust fund, & also a special power of appointment notwithstanding coverture over the income of the same fund in favour of her husband for life.

By her will made in exercise of the special power & of "every power enabling her in that behalf" she appointed the income of the trust fund to her husband for life, & then devised & bequeathed "all her estate & effects whatsoever & where-soever" to trustees upon trust to pay the proceeds & annual income to her husband for life, & after his decease & that of her sister, to divide the capital & income between her two brothers:—*Held*: as the subject-matter of each appointment was not necessarily the same, & as, under the circumstances, there was no inconsistency between the two parts of the will by reason of a double gift of a life interest to the husband there had been no such expression of a contrary intention within Wills Act, 1837 (c. 26), s. 27, as to defeat the gift of the residue; & the will was a good exercise by testatrix of the general power of appointment under her father's will.—*Re STOKES, PUBLIC TRUSTEE v. BROOKS*, [1922] 2 Ch. 406; 91 L. J. Ch. 774; 127 L. T. 92; 66 Sol. Jo. 523.

**466.** — Will purporting to be "last will"—*Exercise in previous will.*—B., by a will made in 1858, specifically devised & bequeathed freehold, copyhold, & leasehold property, & gave all other real & personal estate of which he should die possessed or should have power to dispose, upon certain trusts. By a voluntary settlement in Aug. 1862, B. conveyed all his freehold property upon trust, after his own death, for E., for life, with remainder as B. should "by his last will or any codicil thereto," appoint, & in default of appointment, in trust for E. in fee, & by the same settlement he disposed of all his leasehold & personal property. In Nov. 1862, B., by an instrument purporting to be his last will, & not mentioning any former will, appointed under the power in the settlement an annuity to be raised out of his freehold property, & devised all his copyhold property; but made no other disposition of freehold or personal property. Probate of both wills was granted:—*Held*: having regard to the terms of the power testator had indicated an intention that the will of 1862 alone should operate as an execution of the power, & consequently the specific & residuary devises in the will of 1858 were not a due execution of the power.—*PETTINGER v. AMBLER, BUNN v. PETTINGER* (1866), L. R. 1 Eq. 510; 35 Beav. 321; 35 L. J. Ch. 389; 14 L. T. 118; 55 E. R. 919.

*Annotation*:—*Distd.* *Hodson v. Dancer* (1868), 16 W. R. 1101.

**467.** — Codicil explaining will.]—By voluntary deed A. settled property including £1,000 due to him from his son-in-law B., such sum to be allowed to remain owing during A.'s lifetime but not after his death, except on the terms of obtaining security by the assignment of a policy upon B.'s life, upon such trusts as A. should by will or deed appoint, & in default of appointment on trust to pay the interest to A. for life & after his death on trusts for his daughters & their children under which the interests of daughters ceased on their death without issue. By a subsequent will A. bequeathed his residuary estate on trust for his daughters & their children under which daughters dying without issue had power by will to appoint their shares. By a codicil, after reciting that he had advanced to B. other sums besides the £1,000, & that under the settlement & under the will or one of them his daughter, B.'s wife, would be entitled for her life, & their children would be entitled in remainder to a certain share in the property comprised in the settlement A. declared that such share under the settlement or will, or either of them, should be



taken to be satisfied out of the moneys owing to him by B. other than the £1,000. On the day following the execution of this codicil B. assigned to A. a policy of assurance on his life as security for £2,000 then owing by him to A.:—*Held*: no contrary intention had been shown within Wills Act, 1837 (c. 26), s. 27; & accordingly that the residuary gift in the will was an execution of the general power reserved by the settlement.—*Re CLARK'S ESTATE, MADDICK v. MARKS* (1880), 14 Ch. D. 422; 49 L. J. Ch. 586; 43 L. T. 40; 28 W. R. 753, C. A.

*Annotations*:—*Apld.* *Re Marsh, Mason v. Thorne* (1888), 38 Ch. D. 630. *Re Phillips v. Cayley* (1889), 43 Ch. D. 222.

**468. — Property “which I possess or to which I am entitled.”**—Testatrix had general testamentary powers of appointment over funds comprised in her marriage settlement, & over a settled legacy & share of residue under a will. Her husband, if he survived her, had a life interest in both funds. By her will she bequeathed, subject to her husband's life interest therein & his enjoyment of the annual income thereof, “all stocks, shares & securities which I possess or to which I am entitled,” to her sisters, & desired that after the death of her husband all such stocks, shares, & securities should be & become the absolute property of her sisters in equal proportions. The settled funds were represented by colonial & railway stocks & a small sum of cash:—*Held*: the gift was a bequest of personal property described in a general manner within Wills Act, 1837 (c. 26), s. 27; the words “which I possess or to which I am entitled” did not show a contrary intention; & the will therefore exercised the powers to the extent to which the property subject to them came within the definition of “stocks, shares & securities.”—*Re JACOB. MORTIMER v. MORTIMER*, [1907] 1 Ch. 445; 76 L. J. Ch. 217; 96 L. T. 362; 51 Sol. Jo. 249.

**469. — Failure of appointment by subsequent revocation.**—The failure of an appointment made under a general testamentary power occasioned by a subsequent revocation does not amount to a “contrary intention” within Wills Act, 1837 (c. 26), s. 27, so as to exclude the operation of Wills Act, 1837 (c. 26), s. 27.—*Re JARRETT, Re VRENEBUROO, BIRD v. GREEN*, [1919] 1 Ch. 366; 88 L. J. Ch. 150; 121 L. T. 119; 63 Sol. Jo. 353.

**470. Ascertainment of intention—Settlement creating power made by testator or stranger—Whether material.**—*Re CLARK'S ESTATE, MADDICK v. MARKS*, No. 467, *ante*.

**471. — Surrounding circumstances.**—*Re CLARK'S ESTATE, MADDICK v. MARKS*, No. 467, *ante*.

**472. — From will only.**—*Re MARSH, MASON v. THORNE*, No. 484, *post*.

**When power created after execution of will.**—*See Nos. 440–443, ante*.

#### *B. General Bequest Operating as Appointment of Sum Charged on Land.*

**473. Will containing appointment of land under another power.**—*CLIFFORD v. CLIFFORD*, No. 477, *post*.

**474. Sum charged must be in existence—Not created by residuary bequest.**—Testator by his will, dated in 1884, after giving his residuary real & personal estate upon certain trusts for the benefit of his widow & his daughter & the daughter's children, empowered his widow by will to appoint that any sum or sums of money not exceeding £20,000 should after her death be raised & applied as she should think fit. The widow by her will, dated in 1885, devised & bequeathed all her estate

& effects real & personal which she might die possessed of or entitled to unto her daughter absolutely:—*Held*: by force of Wills Act, 1837 (c. 26), s. 27, the general devise & bequest in the widow's will operated as an exercise to the extent of £20,000 of the power of appointment contained in the will of testator.—*Re JONES, GREENE v. GORDON* (1886), 34 Ch. D. 65; 56 L. J. Ch. 58; 55 L. T. 597; 35 W. R. 74; 31 Sol. Jo. 28.

*Annotations*:—*Consd.* *Re Gibbos' Settlement, White v. Randolph* (1887), 37 Ch. D. 143. *Distd.* *Re Salvin, Marshall v. Wolsley*, [1906] 2 Ch. 459. *Fold.* *Re Wilkinson, Thomas v. Wilkinson*, [1910] 2 Ch. 216.

**475. — —.**—W. by his will gave his real & personal estate to trustees in trust to permit his wife to receive the income during her life, & directed that she should have power by her will to appoint that the trustees of his will should on her death raise & set apart out of his estate & effects enough money to produce the sum of £2 10s. per week, & that she should have absolute power by her will to dispose of that sum when raised & the income thereof as she might think fit, expressing by his will a wish that she should be able, if she desired, to direct the payment of the £2 10s. per week to his son J. during his life, but that, if she should not think fit to exercise the power in favour of J., she should have full power to dispose of the sum so raised & the income thereof in such manner as she might in her uncontrolled discretion think best. “Subject as aforesaid” W. gave his estate & effects in trust, after his wife's death, in favour of his children. A power of sale was given by W.'s will, whereby it was also declared that any of W.'s children who should call in question his will should be deprived of all interest thereunder, & if J. should do so, testator's wife, should not be able to exercise the power to appoint in his favour.

J. died before the wife, who by her will gave all the residue of her real & personal estate not thereby otherwise disposed of upon certain trusts:—*Held*: (1) a charge on testator's residuary real & personal estate for any sum which his wife might appoint under the power was created by the words “subject as aforesaid”; (2) notwithstanding the words as to the children calling in question the will, she had, in the events which happened, a general power of appointment in respect of the sum which might be raised; (3) although there was no trust for conversion, the power was an overriding one to appoint a fund of mixed realty & personalty; (4) by virtue of Wills Act, 1837 (c. 26), s. 27, the power was exercised by the residuary gift in the wife's will.—*Re WILKINSON, THOMAS v. WILKINSON*, [1910] 2 Ch. 216; 79 L. J. Ch. 600; 102 L. T. 854; 54 Sol. Jo. 563.

**476. — —.**—Under a settlement of real property the tenant for life had power by deed or will to charge the settled property with payment to himself or any other person or persons of any sum or sums not exceeding in the whole £6,000 with interest at a rate not exceeding 5 per cent., & to appoint the premises charged to any person for any term of years upon trusts for raising the sum charged. By his will the tenant for life gave all his real property to one person, & continuing, gave “all the rest of my personal property among the children of my four sisters equally”:—*Held*: the bequest in the will of “all the rest of my personal property” did not operate as an exercise of the power.

I am unable to find . . . any words which provide that where there is a power to charge upon real estate a sum which when charged will be



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personal estate, general words of gift are to be construed as affecting, first the creation of the personal estate by charging it on the real estate &, secondly, the bequest of the personal estate thus created (BUCKLEY, J.).—*Re SALVIN, MARSHALL v. WOLSELEY*, [1906] 2 Ch. 459; 75 L. J. Ch. 825; 95 L. T. 289; 50 Sol. Jo. 594.

*Annotation* :—*Distd. Re Wilkinson, Thomas v. Wilkinson*, [1910] 2 Ch. 216.

**F. Devise Operating as Bequest : Bequest as Devise.**

**477. General rule.]**—Testatrix, having a power of appointing a sum of £10,000 secured by a term of five hundred years, & having also a power of appointing the fee of the lands on which the money was secured by her will, devised her lands to A. for life, with remainder to B. in tail, & gave to A. all the residue of her personal estate :—*Held* : the £10,000 passed under the residuary gift of the personal estate.

By sect. 27 [of Wills Act, 1837 (c. 26)] a general devise of real estate operates as an execution of a power over real estate & a general bequest of personal estate operates as an execution of a power over personal estate; but this has nothing to do with the question whether the execution of a power over real estate shall operate as the execution of a power over personal estate . . . Wills Act, 1837 (c. 26), not affecting the case (TURNER, V.-C.).—*CLIFFORD v. CLIFFORD* (1852), 1 Hare, 675; 68 E. R. 684.

**478. —.]**—Testatrix, who had a general power of appointment by will over a freehold house which she did not in terms exercise, gave "the rest of the money of which I die possessed" to Truro Cathedral :—*Held* : the freehold house did not pass under the bequest.—*Re TRIBE, TRIBE v. TRURO CATHEDRAL* (DEAN & CHAPLAIN) (1915), 85 L. J. Ch. 79; 113 L. T. 313; 59 Sol. Jo. 509.

**479. Where property liable to conversion.]**—Under his marriage settlement, A. had power to appoint the reversion in fee of the settled estates, & the trustees had a power of sale with his consent. A., by his will, appointed it to trustees, to sell & stand possessed of the produce in trust for a class; & he gave all his real & personal estate "not thereinbefore specifically disposed of" to his widow. Subsequently, the trustees, with A.'s consent, sold the estate; but, at his death, the conveyance had not been executed by one of the trustees, & the purchase-money had not been received :—*Held* : the gift to the class was inoperative, & the purchase-money passed, under the residuary gift, to the widow.—*GALE v. GALE* (1856), 21 Beav. 349; 4 W. R. 277; 52 E. R. 894.

*Annotations* :—*Fold. Blake v. Blake* (1880), 15 Ch. D. 481. *Distd. Re Johnstone's Settlement*, (1880), 14 Ch. D. 162. *Consd. Re Dowsett, Dowsett v. Meakin*, [1901] 1 Ch. 398. *Apprvd. Beddington v. Baumann*, [1903] A. C. 13.

**480. —.]**—Under a settlement testator had a general power of appointment over the reversion in fee of certain real estate thereby settled & which the trustees were empowered to sell with his consent, there being no express power of reinvestment of the proceeds of sale. During his lifetime, & with his consent, parts of the real estate were sold. Shortly afterwards, some of the real estate still remaining unsold, he made his will, whereby, after reciting that under the settlement the real estate comprised therein was subject to such uses as he should appoint, he appointed the same to the use of trustees for a term of five hundred years,

&, subject thereto, to the use of his son in fee; &, without prejudice to that appointment, he gave all the real & personal estate of or to which he was seised or possessed, or over which he might have any power of appointment, to his widow absolutely :—*Held* : the purchase-money of the real estate sold, which had been received by the trustees of the settlement & invested by them in India stock, passed to the widow under the residuary gift, & not to the son under the prior appointment.—*BLAKE v. BLAKE* (1880), 15 Ch. D. 481; 49 L. J. Ch. 303; 42 L. T. 724; 28 W. R. 647.

*Annotations* :—*Consd. Re Dowsett, Dowsett v. Meakin*, [1901] 1 Ch. 398. *Apprvd. Beddington v. Baumann*, [1903] A. C. 13. *Mentd. Re Lowman, Devonish v. Pester* (1895), 12 R. 362.

**481. —.]**—By A.'s marriage settlement, dated in 1832, her father settled certain real estate to the use of A. for life, & after her death, & in default of issue of the marriage, to the use of such persons as she should by will appoint, & in default of appointment to the use of the person under whom *pltf.* claimed. The settlement contained a power for the trustee to sell the real estate, with a direction to lay out the proceeds, with A.'s consent, in the purchase of other hereditaments to be settled to the like uses, with a power of interim investment, with the like consent in *govt.* securities. By his will dated 1831, & confirmed, subject to the settlement, by a codicil executed shortly after the settlement, A.'s father devised the property, subject to the settlement, & all other his real estate, to the use of A. for life, & in default of her having any issue, to such uses as she should by will appoint. Some years afterwards, A.'s father & husband both having died, & there having been no issue of the marriage, the trustees of the settlement, at A.'s request, sold all the settled real estate for a sum of £24,226 2s. Consols, which they transferred to her. A. died a widow in 1879, having by her will, made shortly after the transfer to her of the consols, after appointing exors. & bequeathing pecuniary legacies amounting to upwards of £30,000 bequeathed "all the residue of my personal estate & effects whatsoever" to two persons absolutely. The personal estate to which A. was entitled at the date of her will & of her death, independently of the Consols, did not amount to more than £6,000 :—*Held* : the general devise of personal estate contained in A.'s will operated as an execution of the powers of appointment over the real estate given to her by her marriage settlement & by her father's will, & passed the Consols.—*CHANDLER v. POCOCK* (1881), 16 Ch. D. 648; 50 L. J. Ch. 380; 44 L. T. 115; 29 W. R. 877.

*Annotations* :—*Consd. Re Groave's Settlement. Trusts* (1883), 23 Ch. D. 313. *Appld. Re Harman, Lloyd v. Tardy*, [1894] 3 Ch. 607. *Distd. Re Jenkins, Tucker v. Jenkins* (1901), 46 Sol. Jo. 13. *Reid. Re Cleveland's S. E.*, [1933] 3 Ch. 224; *Bassot v. St. Levan* (1894), 71 L. T. 718; *Re Wernher, Wernher v. Beit*, [1918] 2 Ch. 82; *Re Lyne's Settlement. Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

**482. —.]**—By a marriage settlement executed in Mar. 1823, real estate was conveyed to trustees in fee, to their use during the life of the wife, on trust to pay the rents to her for her life, & after her death to such uses as the husband should by deed or writing, to be by him executed & delivered in the presence of & attested by two witnesses, appoint, &, in default of appointment & subject thereto, to the common dowry uses in favour of the husband. There was a power for the trustees to sell the property with the consent of the husband & wife during their joint lives, & the money to arise from any sale was to be laid out in the purchase of other land, to be settled to

the same uses, & until the reinvestment should be made the money was to be invested (*inter alia*) the public funds, & the income was to be payable to the persons to whom the rents of the land to be purchased would go. During the joint lives of the husband & wife, & before the date of the husband's will, the land was sold, & the proceeds of the sale were invested in new 3 per cents. in the names of the trustees. No purchase of land was ever made, but the income of the stock was paid to the wife during her life. In Oct. 1844, the husband made his will, which was signed by him & sealed, & attested by two witnesses. The will contained the following bequest: "I also give & bequeath all the money & moneys that I die possessed of, whether in the public funds or in the care of W., or elsewhere, after my funeral expenses are paid, unto the sole use & behoof of my children hereinbefore named, share & share alike." W. was one of the trustees of the will, & at the time of testator's death he had in his hands some money belonging to testator. Testator had no money of his own in the funds, nor had he any power of appointment other than that contained in the settlement. Testator died on Dec. 28, 1851. His wife died on Oct. 24, 1881. After her death the question arose whether testator had by his will exercised the power of appointment contained in the settlement, or whether the sum of stock passed as unappointed to his heir-at-law:—*Held*: inasmuch as the wife had a right to call for the reinvestment of the stock in land, it must be considered as having been land at the time of testator's death, & the will did not operate as an exercise of the power of appointment consequently, the stock passed to testator's heir-at-law.—*Re GREAVES' SETTLEMENT TRUSTS* (1883), 23 Ch. D. 313; 52 L. J. Ch. 753; 48 L. T. 414; 31 W. R. 807.

*Annotations*:—*Reid*, *Re Cleveland's S. E.*, [1893] 3 Ch. 244; *Basset v. St. Levan* (1894), 71 L. T. 718.

483. —.—.]—An English lady, domiciled in France, having a general power of appointment over a sum of Metropolitan Board of Works Stock, representing a share of proceeds of real estate in England sold under the judgment in a partition action, such proceeds being liable to be laid out in the purchase of land under Settled Estates Act, 1877 (c. 18), s. 34, by her will in the French language gave "all her properties & chattels (*tous les biens et droits mobiliers*)" to T. absolutely:—*Held*: the will must be construed as disposing of everything in the form of personal estate over which testatrix had a general power of disposition; & the fund being personal estate in form it passed by the will.—*Re HARMAN, LLOYD v. TARDY*, [1894] 3 Ch. 607; 63 L. J. Ch. 822; 71 L. T. 401; 8 R. 549.

*Annotation*:—*Reid*, *Re Scholefield, Scholefield v. St. John, Re Young, Smith v. St. John*, [1905] 2 Ch. 408.

#### G. Direction to make Express Reference to Power.

See Wills Act, 1837 (c. 26), s. 27.

484. Failure to refer to power.—Whether general devise or bequest operates as exercise.]—A marriage settlement made in 1840 reserved to the husband a general power of appointment by will "expressly referring to this power or the subject thereof." By his will, not referring to the power, he gave the residue of his property to trustees on certain trusts differing from those declared by the settlement in default of appointment:—*Held*: the power was exercised by the will.

In ascertaining whether testator has shown an intention not to exercise by a residuary gift a

general power of appointment reserved to him by a settlement made by himself the will only can be looked at.—*Re MARSH, MASON v. THORNE* (1888), 38 Ch. D. 630; 57 L. J. Ch. 639; 59 L. T. 595; 37 W. R. 10.

*Annotations*:—*N.F. Phillips v. Cayley* (1889), 43 Ch. D. 222. *Consd.* *Re Phillips, Robinson v. Burke* (1889), 41 Ch. D. 417; *Re Tarrant's Trust* (1889), 58 L. J. Ch. 780.

485. —.—.]—P. by a voluntary settlement, dated in 1880, directed his trustees to invest & deal with the trust premises in such manner in all respects as he should from time to time order & direct by any writing, but not by his last will, unless he should expressly refer to the trust premises, & subject to such trust to stand possessed of the funds upon trusts in favour of R. & her children. P. by his will dated in 1879, gave & bequeathed all his leasehold estates & personal estate & effects whatsoever & wheresoever to his exors. upon trusts in favour of other persons than R.:—*Held*: having regard to the terms of the settlement, the power was not exercised by the will.—*Re PHILLIPS, ROBINSON v. BURKE* (1889), 41 Ch. D. 417; 58 L. J. Ch. 448; 60 L. T. 808; 37 W. R. 504.

*Annotations*:—*Reid*, *Phillips v. Cayley* (1889), 43 Ch. D. 222; *Re Tarrant's Trust* (1889), 58 L. J. Ch. 780.

486. —.—.]—Testatrix was possessed of a power of appointment over a fund "for such persons & purposes & in such manner as she should by will expressly referring to this present power appoint." By her will she gave all her property generally to her exors. upon trust as therein mentioned, but without referring to the power:—*Held*: the will did not operate, under Wills Act, 1837 (c. 26), s. 27, as an appointment under the power.—*Re TARRANT'S TRUST* (1889), 58 L. J. Ch. 780.

487. —.—.]—Under an indenture of settlement trustees were to hold a sum of railway stock for such persons as settlor should by writing under his hand, not being a will or codicil, or by a will or codicil expressly referring to the power, appoint. Settlor by will bequeathed his personal estate to trustees not making any reference to the power:—*Held*: this bequest did not operate under Wills Act, 1837 (c. 26), s. 27, as an execution of the power.—*PHILLIPS v. CAYLEY* (1889), 43 Ch. D. 222; 59 L. J. Ch. 177; 62 L. T. 86; 38 W. R. 241; 6 T. L. R. 128, C. A.

*Annotations*:—*Consd.* *Re Tarrant's Trust* (1889), 58 L. J. Ch. 780; *Re Davies, Davies v. Davies*, [1892] 3 Ch. 63; *Re Lane, Bell v. Lane*, [1908] 2 Ch. 581. *Reid*, *Re Reynolds, Williams v. Mitchell* (1891), 60 L. J. Ch. 807; *Re Waterhouse, Waterhouse v. Ryley* (1907), 77 L. J. Ch. 30.

488. Failure to make express reference.—General reference to any disposing power.—General devise or bequest operating as exercise.]—A residuary bequest of personal estate over which testatrix has "any disposing power" is a sufficient exercise of a general testamentary power of appointment to which a condition is attached that no will shall be deemed an exercise of the power "unless it expressly purports to exercise such power."—*Re WATERHOUSE, WATERHOUSE v. RYLEY* (1907), 77 L. J. Ch. 30; 98 L. T. 30, C. A.

*Annotations*:—*Consd.* *Re Lane, Bell v. Lane*, [1908] 2 Ch. 581. *Reid*, *Re Barker's Settlement, Knockor v. Vernon Jones*, [1920] 1 Ch. 527.

489. —.—.]—*Re ROLT, ROLT v. BURDETT*, [1908] W. N. 76.

*Annotation*:—*Consd.* *Re Lane, Bell v. Lane*, [1908] 2 Ch. 581.

490. —.—.]—A fund was settled in trust for such persons as settlor should by will "expressly referring to this power" appoint.

By her will testator gave & devised the residue of her estate, both real & personal, of which she

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should die possessed or entitled to “ & over which I shall have any power of disposition by will ” to certain beneficiaries:—*Held*: this was sufficient reference to execute the power.—*Re LANE, BELLI v. LANE*, [1908] 2 Ch. 581 ; 77 L. J. Ch. 774 ; 99 L. T. 693.

SUB-SECT. 3.—APART FROM WILLS ACT.

*A. In General.*

**491. Expression of intention—Necessity for.]—**

*HARVEY v. STRACEY*, No. 869, *post*.

**492. ———.]—**Testator bequeathed leaseholds, subject to the payment thereof of an annuity to A. He afterwards assigned the leaseholds on other trusts, & reserved a power to appoint a like annuity to A. Subsequently, he confirmed his will, but he did not, in terms, execute his power:—*Held*: the annuity failed.—*COWPER v. MANTELL* (No. 1), *COOPER v. MANTELL* (No. 1) (1856), 22 Beav. 223 ; 2 Jur. N. S. 745 ; 4 W. R. 500 ; 52 E. R. 1094 ; *sub nom.* *COOPER v. MANTELL*, 27 L. T. O. S. 130.

*Annotations*:—*Reid*, *Re Hayes*, *Turnbull v. Hayes*, [1901] 2 Ch. 529. *Mentl*, *Re De Bruyn*, *Ford v. Prevost* (1904), 48 Sol. Jo. 458.

**493. ———.]—**Testatrix, by her will, gave certain real & personal property to her daughter, M., absolutely. She afterwards made a codicil to her will, which contained the following words: “ The profits arising in my will, which I have given my daughter M., I give her for her life, & at her disposal by will into my surviving family, as she may think proper. In case she died without a will, then I request her property may be divided to the females in L.’s, W.’s, & J.’s daughters, share & share alike.” M., by her will, in which she made no reference to her mother’s will or codicil, gave all her property to her niece R., who was a grandchild of testatrix:—*Held*: M.’s will was not a good execution of the power, but it operated upon all her property not included in the codicil.—*ELGOOD v. COLE* (1869), 21 L. T. 80 ; 17 W. R. 953.

**494. ———.]—**A. being entitled under B.’s will to a considerable sum of personalty, settled thereout £3,000 on the marriage of his daughter ; & on his own second marriage, in Oct. 1823, he settled thereout a further sum of £2,500 on his wife for life, with remainder to the children of the marriage ; & in default of issue, it was declared that the trustees should, after the decease of the survivor of the husband & wife, pay the money to such persons as A. should appoint by will, & in default of appointment to such persons as should then be the next of kin of A., according to the statute. A. made his will in Apr. 1824, & after reciting that under B.’s will, he was entitled to considerable sums of personalty, & that he had settled £3,000 part thereof, upon his daughter, & £2,500 other part thereof, upon his wife upon his marriage, testator ratified & confirmed the settlements made by him upon his daughter & his wife, & as to all the residue & remainder of the moneys to which he was entitled under B.’s will, he gave them upon trusts under which his wife eventually became entitled. Testator died in 1839, & his wife died in 1869:—*Held*: under the above circumstances testator had not, by the residuary gift in his will, exercised the power of appointment conferred on him by the settlement ;

& the sum of £2,500 went, as in default of appointment, to A.’s next of kin, who were to be ascertained at the death of his wife.—*Re BRINGLOE’S TRUSTS* (1872), 20 L. T. 58.

**495. ———.]—**By a marriage settlement in 1859 real estate was settled for the benefit of S. & her husband W. for their lives & then for the children of S. as she should by deed or will appoint, & in default, to them in equal shares, & if no such child then for such persons as S. should by deed or will appoint, & in default for S., her heirs & assigns. In the settlement was a covenant by W. that after acquired property of S. should be conveyed to the trustees to be held by them upon the trusts of the settlement. W. & S. married & had four children, one only of whom was now living. W. died in 1891. By her will made in that year S. “ in pursuance of all powers & authorities in anywise enabling me thereto ” directed, limited, & appointed her residuary estate as to a moiety for her son M. & his wife & children, & as to the other moiety to persons not objects of the special power. She died in 1898. During her coverture she had become entitled to certain real & personal estate which was never conveyed to the trustees of the settlement:—*Held*: there was not sufficient evidence to show an intention on the part of testatrix to exercise her special power of appointment in favour of her son M.—*Re RICKMAN, STOKES v. RICKMAN* (1899), 80 L. T. 518.

**496. ———.]—**A tenant for life of real estate who had under the settlement power to appoint the estate by will among his children after his own death exercised the power & appointed the estate among his children. Afterwards testator granted under Settled Land Act, 1822 (c. 38), leases of parts of the appointed property in consideration of premiums paid by the lessees. The premiums were paid to the trustees of the settlement & invested by them:—*Held*: there being in the will no apparent intention to appoint the property representing the premiums, that property did not pass under the appointment.—*BEDDINGTON v. BAUMANN*, [1903] A. C. 13 ; 72 L. J. Ch. 155 ; 87 L. T. 658 ; 51 W. R. 383 ; 19 T. L. R. 58 ; 47 Sol. Jo. 90, H. L. ; *affg.* S. C. *sub nom.* *Re MOSES, BEDDINGTON v. BEDDINGTON*, [1902] 1 Ch. 100, C. A.

*Annotations*:—*Reid*, *Re Thompson*, *Thompson v. Thompson* (1906), 54 W. R. 613. *Mentl*, *Re Llanover*, *Herbert v. Freshfield*, [1903] 2 Ch. 330.

**497. ———.]—***Re WESTON’S SETTLEMENT, NEEVES v. WESTON*, No. 540, *post*.

**498. ———.]—***Re ACKERLEY, CHAPMAN v. ANDREW*, No. 562, *post*.

**499. ———.]—**Where no reference to power or subject-matter thereof.]—*DOE d. CALDECOTT v. JOHNSON*, No. 613, *post*.

**500. ———.]—**A married woman having power to dispose of property, by her will executed as required by the power, but not referring to it, gave to her husband, all the property which she might die possessed of, or have in reversion or in expectation:—*Held*: not to be an execution of the power.—*LEMPRIERE v. VALPY* (1832), 5 Sim. 108 ; 58 E. R. 278.

*Annotations*:—*Consd.* *Evans v. Evans* (1856), 26 L. J. Ch. 193. *Distd.* *A.-G. v. Wilkinson* (1866), 14 L. T. 725. *Reid*, *Curtels v. Kenrick* (1838), 3 M. & W. 461 ; *Burdett v. Spilsbury* (1843), 10 Cl. & Fin. 340 ; *Barnes v. Vincent* (1845), 3 Notes of Cases, 628.

**501. ———.]—**A *feme covert* having a limited testamentary power of appointment over personalty, made her will in 1848, whereby, without referring either to her power or to the property subject to it, she professed to dispose “ of the

property & income I am now or may become possessed of," & she then gave her property to her husband & her children. She died in 1854, at which time she had, independently of the property subject to the power, £93 arrears of income & a contingent reversionary interest in some trust moneys:—*Held*: the will did not operate as an execution of the power.—*EVANS v. EVANS* (1856), 23 Beav. 1; 26 L. J. Ch. 193; 28 L. T. O. S. 108; 3 Jur. N. S. 7; 5 W. R. 169; 53 E. R. 1.

*Annotations*:—*Distd.* *Shelford v. Acland* (1856), 26 L. J. Ch. 144; *A.-G. v. Wilkinson* (1866), 12 Jur. N. S. 593. *Consd.* *Humphery v. Humphery* (1877), 36 L. T. 91.

502. ————.]—A *feme sole*, having a limited power of appointment, made her will, whereby, after making certain specific bequests of jewellery, without referring either to the power or to the property subject to it, she "bequeathed the residue of her personal estate" amongst certain persons, all of whom, except one, were objects of the power. At the time of her death she had, independently of the property subject to the power, the jewellery specifically bequeathed, & a reversionary interest in some trust moneys:—*Held*: the will did not operate as an execution of the power.—*HUMPHERY v. HUMPHERY* (1877), 36 L. T. 91.

503. ————.]—*Re WILLIAMS, FOULKES v. WILLIAMS*, No. 427, *ante*.

504. ————.]—Testatrix, having a special power of appointment by deed or will over personal estate in favour of her children, by her will directed that "all my property of every kind" should be divided among her children in certain shares, but made no express reference to her power:—*Held*: the will did not operate as an execution of the power; & the gift being general, an affidavit showing the state of testatrix's property at the date of her will & of her death was not admissible as evidence of her intention.—*Re HUDDLESTON, BRUNO v. EYTON*, [1894] 3 Ch. 595; 64 L. J. Ch. 157; 43 W. R. 139; 8 R. 402.

*Annotations*:—*Distd.* *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563. *Reid.* *Re Hayes, Turnbull v. Hayes* (1900), 69 L. J. Ch. 691.

505. ————.]—Whether a special power of the appointment has been exercised or not by will must depend, in the absence of any specific reference to the power, or the property subject to the power, upon whether it can be gathered from the terms of the will that the donee of the power had the power in mind & meant to exercise it.

Testatrix, donee of a special power of appointment, made a will by which she duly & in terms exercised such power of appointment. In a later & holograph will executed by her were these words, "I wish to leave at my death everything I have power to will to my husband":—*Held*: testatrix meant to exercise & did exercise the special power by the later will, & that will revoked the earlier will.—*WRIGLEY v. LOWNDES*, [1908] P. 348; 77 L. J. P. 148; 99 L. T. 879.

506. ————.]—*Exercise by general devise*.—The question whether since Wills Act, 1837 (c. 26), a special power of appointing real estate is exercised by a general devise, where testator had neither at the date of his will nor of his death any real estate of his own, is one of intention to be inferred from the words of the will & from the surrounding circumstances at the date of it, particularly the enlarged operation given by Wills Act, 1837 (c. 26), to a general devise. Testator making a mere general devise though having no real estate of his own, does not thereby sufficiently indicate an intention of exercising a special power

of appointing real estate, notwithstanding that objects of the power happen to be included among the devisees.—*Re MILLS, MILLS v. MILLS* (1886), 34 Ch. D. 186; 56 L. J. Ch. 118; 55 L. T. 665; 35 W. R. 133.

*Annotations*:—*Apprvd.* *Re Williams, Foulkes v. Williams* (1889), 42 Ch. D. 93. *Distd.* *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563.

507. ————.]—*Presumption of intention*.—*Re HAYES, TURNBULL v. HAYES*, No. 335, *ante*.

508. ————.]—*Gathered from whole instrument*.—*Contrary indication notwithstanding*.—Whether testator intended by his will to execute a power, is to be collected from the whole instrument, & not from the force of any particular expression. In this case, testator devised his estates, & made disposition of part of the fund to be produced by the sale of the estates, to purposes not warranted by the power; but still, upon the whole will, the ct. held that he intended to execute the power. The recital of a deed is a key to the construction, where the operative part is doubtfully expressed, & not otherwise.

[Testator] prefaces his devise thus:—"by virtue of all & every power & powers, authority & authorities enabling me thereto, I give & devise my estates, etc." . . . this preface manifests a plain intention to pass all estates which he could effect by virtue of any power which was vested in him (*LEACH, M.R.*).—*BAILEY v. LLOYD* (1829), 5 Russ. 330; 7 L. J. O. S. Ch. 98; 38 E. R. 1051.

*Annotations*:—*Apld.* *Banks v. Banks* (1853), 17 Beav. 352. *Distd.* *Hope v. Hope* (1854), 5 Giff. 13; *Pouffret v. Porring* (1854), 5 De G. M. & G. 775. *Foll.* *Cowx v. Foster* (1860), 1 John. & H. 30. *Expld.* *Graham v. Wickham* (1863), 1 De G. J. & Sm. 474. *Apld.* *Maunsell v. Maunsell* (1871), 24 L. T. 698. *Consd.* *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510. *Reid.* *Cooke v. Cunliffe & Cooke* (1851), 15 Jur. 1076; *Re Denton, Bannerman v. Toosey* (1890), 63 L. T. 105. *Mentd.* *Payne v. Mortimer* (1859), 28 L. J. Ch. 716.

509. ————.]—*Re MILLS, MILLS v. MILLS*, No. 506, *ante*.

510. ————.]—Under a marriage settlement the husband & wife took successive life interests in a trust fund, the wife's interest being cut down to one moiety on remarriage, & subject thereto the fund was settled on trust for the issue of the marriage as the husband should appoint, & in default of appointment for the sons at twenty-one or daughters at twenty-one or marriage, with the usual hotchpot clause. By his will, which recited that he had power to appoint the fund after the death of his wife, the husband appointed that "after the death of my said wife" three-fifths of the fund should be held in trust for his elder son, & two-fifths for his younger son, these sons being the only issue of the marriage. The wife having remarried after her husband's death:—*Held*: the moiety of the income thereby set free during her life passed under the appointment, the ct. finding on the face of the will an intention to appoint the whole fund subject to the wife's interest.

I find in this will, reading it fairly as a whole . . . an absolute intention to appoint the entire fund subject to the wife's interest (*FARWELL, J.*).—*Re SHUCKBURGH'S SETTLEMENT, ROBERTSON v. SHUCKBURGH*, [1901] 2 Ch. 794; 71 L. J. Ch. 32; 85 L. T. 406; 50 W. R. 133; 46 Sol. Jo. 13.

511. ————.]—*Re HAYES, TURNBULL v. HAYES*, No. 335, *ante*.

512. ————.]—*Gathered from surrounding circumstances*.—No reference to power or subject-matter thereof.—*WRIGLEY v. LOWNDES*, No. 505, *ante*.

513. ————.]—*Re MILLS, MILLS v. MILLS*, No. 506, *ante*.

514. ————.]—Testatrix who had a special power of appointment in favour of her issue, the

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terms creating the power being very wide, gave, devised, & bequeathed all her property, including any property over which she might have a power of appointment, to the trustees of her will upon trust for sale & conversion, &, after payment of her debts, funeral & testamentary expenses, to invest in the securities authorised by law for the investment of trust funds & to pay the income to her daughter & on her death the corpus to the children of her daughter. The deed creating the power contained an investment clause which authorised a much wider range of investments. Testatrix had only this one power of appointment, & little or no other property except that which was comprised in the power of appointment:—*Held*: (1) evidence was admissible of the surrounding circumstances at the date of the death, including the question of the state of her property, & there was sufficient in the will to indicate an intention to exercise the power of appointment notwithstanding that it purported to provide for the payment of debts, & the appointment to the trustees of the will was not such an inconsistent provision as to prevent the will being a good exercise of the power of appointment; (2) though the power was well exercised it did not have the effect of vesting in the trustees nominated in the appointment the trust property, but the trustees of the deed creating the power held it on the trusts declared by the will.—*Re MACKENZIE, THORNTON v. HUDDLESTON*, [1911] 2 Ch. 58; 86 L. J. Ch. 543; 117 L. T. 114.

515. ——.].—E. under her father's will had a power of appointment by deed or will over one-twelfth of his residuary estate in favour of her children & remoter issue, such issue to be born in her lifetime. The value of the twelfth share was about £17,000. L. the son & only child of E. married in 1889, & had two children, both born in E.'s lifetime.

In 1900 by a separation deed made between L. of the first part, his wife of the second part, E. of the third part, & trustees of the fourth part, after reciting an agreement between the parties of the first three parts that L. & his wife should enter into a separation deed, to which E. should be a party & should enter into such covenant as thereafter contained, & that L. should make such settlement as thereafter contained, & that he was entitled to one-twelfth of the residuary estate of his grandfather, subject to E.'s life interest therein, the parties of the first, second & fourth parts entered into mutual covenants providing for the husband & wife living part. E. separately covenanted to pay during her life to L. the sum of £300 *per annum*, & then L. as settlor assigned to the trustees the sum of £10,000 to be raised out of the shares to which he was entitled in reversion as soon as it fell into possession to be held on trusts, in the events which happened, for the benefit of his two children. In Feb. 1909, L. died & by his will left his estate to charities. Subsequently E. by a deed poll appointed the twelfth share upon trusts for the benefit of L.'s two children & their respective issue to be born in her lifetime. E. died in 1915, & the question arose whether the separation deed had in any way affected her power of appointment:—*Held*: having regard to the terms of the separation deed & the surrounding circumstances the intention of the parties was that E. should release her power of appointment to the extent of £10,000 only, & consequently the deed poll

operated as an effective appointment of the balance, of the twelfth share in favour of L.'s two children & their respective issue.—*Re SUGDEN'S TRUSTS, SUGDEN v. WALKER*, [1917] 2 Ch. 92; 86 L. J. Ch. 447; 117 L. T. 49, C. A.

516. *Expressed intention not to exercise — Due to misapprehension.*].—Precatory words will not create a case for election, neither will the absence of the execution of a power upon an erroneous impression, stated in the will, that, by its non-execution A., a legatee will divide the fund equally with B.

Testator had a power to appoint a fund, & his son, A., & grandson, B., were objects. Having by deed appointed part to his son, he, by will, reciting that the son could, under the hotchpot clause, be obliged to bring in the appointed part, proceeded, " & then as I make no further appointment," the whole settled fund must be equally divided between A. & B. He made A. his residuary legatee. It turned out that the hotchpot clause did not apply:—*Held*: the will did not operate as an appointment & no case of election arose.—*LANGSLOW v. LANGSLOW* (1856), 21 Beav. 552; 25 L. J. Ch. 610; 2 Jur. N. S. 1057; 52 E. R. 973.

*Annotation*:—*Reid, Box v. Barrett* (1866), L. R. 3 Eq. 244.

517. ——. *Precatory document.*].—A. having in the events that happened power to appoint funds amongst her children by deed, or by her last will in writing, or any writing purporting to be or being in the nature of her last will, or any codicil thereto, to be signed & published in the presence of, & to be attested by, two credible witnesses, died intestate; but left in an envelope, addressed to her son, an unattested memorandum, signed by herself, & dated eight years before her death, " for my son & daughters. Not having made a will, I leave this memorandum, & hope my children will be guided by it, though it is not a legal document. The (funds) I wish divided as follows: "—amongst her children, followed by bequests out of another fund, & a gift of the residue, & concluding, " this paper contains my last wishes & blessings upon my dear children, & thanks for their love to me " :—*Held*: this memorandum showed no intention to execute the power, & consequently, the ct. could not remedy any defects in execution so as to give validity to it as an appointment.—*GARTH v. TOWNSEND* (1869), L. R. 7 Eq. 220.

*Annotation*:—*Cond. Kennard v. Kennard* (1872), 8 Ch. App. 227.

518. ——.].—Testator bequeathed £15,000 to trustees upon trust for B. for her life, & on her death in trust for her three children, H., J., & A., in such shares as B. should by will or codicil appoint, & in default of appointment in trust for her three children equally as tenants in common. B., by a codicil to her will, appointed two-sixths of the fund in trust to pay the income to her son H. until he should assign, charge, or otherwise dispose thereof; & on such event happening, then in trust during his life, & after his death for his children, if any, as therein mentioned, & if no children in trust to be equally divided between all her children & grandchildren then living *per capita*; & she appointed one-sixth in trust for her daughter J. as therein mentioned, & one-sixth in trust for her daughter A. as therein mentioned, & declared as follows: " I make no appointment of the other two-sixth parts of the said sum of £15,000, as I wish them to pass directly to my said two daughters, so as to give them an immediate vested & disposable interest therein, & I also declare that neither my son nor his children, if any, shall take any share or

interest in the said unappointed parts of the said trust funds":—*Held*: the last mentioned two-sixth parts of the funds went as unappointed among the three children of B.—*Re JACK, JACK v. JACK*, [1899] 1 Ch. 374; 68 L. J. Ch. 188; 80 L. T. 321.

519. —.] — Under her marriage settlement, testatrix had a special power of appointment over a settled fund in favour of the issue of her then intended marriage. By her will she gave all her residuary estate " & all other if any the estate & effects over which I may have a power of appointment " to the trustees of her will upon trust for sale & conversion, & out of the proceeds thereof to pay her just debts, funeral & testamentary expenses, & she directed her trustees to stand possessed of her residuary estate upon trust to divide the same between her two daughters in equal shares:—*Held*: the introduction of the words "if any" into the clause purporting to exercise a power of appointment negatived any intention to exercise the special power, & therefore, the will did not operate as an exercise of the power.—*Re SLACK'S SETTLEMENT, Re SLACK, BUTT v. SLACK*, [1923] 2 Ch. 350; 93 L. J. Ch. 46; 129 L. T. 628.

520. Appointment of realty—Whether operating on sum charged on realty.]—*FARMER v. BRADFORD*, No. 625, *post*.

521. Exercise prior to creation of power.]—*Re HAYES, TURNBULL v. HAYES*, No. 335, *ante*.

#### B. Reference to Power.

522. Mode of expressing intention.]—*HUGHES v. TURNER*, No. 556, *post*.

523. —.]—*HARVEY v. STRACEY*, No. 869, *post*.

524. —.]—*Re WESTON'S SETTLEMENT, NEEVES v. WESTON*, No. 540, *post*.

525. —.]—*Re ACKERLEY, CHAPMAN v. ANDREW*, No. 562, *post*.

526. — If reference sufficiently clear.]— Bequest by the wife of £1,000, "according to the request of her late husband," at a time when she had no property, except what was in settlement, & over which she had a power of appointment:—*Held*: not to be a sufficient reference to the power to make the will operate as an appointment under the power.

An exercise of a power must refer either to the power or the property subject to it. In this case the only means of connecting the bequest with the power is . . . much too vague to enable the court to consider this as an execution of the power (*LORD COTTENHAM, M.R.*).—*HOWELL v. HOWELL, HOWELL v. JAMES* (1835), 4 L. J. Ch. 242.

*Annotations*:—*Refd.* *Carter v. Carter* (1869), L. R. 8 Eq. 551. *Mentd.* *Dickinson v. Dillwyn* (1869), L. R. 8 Eq. 546.

527. Substantial reference sufficient—Express reference unnecessary.]—As to his [the donee's] execution of it, he has used the word charge which is the word in the power, nor is there any occasion for his referring to the power if he does it in substance (*LORD HARDWICKE, C.*).—*MADISON v. ANDREW* (1747), 1 Ves. Sen. 57; 27 E. R. 889, L. C.

*Annotations*:—*Refd.* *Willson v. Platt* (1794), 2 Ves. 351, 497.

#### PART IV. SECT. 9, SUB-SECT. 3.—A.

521 i. Exercise prior to creation of power.]—*MACAVISH'S TRUSTEES v. OOSTON'S EXECUTORS* (1903), 5 F. (Ct. of Sess.) 641; 40 So. L. R. 458; 10 S. L. T. 730.—*SCOT*.

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*Refd.* *Doe d. Devonshire v. Cavendish* (1782), 3 Doug. K. B. 48; *Madoc v. Jackson* (1789), 2 Bro. C. C. 588; *Kemp v. Kemp* (1801), 5 Ves. 849; *Reade v. Reade* (1801), 5 Ves. 744; *McGhie v. McGhie* (1817), 2 Madd. 368; *Thornton v. Bright* (1836), 2 My. & Cr. 230; *Fordyce v. Bridges* (1848), 2 Coop. temp. Cott. 324; *Butler v. Gray* (1869), 5 Ch. App. 26. *Mentd.* *Horsley v. Chaloner* (1750), 2 Ves. Sen. 83; *Bentlett v. Hollister* (1757), Amb. 334.

528. Donee having more than one power—Whether exercise of one amounts to exercise of all.]

—*A.-G. v. VIGOR*, No. 15, *ante*.

529. —.] — By arts. for settlement of the wife's real & leasehold estates, the husband had power to appoint her estates to the children of the marriage, for such estates, & in such parts, & in such manner & form as he should by deed or will appoint; & by other arts. of the same date, for the settlement of his own real estates, he had an absolute power of appointment over them by deed or will, in default of issue of the marriage. There being several children of the marriage, & no settlement pursuant to the arts., the husband, who died in the lifetime of the wife, by his will, recited the arts. for the settlement of his own estates, & confirmed them, & recited the power of appointment in them at length, mentioning it as a power intended to be exercised by that his will; & thereby, in exercise of that power, & all other powers, appointed his own real estates, & all other real estates over which he had power, to trustees for a term of five hundred years, upon trust, to raise portions for his younger children, making no mention, in any part of his will, of the articles for settlement of his wife's estate; but directing that all persons taking any benefit under his will should be bound by the doctrine of election to give effect to every disposition contained in it:—*Held*: the will operated as an appointment of the wife's real estates; & the creation of the term of five hundred years was a good execution of a power to appoint for such estates as the appointor should think fit; & the words "in such manner & form" authorised him to give equitable interests to the children.—*TROLLOPE v. LINTON* (1823), 1 Sim. & St. 477; 2 L. J. O. S. Ch. 3; 57 E. R. 189.

*Annotations*:—*Refd.* *Ponifret v. Perring* (1854), 5 De G. M. & G. 775; *Busk v. Aldam* (1874), L. R. 19 Eq. 16; *Scotney v. Lomer* (1885), 29 Ch. D. 535; *Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125.

530. —.] — R., being entitled to one-third share of real & personal estates, settled such share upon her marriage, with power of appointment to herself, in events that happened over one-third part thereof, by deed or will, & over the other two-third parts by will, subject to the husband's life interest therein, & in default of issue of the marriage. R. becoming entitled to a moiety of another third share of the same estates, settled it to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage. R. by her will devised, bequeathed, & appointed "all that one-third part of her real & personal estates, over which she had a disposing power," upon trust, immediately after her death to raise a sum of £500; & "as to the residue of the said one-third part, & the remaining two-third parts," she gave the same to her husband for life, remainder to her infant son, & his heirs; but in case he should die under twenty-one, without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity & legacies given by her will, the

#### PART IV. SECT. 9, SUB-SECT. 3.—B.

522 i. Mode of expressing intention.]—The circumstances which a ct. usually seizes upon to enable it to say that a will is a valid exercise of a power of appointment where it is not expressed

to be such are (a) some reference in the will to the settlement, or (b) the use in the will of the word "appoint," or (c) some reference to the settled property.—*Hicks v. Hirst* (1907), 26 N. Z. L. R. 1376.—N.Z.



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annuity to be payable upon the son's death, & the legacies as soon as the said one-third part could be sold; & as to the remaining two-third parts, subject to her husband's life interest, she gave & appointed them to her sister absolutely. The son survived testatrix & died under twenty-one without issue:—*Held*: the appointment of the "one-third part" for payment of the annuity & legacies, extended only to one-ninth of R.'s original third share, & to one-third of her moiety of the other third share.—*SAWARD v. M'DONNELL* (1848), 2 II. L. Cas. 88; 12 Jur. 685; 9 E. R. 1026, L.

531. ———.]—M. by will devised her estates to her son-in-law B. for life, remainder to her daughter F. his wife for life, remainder to trustees to preserve contingent remainders, remainder to the use of the children of the marriage as B. & F. should jointly appoint by deed, or as the survivor should appoint by deed or will, & in default of appointment, to the use of trustees for a term of five hundred years to commence on the death of the survivor of B. & F., & subject thereto, to the use of P., eldest son of B. & F. in strict settlement. The trusts of the term were, (a) on request of B. & F. to raise £10,000 for B. & F., & (b) to raise for each younger child of B. & F. any sums not exceeding £1,000 apiece, as B. & F. jointly by deed, or the survivor by deed or will, should appoint & in default of appointment £1,000 apiece, payable after the decease of the survivor of B. & F., unless they or the survivor should appoint the same to be raised in his or her lifetime, in which case, the term was to commence on such last mentioned appointment. F., the wife, died, leaving B. her surviving, without having joined in any appointment under the will; & leaving four sons besides P. & a daughter. On the marriage of the daughter B. by deed appointed to her £1,000 payable on his decease. After this B. made his will, by which he gave a legacy to his daughter, & to each of his other younger children, bequeathed "such a sum of money as with" what they are entitled to under, amongst other settlements referred to, "the will of M. will make up to each £8,000": & "all the residue of my personal estate & all my real estate over which I have any disposing power I give," etc. to P. & his heirs. At the time when this will was executed, B. resided on an estate derived from his own family, which was partly settled & partly held in fee:—*Held*: the devise of "all my real estate over which I have any disposing power" was under the circumstances to be construed as a devise of the unsettled patrimonial estate of B., & did not operate as an execution of the limited power of appointment over the estates which he held as tenant for life under M.'s will.—*COOKE v. CUNLIFFE* (1851), 17 Q. B. 245; 21 L. J. Q. B. 30; 15 Jur. 1076; 117 E. R. 1274.

532. ———.]—Where testatrix, having a testamentary power of appointment, made a will referring to the property, subject to the power, & exercising the power as to it, & then, by a subsequent part of her will, purported, to exercise all powers vested in her:—*Held*: property, subject to the power not specifically referred to, passed by the subsequent part of the will.—*MAUNSELL v. MAUNSELL* (1871), 24 L. T. 698; 19 W. R. 1003.

533. ———.]—General & limited—No reference to limited power.]—Testatrix had two general powers of appointment in addition to a limited power to

appoint the income of certain property to her husband for life. By her will, which contained no reference to the limited power or to the property subject thereto, she gave, devised, & bequeathed all her real & personal estate, & appointed all real & personal estate over which she might have a power of appointment unto her husband absolutely:—*Held*: testatrix had clearly expressed her intention of exercising every power she had in favour of her husband, & the limited power was therefore exercised.—*Re SHARLAND, Re REW, REW v. WIPPELL*, [1899] 2 Ch. 536; 68 L. J. Ch. 747; 81 L. T. 384.

*Annotation*:—*Reid, Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510.

**534. Fund not subject to payment of debts—Appointment for payment of debts & gift of residue.]**

—Testatrix having a testamentary power of appointment in favour of her children over certain sums of stock standing in the names of A. & B. as trustees, gave & bequeathed, & by virtue of every power enabling her in that behalf, appointed, all the property of or to which she was then, or, at the time of her death, should or might be possessed or entitled or have power to dispose to A. & B. upon trust, after payment of her debts & funeral & testamentary expenses, to invest the residue thereof, in their names, in the funds, or upon govt. or real security; & she then declared trusts in favour of her children. She died possessed of personal estate more than sufficient to pay her debts & funeral & testamentary expenses:—*Held*: her will was not an exercise of the power.—*CLOGSTOUN v. WALCOTT* (1843), 13 Sim. 523; 7 Jur. 616; 60 E. R. 203.

*Annotations*:—*Consd. Elliott v. Elliott* (1846), 15 Sim. 321. *N.F. Ferrier v. Jay* (1870), L. R. 10 Eq. 550; *Re Teape's Trusts* (1873), L. R. 16 Eq. 442. *Reid, Butler v. Gray* (1899), 5 Ch. App. 28, n.; *Maunsell v. Maunsell* (1871), 24 L. T. 698; *Busk v. Aldam* (1874), 44 L. J. Ch. 119.

535. ———.]—Testatrix, having a power of appointment by will over portions of two sums of stock, in the first place directed payment of her debts & certain expenses out of her personal estate, & bequeathed several legacies; & then, without any reference to the power, bequeathed parts of the said portions of stock, speaking, nevertheless, of such portions as integral sums, to, or in trust for persons, objects of the said power, & afterwards bequeathed the residue of her personal estate & effects, after payment of her debts, expenses, & legacies aforesaid, to other persons, also objects of the power:—*Held*: by the residuary clause passed, as by a valid exercise of the power, so much of the stock, over which testatrix had the power of appointment, as she had not previously disposed of by her said will, as well as the surplus of her general personal estate.—*ELLIOTT v. ELLIOTT* (1846), 15 Sim. 321; 15 L. J. Ch. 393; 10 Jur. 730; 60 E. R. 642.

*Annotations*:—*Apld. Re Teape's Trusts* (1873), L. R. 16 Eq. 442; *Re Nicholl, Re Perkins, Nicholl v. Perkins* (1920), 125 L. T. 62.

536. ———.]—Testator having a power to appoint realty among children devised & bequeathed "all my real & personal estate whatsoever whereof I have power to dispose," upon trust to sell the realty & give valid discharges to purchasers, & to apply the proceeds of the realty & the personalty in payment of his debts, funeral & testamentary expenses, & then among his children in certain specified shares.

It did not appear whether the personal estate was sufficient for the debts & funeral & testamentary expenses; but testator had no real estate of his own, except a contingent reversion in the subject of the power:—*Held*: (1) though the



debts & expenses could not be paid out of the settled estate, the appointment was not thereby invalidated; (2) independently of Wills Act, 1837 (c. 26), there was a sufficient indication of an intention to appoint.—*Cowx v. Foster* (1860), 1 John. & H. 30; 29 L. J. Ch. 886; 2 L. T. 797; 6 Jur. N. S. 1051; 70 E. R. 649.

**Annotations:**—*As to* (2) *Fold.* *Ferrier v. Jay* (1870), L. R. 10 Eq. 550. *Apld.* *Re Teape's Trust* (1873), L. R. 16 Eq. 442; *Thornton v. Thornton* (1875), L. R. 20 Eq. 599; *Re Denton, Bannerman v. Toosey* (1890), 63 L. T. 105; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563. *Consd.* *Re Hedgate, Marsh v. Hedgate*, [1903] 1 Ch. 356. *Apld.* *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510. *Generally, Reid.* *Maunsell v. Maunsell* (1871), 24 L. T. 698; *Busk v. Aidam* (1874), L. R. 19 Eq. 16; *Scotney v. Lomer* (1885), 29 Ch. D. 535; *Re Pagot, Re Mellor, Mellor v. Mellor*, [1898] 1 Ch. 290; *Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125.

**537.** ———.] —Testatrix having a general power to appoint £500, & a special power to appoint the residue of certain property, gave all her real & personal estate whatsoever & where-soever, & of which she had any power to appoint or dispose of, to trustees, in the first place to pay her debts, funeral & testamentary expenses, & then to divide the residue between the objects of the special power:—*Held:* the special power was well executed.—*FERRIER v. JAY* (1870), L. R. 10 Eq. 550; 39 L. J. Ch. 686; 23 L. T. 302; 18 W. R. 1130.

**Annotations:**—*Apld.* *Re Teape's Trusts* (1873), L. R. 16 Eq. 442. *Expld.* *Busk v. Aidam* (1874), L. R. 19 Eq. 16. *Apld.* *Thornton v. Thornton* (1875), L. R. 20 Eq. 599. *Consd.* *Scotney v. Lomer* (1885), 29 Ch. D. 535; *Re Denton, Bannerman v. Toosey* (1890), 63 L. T. 105; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563; *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510. *Reid.* *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518.

**538.** ———.] —Testatrix under her marriage settlement had power to appoint the settled funds amongst the children & issue of the marriage.

By her will testatrix gave all her residuary real & personal estate, "which by virtue of any power or authority, or of any separate right of property she was competent to dispose of," to trustees upon trust to sell & convert into money, & thereout pay her funeral & testamentary expenses, & to invest the residue & hold the same upon trust to pay the income to her husband during his life, & after his decease as to one-seventh part in trust for her son, & as to the remaining six-sevenths in trust for her daughters, with a direction that the trustees were to retain the daughter's shares upon trusts in favour of each daughter for life for her separate use without power of anticipation, & after her death in favour of her children. There was evidence that testatrix & her husband had forgotten the existence of the settlement. The question was whether or not the will operated as an exercise of the power of appointment:—*Held:* (1) the evidence as to the settlement having been forgotten could not be acted upon; & if the will were not regarded as an exercise of the power, words would have to be struck out of the will, upon the face of which there was a clear intention to exercise any testamentary power testatrix might have; (2) the daughters took their shares of the settled funds free from the fetters attempted to be imposed by the subsequent direction.—*Re BOYD, NIELD v. BOYD* (1890), 63 L. T. 92.

**539.** ———.] —Testatrix devised, bequeathed, & appointed her residuary estate including all property over which she should have at her death a power of appointment, on trust, after payment thereof of debts, testamentary & funeral expenses, to apply so much as the trustees should think fit of the income during the minority

& spinsterhood of her only child, a daughter, for her maintenance & to accumulate the surplus, & on the daughter attaining twenty-one or marrying the whole to her for life, with remainders over. Testatrix had a power of appointment among her children over property settled in default of appointment on such children at twenty-one or marriage:—*Held:* the power was not executed.—*Re COTTON, WOOD v. COTTON* (1888), 40 Ch. D. 41; 58 L. J. Ch. 174; 37 W. R. 232.

**Annotations:**—*Distd.* *Re Blackburn, Smiles v. Blackburn* (1889), 43 Ch. D. 75. *Consd.* *Re Denton, Bannerman v. Toosey* (1890), 63 L. T. 105. *Distd.* *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563. *Reid.* *Re Mayhew, Spencer v. Cutbush* (1901), 70 L. J. Ch. 428; *Re Weston's Settlement, Neeves v. Weston*, [1906] 2 Ch. 620.

**540.** ———.] —By a settlement, made in 1863 on the marriage of W. & X., leasehold hereditaments were settled upon trust, after the decease of the survivor of them, for all & every the children & child of the marriage in such parts & shares as the survivor should by will or codicil appoint. W. survived X., & by his will, after making bequests of a watch, a picture, & an organ, he gave, devised, bequeathed, & appointed all the residue of his "estate," "real as well as personal," unto trustees, upon trust to convert into money such parts of "the said trust premises" as should not consist of money, & out of the proceeds to pay his funeral expenses & debts, & to pay & divide the residue of "such trust moneys & premises unto & equally between" his sons A., P., & R., declaring that he made no provision for his other children because they were sufficiently provided for. Testator then empowered his trustees to postpone the conversion of his "real & personal estate" for so long as they should think proper, & during the postponement to manage, lease, or let his "real & leasehold estates," & out of the capital or income thereof to make any proper outlay for improvements, repairs, insurance, or otherwise for the benefit of his "real & personal estate," but declared that no property not actually producing income which should form part of his estate should be treated as producing income. Testator also declared that the trustees might invest the "trust moneys representing the shares" of P. & R. during their respective minorities in certain specified securities, & that during their minorities the trustees should pay the whole income of those shares to A. as their guardian for their maintenance:—*Held:* the will did not operate as an exercise of the special power given by the settlement.

For the exercise of a special power there must be either (a) a reference to the power, or (b) a reference to the property subject to the power, or (c) an intention otherwise expressed in the will to exercise the power (BUCKLEY, J.).—*Re WESTON'S SETTLEMENT, NEEVES v. WESTON*, [1906] 2 Ch. 620; 76 L. J. Ch. 54; 95 L. T. 581.

**Annotations:**—*Consd.* *Wrigley v. Lowndes*, [1908] P. 348. *Fold.* *Re Sanderson, Sanderson v. Sanderson* (1912), 106 L. T. 26. *Reid.* *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510.

**541.** ———.] —Testator having no other power of appointment.]—Testator, having a limited power to appoint the income of £5,000 Consols to his wife for her life, & having no other power, by his will, which contained no reference to the power, after first directing payment of his debts & funeral expenses, devised & bequeathed the residue of his estate belonging to him at the time of his decease, or over which he might have any power of disposition or control, to his wife, her heirs, assigns, & legal representatives for ever in full property:—*Held:* the power was well exercised.

*Sect. 9.—Expression of intention to exercise powers :  
Sub-sect. 3, B.]*

—*Re TEAPE'S TRUSTS* (1873), L. R. 16 Eq. 442; 43 L. J. Ch. 87; 28 L. T. 799; 21 W. R. 780.

*Annotations* :—*Consd. Thornton v. Thornton* (1875), L. R. 20 Eq. 599. *Distd. Re Cotton, Wood v. Cotton* (1888), 40 Ch. D. 41; *Re Williams, Foulkes v. Williams* (1889), 58 L. J. Ch. 451. *Reid. Re Denton, Bannerman v. Toosoy* (1890), 63 L. T. 105; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563; *Re Mayhew, Spencer v. Cutbush*, [1901] 1 Ch. 677; *Re Lane, Bell v. Lane*, [1908] 2 Ch. 581; *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510.

542. ————]—Testatrix made the following disposition by her will: "I appoint, devise, & bequeath my real estate & the residue of my personal estate to my trustees upon trust to sell or convert the same into money, & to pay & divide the proceeds, after paying my debts, funeral & testamentary expenses, equally between "four named nephews & nieces, or such of them as shall be living at my decease." The four nephews & nieces survived testatrix.

It appeared that testatrix had a testamentary power of appointing a share of personal estate among her nephews & nieces, & evidence was tendered to show that she had no other power of appointment:—*Held*: the evidence was admissible, & the limited power was exercised.—*Re MAYHEW, SPENCER v. CUTBUSH*, [1901] 1 Ch. 677; 70 L. J. Ch. 428; 84 L. T. 761; 49 W. R. 330; 45 Sol. Jo. 326.

*Annotations* :—*Apld. Kent v. Kent*, [1902] P. 108. *Distd. Re Weston's Settlement, Neeves v. Weston*, [1906] 2 Ch. 620. *Reid. Re Marten, Shaw v. Marten* (1901), 71 L. J. Ch. 203; *Re Waterhouse, Waterhouse v. Kyles* (1907), 98 L. T. 30; *Re Barker's Settlement, Knock v. Vernon-Jones*, [1920] 1 Ch. 527.

543. ————]—Testator having no other property.—*Re MACKENZIE, THORNTON v. HUDDLESTON*, No. 514, *ante*.

544. ————]—Residue described as "my estate"—Appointment to persons not objects.—C. had under his first marriage settlement, as the survivor of himself & his first wife, a power of appointment of certain funds by deed or will among the children of his first marriage; & had also under his second marriage settlement a power of appointment, after the death or second marriage of his second wife, of a fund settled on her for life or widowhood. By his will C. referred to & confirmed his first marriage settlement, & directed the trusts thereof to be fully carried out; & he also referred to & confirmed his second marriage settlement, & directed a fund to provide his second wife's life annuity to be invested. He then made certain other bequests, & as to all the rest, residue, & remainder of his real & personal estate, & which he should in any way have power to dispose of or appoint by will, he gave, devised, & bequeathed the same unto & to the use of his exors. & trustees upon trust for conversion, & out of the proceeds to pay his funeral & testamentary expenses & debts, & legacies, & to divide the residue thereof among such of the children of his first marriage as should be living at his death, but as to the shares of his daughters therein, he settled them on his daughters for life, then on their husbands for life, then on the issue of the daughters as they should appoint, & in default of such appointment then to his daughters' children, as to sons at twenty-one, as to daughters at twenty-one or marriage, & in default of daughters' children, then as his daughters should generally appoint, & in default of such appointment, then for his daughters' next of kin:—*Held*: the will of C. operated as an exercise of the power to appoint among the

children of his first marriage the fund settled on that marriage, which was vested in him under his first marriage settlement as being the survivor of himself & his first wife, notwithstanding that (a) testator had described the residue which he was giving as the residue of "my estate"; (b) he had directed it to be converted; (c) he had directed payment out of it of his funeral & testamentary expenses, debts, & legacies; & (d) he had settled his daughters' shares for the benefit of their respective husbands & children.—*PRICE v. PRICE* (1882), 46 L. T. 228.

*Annotation* :—*Reid. Re Milner, Bray v. Milner*, [1899] 1 Ch. 563.

545. Sufficiency of reference to any disposing power.—*BAILEY v. LLOYD*, No. 508, *ante*.

546. ————]—A., under his marriage settlement, had a power of appointing, by deed or will, certain property amongst the children of the marriage. By his will, he declared, that "as to all the residue of my real estate over which I have any power of appointment or other testamentary disposition, & as to all my moneys & securities for moneys, goods, chattels, rights, credits, personal & testamentary estate & effects, over which I have any right or power of appointment or other testamentary disposition, I give, devise, & bequeath, direct, limit, & appoint, the same to trustees, naming them upon trust, to raise the sum of £3,000 for the benefit of my daughter & her children, & subject thereto, upon further trust," etc. Testator had no other power of appointment:—*Held*: the will was a due exercise of the power.—*PIDGELY v. PIDGELY* (1844), 1 Coll. 255; 3 L. T. O. S. 200; 8 Jur. 529; 63 E. R. 408.

*Annotations* :—*Apld. Re Swinburne, Swinburne v. Pitt* (1884), 27 Ch. D. 696. *Reid. Maunsell v. Maunsell* (1871), 24 L. T. 698; *Von Brockdorff v. Malcolm* (1885), 30 Ch. D. 172; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563.

547. ————]—A. B., having a testamentary power over real estate in favour of his children, devised all the real estates, of or to which he was seised or entitled, "or of which he had power to dispose or to appoint by that his will," on trust for his children & for other uses exceeding his authority:—*Held*: the will was an execution of the power.—*BANKS v. BANKS* (1853), 17 Beav. 352; 1 W. R. 511; 51 E. R. 1070.

*Annotations* :—*Apld. Maunsell v. Maunsell* (1871), 24 L. T. 698. *Reid. Re Milner, Bray v. Milner*, [1899] 1 Ch. 563.

548. ————]—J. bequeathed £1,000 in case his daughter S. should die leaving issue, to be at her disposal unto such issue, & directed that the said sum should be paid & payable to such issue, being a son or sons, at the age of twenty-one years, & being a daughter or daughters at the age of twenty-one years or marriage, in such proportions as S. should, by deed or will, appoint. S. having two daughters M. & A. the latter being the wife of H., by will bequeathed all her property, including that over which she had any disposing power, to trustees, in trust, as to one moiety, for M. her heirs & assigns, & as to the other moiety, upon trust to pay the dividends to A. for her life for her separate use without power of anticipation, & on the death of A. in the lifetime of H. upon trusts, in default of appointment by A., in favour of her children, as & therein mentioned, & upon other trusts as therein mentioned. The trustees of J.'s will having paid the money into court, M., H., & A. petitioned the ct. as to its disposal. Ordered, that one moiety of the residue of the fund should be transferred to M., & the other moiety carried to the account of A.'s moiety, & the dividends

paid to her separate use, without prejudice to any question.—*Re HARRIS' TRUSTS* (1872), 20 W. R. 742.

**549.** —.]—Testator gave his estate by will to trustees in the following words: "I give, devise, & bequeath all my property over which I have any disposing power." The trusts of the will were for his wife for life, for her separate use, & after her death for all his children who should attain twenty-one in equal shares, & upon failure of children for the brothers & sisters of his wife:—*Held*: the will must be read *reddendo singula singulis*, & operated as an appointment under two special powers, one of which was a power to appoint among his children subject to a life interest in his wife during widowhood; & the other was a power to appoint a life interest to his wife in a fund which, subject to such power, was held on trust for his children at twenty-one in equal shares.—*THORNTON v. THORNTON* (1875), L. R. 20 Eq. 599.

*Annotations*:—*Reid*. *Re Denton, Bannerman v. Toosey* (1890), 63 L. T. 105; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563.

**550.** —.]—Testatrix had, under the will of a brother who had predeceased her, a power to appoint his property by will among his nephews & nieces & the children or child of deceased nephews & nieces. She, by her will, gave all the real & personal estate of which she might be seised or possessed at the time of her death, or over which she might have any testamentary power of disposition, to trustees, upon trust for sale & conversion, & to stand possessed of the proceeds, which she described as "my said trust funds" upon trust to pay costs & expenses, & to pay her debts & funeral expenses & certain pecuniary legacies, & then upon trust as to two one-fourth parts of her trust funds respectively for persons who were objects of the power; & upon trust as to the other two one-fourth parts respectively for persons who were not objects of the power. She declared that, in case of the failure of the trusts thereinbefore declared of any of the one-fourth parts of her trust funds, the one-fourth part, or so much thereof of which the trusts should fail, should be held upon the trusts thereinbefore declared of the others or other of the fourth parts of which the trusts should not fail:—*Held*: testatrix had manifested an intention to exercise the power & as to one moiety of the brother's property the power was well exercised.—*Re SWINBURNE, SWINBURNE v. PITT* (1884), 27 Ch. D. 696; 54 L. J. Ch. 229; 33 W. R. 394.

*Annotations*:—*Dictd.* *Re Cotton, Wood v. Cotton* (1888), 40 Ch. D. 41. *Reid*. *Re Boyd, Nield v. Boyd* (1890), 63 L. T. 92; *Re Milner, Bray v. Milner*, [1899] 1 Ch. 563; *Re Mayhew, Spencer v. Cutbush*, [1901] 1 Ch. 677.

**551.** —.]—Testatrix, who was entitled to a special power of appointment of a life interest in certain funds in favour of her husband, by her will, dated in 1882, gave legacies to persons not objects of the power out of her separate estate, or out of the estate & effects over which she had any disposing power, & then proceeded: "I give, bequeath & appoint all the residue of my estate & effects whatsoever & wheresoever unto my husband absolutely." Testatrix had no other testamentary power of appointment. She died in 1883 leaving her husband her surviving:—*Held*: the power had been exercised.—*Re MILNER, BRAY v. MILNER*, [1899] 1 Ch. 563; *sub nom.* *Re MILNER, MILNER v. BRAY*, 68 L. J. Ch. 255; 80 L. T. 151; 47 W. R. 369.

*Annotations*:—*Dictd.* *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518; *Re Hayes, Turnbull v. Hayes*, [1901] 2 Ch. 529. *Reid*. *Re Mayhew, Spencer v. Cutbush* (1901), 70 L. J. Ch. 428.

**552. General words of reference to all powers—In respect of property in which testator had interest—Not extended to special & limited powers—In respect of property derived from other source.**—*HOPE v. HOPE* (1854), 5 Giff. 13; 23 L. T. O. S. 343; 18 Jur. 823; 2 W. R. 674; 68 E. R. 902.

*Annotations*:—*Reid*. *Re Teape's Trusts* (1873), L. R. 16 Eq. 442; *Re Blackburn, Similes v. Blackburn* (1889), 43 Ch. D. 75.

**553. Reference to "beneficial power."**—Under his marriage settlement testator had a power of appointment by deed or will over personal estate among his children. He had no other power of appointment. By his will he devised & bequeathed all the real & personal estate of or to which he might be at the time of his death seised or entitled, or over which he might have "any beneficial power of disposition," save such as were by his will otherwise devised or bequeathed, to trustees, upon trust for sale & conversion, & out of the proceeds to pay his funeral & testamentary expenses, debts, & legacies, & as to the residue of the proceeds, upon trust, as to one-third, for his eldest son; & as to another third, for his younger sons in equal shares; & as to the remaining third, upon trust for his daughters in equal shares, their shares to be settled for the benefit of themselves, their husbands, & children:—*Held*: the power was not exercised by the will.—*AMES v. CADOGAN* (1870), 12 Ch. D. 868; 48 L. J. Ch. 762; 41 L. T. 211; 27 W. R. 905.

*Annotations*:—*Dictd.* *Von Brockdorff v. Malcolm* (1885), 30 Ch. D. 172. *Reid*. *Re Denton, Bannerman v. Toosey* (1890), 63 L. T. 105.

**554.** —.]—*VON BROCKDORFF v. MALCOLM*, No. 771, *post*.

**555. Statements distinguishing general & special power.**—In 1881 the balance of a legacy & certain investments were settled upon trust for W. for life &, after her death, upon trust as to the balance of the legacy for such persons as she should by deed or will appoint, & as to the investments for her blood relations as she should in like manner appoint, & in default of appointment for her next of kin. By her will made in Jan. 1917, W. gave the balance of the legacy, describing it as "the only part of my money I can leave to other than blood relations," to certain persons. She then gave pecuniary legacies to several persons who were some of her blood relations, including £50 to her sister & £600 to each of her two nephews sons of her brother Robert, & directed the residue of her "money" other than the aforesaid balance of the legacy to be equally divided between her sister & her said two nephews. W. died in July, 1917, & questions arose as to whether her will executed her special power &, if it did, whether her will was a fraud on the power to the extent of the benefits conferred on the two nephews. There was no evidence of a fraud on the power other than a letter written by W. in 1911 to her two nephews in which she in effect stated that in 1891 she verbally agreed with her brother Robert to appoint £2,000 to him or his family on condition that he paid her an annuity of £80 per annum, & expressed her intention of carrying out the bargain:—*Held*: (1) the will sufficiently referred to the special power & to the subject matter of the power, & operated as an execution of the power; (2) the letter was admissible in evidence to show the motive which actuated W. in making the appointments of the two nephews, the *onus* was on them to show that she had abandoned her improper motive when she made her will, the *onus* was not discharged, & therefore the appointments to them were a fraud on the power.—*Re WRIGHT*,

**Sect. 9.—Expression of intention to exercise powers:**  
**Sub-sect. 3, B. & C. (a).]**

**HEGAN v. BLOOR**, [1920] 1 Ch. 108; 88 L. J. Ch. 452; 121 L. T. 549; 64 Sol. Jo. 21.

**C. Reference to Property.**  
**(a) In General.**

**556. Mode of expressing intention.**—A general gift, to operate as an execution of a power must either refer to the power or to the subject of it; & a reference to part of the subject or to some of many subjects of the power, will not be sufficient to make a will operate as an execution of the power, where there is no other indication of an intention to execute it.—**HUGHES v. TURNER** (1835), 3 My. & K. 666; 4 L. J. Ch. 141; 40 E. R. 254.

**Annotations:**—**Apld.** *Re Nicholl, Re Perkins, Nicholl v. Perkins* (1920), 125 L. T. 62. **Held.** *Doe d. York v. Walker* (1844), 12 M. & W. 591; *Innes v. Sayer* (1851), 3 Mac. & G. 606; *Hope v. Hope* (1854), 5 Giff. 13; *Minchin v. Minchin* (1871), 19 W. R. 993; **Mentd.** *Hughes v. Hosking* (1856), 11 Moo. P. C. C. 1.

**557.** —.—**HOWELL v. HOWELL, HOWELL v. JAMES**, No. 526, *ante*.

**558.** —.—**HARVEY v. STRACEY**, No. 860, *post*.

**559.** —.—**Where A. has a power of appointment by deed or will over a certain sum of money, & conceiving that she has power over a larger sum, appoints accordingly, such appointment is valid *pro tanto*, & bad only for the excess.**

Where testatrix made a bequest of a sum over which she has a power of appointment only, but does not refer to the power, it is a good exercise of the power, if she refers distinctly to the property, the subject of the power.—**Re HINDLE'S TRUST** (1859), 7 W. R. 355.

**560.** —.—**Testator, after indicating his intention of disposing of a sum of money over which he had a power of appointment, gave a portion of it to certain persons named. He subsequently disposed of the residue of his property without any reference to the power in question:—Held:** the remainder of the sum under the power formed part of the residuary estate.—**Re COMBER'S SETTLEMENT** (1865), 13 L. T. 459; 11 Jur. N. S. 908; 14 W. R. 172.

**Annotation:**—**Apld.** *Re Nicholl, Re Perkins, Nicholl v. Perkins* (1920), 125 L. T. 62.

**561.** —.—**Re WESTON'S SETTLEMENT, NEEVES v. WESTON**, No. 540, *ante*.

**562.** —.—**In order to exercise a special power of appointment there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it; & either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose. Where, however, two powers exist in reference to the same property, it may well be that a reference to the property will not indicate any intention to exercise more than one of the powers.**

Testatrix, by her will proved in 1909, gave one moiety of her residuary estate in trust for her daughter, with a direction that the income thereof was to be held in trust for her daughter during her life, & after her death the capital thereof was to be held, subject to the appointment of any life interest to any future husband of the daughter as thereafter mentioned, upon trust for the children of the daughter living at her death who being sons should attain twenty-one,

or being daughters should attain that age or marry, with a provision that if no child should attain a vested interest, the share should be held in trust absolutely for such persons as the daughter should by will appoint, & in default of appointment for testatrix's son; & testatrix thereby empowered her daughter by deed or will to appoint for the benefit of any future husband who might survive her during his life or any less period all or any part of the income of her share.

The daughter's first husband died in 1910, the only issue of that marriage being a daughter, who was born in 1898. In the year 1910 testatrix's daughter married A., her second husband. She died in 1912, having made a will whereby she appointed A. guardian of her infant daughter & proceeded: "I give, devise, appoint & bequeath all my estate, property & effects, whatsoever & wheresoever, both real & personal, which I have power to dispose of by my will, to my said husband, A., absolutely, & I appoint A. sole exor. of this my will":—**Held:** the daughter's will executed the special power of appointing the income of her share in favour of her second husband during his life.—**Re ACKERLEY, CHAPMAN v. ANDREW**, [1913] 1 Ch. 510; 82 L. J. Ch. 260; 108 L. T. 712.

**563. Necessity for reference—When power not referred to.**—A person may execute a power without reciting it, but necessary he should mention the estate which he disposes of.—**Re CASWALL, Ex p. CASWALL** (1744), 1 Atk. 559; 26 E. R. 351, L. C.

**Annotation:**—**Consd.** *Doe d. Nowell v. Roake* (1825), 2 Bing. 497.

**564.** —.—**Though to effect the execution of a power by will a direct reference to the power is not necessary, the intention must distinctly point to the subject of it; as if something is included, which testator had not otherwise than under the power; & part of the will, unless applied to it, would be wholly inoperative.**—**BENNETT v. ABURROW** (1803), 8 Ves. 609; 32 E. R. 492.

**Annotations:**—**Consd.** *Doe d. Nowell v. Roake* (1825), 2 Bing. 497; *Hougham v. Sandys* (1827), 2 Sim. 95; *Lemprière v. Valpy* (1832), 5 Sim. 108. **Apld.** *Davies v. Davies* (1858), 28 L. J. Ch. 102. **Consd.** *Re Mills, Mills v. Mills* (1886), 34 Ch. D. 186.

**565.** —.—**Although a will does not state that it is made in execution of a power, yet if it plainly refer to & comprise the subject of the power, it will be deemed a good execution.**—**ILUNLOKE v. GELL** (1830), 1 Russ & M. 515; 39 E. R. 198.

**566. "All my personal estate"—"All my estate & interest therein."**—Distinction between property & power. Bequest of all money, stock, etc., & all other personal estate, to the sole use of testator's wife for life, to be at her full, free, & absolute disposal during her life, without being liable to any account; & after her decease, certain articles specified & £500 according to her appointment by will; in default of appointment, to fall into the residue; which was disposed of. An interest for life only; with a limited power of disposition. Power of appointment not executed by general words in a will, "all my personal estate," etc., & "all my estate & interest therein."—**BRADLY v. WESTCOTT** (1807), 13 Ves. 445; 33 E. R. 361.

**Annotations:**—**Consd.** *Doe d. Nowell v. Roake* (1825), 2 Bing. 497; *Lovell v. Knight* (1831), 1 L. J. Ch. 47. **Held.** *Pennock v. Pennock* (1871), L. R. 13 Eq. 144. **Mentd.** *Re Cholmondeley* (1892), 1 Cr. & M. 149.

**PART IV. SECT. 9, SUB-SECT. 3.—**  
**C. (a).**

**556 i. Mode of expressing intention.]**

—**HUTCHINSON v. BAIRD** (1899), 1 N. B. Eq. Rep. 624.—**CAN.**

**t. Appointment of part of pro-**

**perty—Right to participate in un-appointed portion.]—MACRAE'S TRUSTS v. MACRAE**, [1927] S. C. 210.—**SCOT.**

**567. Reference in codicil—Codicil revoking previous devise.]**—M. devised all her lands, etc., in Westley, in the county of S., to A. & his issue; & in default of issue to such uses as A. might by his will appoint: A., by a will made in the lifetime of M., devised all his lands in the parish of Worthen & elsewhere in the county of S., after several estates for life in tail, to his own right heirs in fee: & afterwards, by a codicil made after the death of M., revoked the devise of the reversion to his heir, in all other respects expressly confirming the will, & then devised the reversion in fee of all his said lands in the parishes of Worthen, Westbury, & Cherbury, in the county of S., to B.; A. had no other land in Westbury, except what he took under the will of M.:—*Held*: the power of appointment was not well executed by the codicil.—*POWELL v. LONDALE* (1819), 2 B. & Ald. 291; 106 E. R. 373.

*Annotation*:—*Refd.* Hope v. Hope (1851), 5 Giff. 13.

**568. Gift of legacies—Precise sum subject to appointment.]**—Testatrix having, under her marriage settlement, a power, in default of issue, to appoint by her will a sum of £2,200, she by her will, after reciting the power, proceeded thus: “& I give & bequeath,” several legacies, some to persons absolutely, & others to persons for life, after their decease, to their children or other persons by substitution, amounting in the whole, to the precise sum of £2,200, & as to all such real estates as she had power to dispose of under her marriage settlement, or the will of her husband, she expressed her desire that the same should descend to & vest in her daughter, by the preferable title of descent; & subject as aforesaid, she bequeathed the residue of her personal estate to her said daughter:—*Held*: the legacies were not general legacies, payable out of her general personal estate, but were intended to be given by testatrix, under a mistaken notion that the execution of the power was not restricted to the event of her dying without issue.—*WALKER v. LAXTON* (1827), 1 Y. & J. 557; 148 E. R. 793.

*Annotations*:—*Consd.* Williams v. Hughes (1857), 21 Beav. 474. *Apld.* *Re* Young, Trye v. Sullivan (1885), 52 L. T. 754.

**569. ———.]**—A. having a power to appoint by will certain funds in such manner as he should think fit, he, by his will, so executed & attested as required by the power, gave & bequeathed to his relations sums of money, amounting in the whole to precisely the sum of which he had the power to dispose, but without any reference or allusion in his will to the power, or any words indicative of his intention to execute it:—*Held*: the will was a good execution of the power.

*Qu.*: if the ct., in deciding whether a will is a good execution of a power, can look at the state of testator's property at the time of making his will, as a guide to his intention.—*LOWNDS v. LOWNDS* (1827), 1 Y. & J. 445; 148 E. R. 745. *Annotation*:—*Distd.* Davies v. Thorns (1849), 3 Do G. & Sm. 347.

**570. ———.]**—A settlement contained a power to tenant for life to appoint to children, or any one or more of them, two sums, one in Consols, the other in New £3 per cents.

The tenant for life by his will, not referring to the power, gave to three of seven surviving children the money that he had in Consols & in the New £3 per cents.; & he gave £100 to his grandson, directing that the three appointees should contribute it.

The only property testator had was a sum of £144 Consols, his title to which was disputed at the date of the will, but which was afterwards

assigned to him, & his interest in the one-eighth share of the trust fund of a son deceased during his life:—*Held*: (1) it was not his intention to refer to & describe either of these two interests; & therefore the will was a good appointment; (2) the gift of the £100 to the grandson was a condition imposed on the appointees, & as such, void, & the appointees took the whole trust fund.—*ROOKE v. ROOKE* (1862), 2 Drew. & Sm. 38; 31 L. J. Ch. 630; 6 L. T. 527; 10 W. R. 435; 62 E. R. 535.

**571. ———.]**—Testator being entitled to real & personal estate absolutely, & having a power of appointment over certain settled personal estate in favour of his children, gave by his will certain pecuniary legacies to the children, & then appointed the settled property subject & charged with the legacies to his children. He also bequeathed & devised his residuary personal and his real estate, subject to the payment of the legacies given by his will:—*Held*: the legacies given to the children were in the nature of demonstrative legacies, & that the settled property was primarily applicable for the payment of them.—*DISNEY v. CROSSE, EYRE v. PARKER* (1860), L. R. 2 Eq. 592.

**572. ——— Donees' own property insufficient to pay legacies—No reference to power.]**—The circumstances that testatrix had not nearly sufficient property of her own to satisfy the legacies bequeathed by her, & that the legacies added together exactly amounted to a sum over which she had a power of appointment by will, held not sufficient grounds for deciding that the will, executed before the Wills Acts of 1837 (c. 26), came into operation, was a good execution of the power, there being no reference to the power in it.—*DAVIES v. THORNS* (1849), 3 Do G. & Sm. 347; 18 L. J. Ch. 212; 12 L. T. O. S. 551; 13 Jur. 383; 61 E. R. 510.

— **Out of only fund answering description.]**—*See* Nos. 508–604, *post*.

**573. Bequest of “all other my property.”]**—A will is deemed a good execution of a power, if it dispose of the subject of the power, although it does not refer to the power. The subject of the power will pass by the words of “all other my property,” if it be plain, from other expressions in the will, that, under these general words she considered the property under the power to be included.—*WALKER v. MACKIE* (1827), 4 Russ. 76; 38 E. R. 733.

*Annotations*:—*Apld.* *Re* David's Trusts (1859), John. 495. *Refd.* Hughes v. Turner (1835), 3 My. & K. 606; *Re* Mattingley's Trusts (1862), 2 John. & H. 426.

**574. Partial reference—No other indication of intention.]**—*HUGHES v. TURNER*, No. 556, *ante*.

**575. Devise of interest in specific property.]**—Testator devised to his wife & three others, B., C., & D., freehold lands in trust for his wife for life, & after her decease for the use of his three children for their lives, in equal shares, & to the lawful issue of their respective bodies for their respective lives only, in equal shares, for ever; & in case of the death of either of his said children without lawful issue, then upon trust for the survivors or survivor of them in equal shares for life only, or to their respective lawful issues in equal shares for life only; & in case there should be only one child then living, then upon trust for such only child for life only, & for the lawful issue of such only child for life, in equal shares; & if but one issue of such child, then to such only child's issue, for life only, & the heirs of his or her body for ever; but in case there should not be any lawful issue of such child or the child of such child, then over. Either of testator's

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children who should marry was to have power to make a settlement of his share, with the consent of his mother, for the lives of the parties, & the lives of their issue, with remainder over in tail. By a second codicil annexed to his will, reciting the above devise, testator devised the premises after the decease of his wife to B., C., & D., upon trust for the equal use of his three children as tenants in common for ninety-nine years from the day of his decease, if they or either of them should so long live; & from & after the determination of that term, & in the meantime subject thereto, to the trustees in fee, to preserve contingent remainders; with power to testator's daughter, if unmarried, to devise one-third part in fee or for life; & the uses, subject to those in the codicil declared, which were expressed in the will, as far as the rules of law would permit, were to be carried into perfect execution. By other codicils, C. James & another were appointed trustees in lieu of C. & D. Testator's widow & C. James alone acted in execution of the trusts of the will & C. James died in the lifetime of the widow, intestate, leaving an eldest son his heir-at-law. Testator's daughter died unmarried, & without any reference to the power given her by the will, devised all her then present & future right & interest in the property in question to her mother. Testator's widow by her will, after various devises & bequests, gave & devised the residue of her estate & effects, both real & personal, (equally between her grandchildren:—*Held*: the will of testator's daughter operated as an appointment in exercise of the power over her one-third part of the estate.—*BROOKE v. TURNER* (1836), 2 Bing. N. C. 422; 1 Hodg. 440; 2 Scott, 611; 132 E. R. 165.

**576. Devise & bequest of "my property."]**—A. having a power of appointment by will, of a sum of £4,000 bequeathed several pecuniary legacies, which greatly exceeded the amount of her estate, exclusive of the £4,000, & then bequeathed to L. all other her personal estate, & over which she had any disposing power. The will did not contain any reference to the £4,000 or to any power of appointment:—*Held*: the power was well executed by the residuary bequest, & L. was entitled to the whole sum of £4,000 to the exclusion of the legatees.—*LOWE v. PENNINGTON* (1840), 10 L. J. Ch. 83, L. C.

**577. —.]**—Under a marriage settlement dated in 1840, power was reserved to the husband to appoint, after the death of his wife, if she should survive him, "so much" of a particular freehold estate settled by him "as shall not exceed the annual income of £300," to the use of the children of the marriage, the same to be, in default of appointment, for the use of the children equally. The residue of the estate to be to the use of the husband, absolutely. By his will the husband gave, devised, & bequeathed "the whole of my property real & personal, consisting of a farm," describing the freehold estate above mentioned, " & whatever may devolve to me by virtue of the marriage settlement," to a trustee, upon trust, after the death of his wife, for his five children, in unequal shares. He further gave to the trustee a discretionary power either to divide the income of "my entire property" according to the provisions before made, or to sell the whole, & divide the proceeds:—*Held*: the will did not operate as an exercise of the power of appointment.—*WILDMORE v. GREGORY* (1871), L. R. 12 Eq. 482; 41 L. J. Ch. 120; 19 W. R. 967.

**578. —.]**—If testator manifests an intention to exercise by his will a special power of appointment by reason of his making some gifts of property which he describes as "my" property, but the words of which gifts cannot be satisfied unless they pass property subject to the power, the ct. will assume that he intended also to exercise the power in the case of other gifts in the will which are capable of passing other property subject to the power, although the words of gift can be satisfied by means of property belonging to testator himself. Testator had under a settlement a special power to appoint by will two estates at B. & at S. respectively, & also some shares in the B. colliery. By his will he made gifts of "my estates at B." & of "my estate at S.," & he made another gift of "all my share & interest in the B., H., & W. Colliery cos." He had no property of his own at either B. or S., but he had some shares of his own in the B. colliery:—*Held*: the will operated as an exercise of the power, not only as regarded the estates at B. & S., but also as regarded the settled shares in the B. colliery.—*RE WAIT, WORKMAN v. PETGRAVE* (1885), 30 Ch. 1. 617; 54 L. J. Ch. 1172; 53 L. T. 336; 33 W. R. 930.

*Annotation*:—*Consol. Re Nicholl, Re Perkins, Nicholl v. Perkins* (1920), 125 L. T. 62.

**579. "Money in books of Governor & Company of Bank of England"—Consols.]**—Stock in the funds held in trust for the wife for life, with remainder as the husband should appoint, & in default to his exors., administrators, or assigns:—*Held*: not to pass under the will of the husband, by the words "money he might have in the books of the Governor & Co. of the Bank of England."—*HOWELL v. GAYLER* (1842), 5 Beav. 157; 11 L. J. Ch. 308; 49 E. R. 537.

**580. Property derived from two sources — Appointment of property from one source.]**—Testator being entitled to certain personal property, derived indirectly through the wills of A., & of his father, settled part of it on his marriage, with a power of appointment among his children, leaving a fractional part in himself. He made his will "giving & bequeathing" all the personal estate that he derived through the will of his father to his two daughters, exclusively of his other children:—*Held*: the fractional part reserved to himself satisfied the language of the gift, & it was not an execution of his special power.—*NOEL v. NOEL* (1850), 4 Drew. 624; 7 W. R. 572; 62 E. R. 239.

*Annotation*:—*Consol. Rooke v. Rooke* (1862), 2 Drew. & Sm. 38.

**581. No property corresponding to reference.]**—Testamentary power to appoint a trust fund among all or any of donee's children. Bequest by donee as follows: "All my personal estate upon trust to pay all just debts & funeral expenses; to pay to my daughter F. £119; & to my daughter J. the whole of my furniture & household effects; & as to my money in the funds, & all my residue of my personal estate" upon further trusts for the benefit of J.

At the date of the will & of the death, testator had no money in the funds, & the trust fund consisted of a sum of Consols:—*Held*: the will was not an appointment.—*RE MATTINGLEY'S TRUSTS* (1862), 2 John. & H. 426; 70 E. R. 1125.

*Annotation*:—*Consol. Re Mills, Mills v. Mills* (1886), 34 Ch. D. 186.

**582. Augmentation of trust fund by donee—Appointment of trust fund—Whether appointment of augmentation.]**—(1) A sum of Consols was vested in the trustees of a marriage settlement, upon the usual trusts, for the husband & wife



successively for life, with remainder for the benefit of the children. The husband directed the bankers who received the dividends & paid them to him under a power of attorney from the trustees, to invest an additional sum of £2,000 Consols in the names of the same trustees, so that they might receive the dividends as before. The bankers invested the sum as directed, & paid the dividend of the aggregate fund to the husband during his life. No notice was given to the trustees of the fresh investment:—*Held*: there was no resulting trust of the sum of £2,000 for the husband, but that it became subject to the trusts of the settlement as an augmentation of the trust fund.

(2) A fund was vested in trustees on the usual trusts of a marriage settlement. The husband added a further sum of £2,000 as an augmentation of the trust fund. Four years afterwards the husband & wife, under a power in the settlement, appointed the original fund, "or the trust fund & property representing the same," to two of their children:—*Held*: the appointment passed only the original fund, & not the augmentation.—*Re CURTIS' TRUSTS* (1872), 1 L. R. 14 Eq. 217; 41 L. J. Ch. 631; 20 L. T. 863.

**583. "All property over which I have power to appoint."**—A. married B. who was a widow with three children then infants. By the settlement made previous to their marriage property was assigned to trustees on trust for B. for life or, in case she should survive A., during widowhood with remainder to A. for life with remainder on trust for such of the children then living of B. & such child or such of the children of the intended marriage as being a male or males should attain twenty-one, or being a female or females should attain that age or marry, in equal shares, if more than one, as tenants in common & if there should be no object of the preceding trust who should acquire a vested interest in the trust funds, then in trust for A. absolutely. At the end of the settlement came this further proviso, that if there should be no child of the intended marriage who should attain a vested interest in the trust funds, A. should have power, subject to E.'s life estate, by deed or will to dispose of the trust funds to such persons & in such manner as he should think fit. B. died & then A. died. E.'s three children & two children of A. & B. survived. A. by his will charged all his real & personal estate with payment of his debts & legacies, & he gave, devised & bequeathed all his estate & effects, both real, leasehold & personal or over which by virtue of any deed or instrument he had any powers of appointment or disposition, including, among other things, all his estate & interest under or by virtue of the settlement made on his marriage with his late wife, to trustees on trust for sale, & to divide the proceeds equally between the two children of A. & B. to be paid to them respectively at twenty-one:—*Held*: (1) there was no repugnancy in the proviso giving the power of appointment to A., & the power was well exercised by A.'s will; (2) two of the children of B. who had attained twenty-one were respectively entitled to one-fifth part of the trust funds, subject only to the contingency of the two children of A. & B. dying under twenty-one.—*BRADLEY v. BURY* (1864), 10 L. T. 868; 10 Jur. N. S. 937.

**584.** —]—*Re COOPER, COOPER v. COOPER* (1890), 40 Sol. Jo. 416.

**585. Effect of word "appoint"**—Property only referred to in the mass.—Testatrix who had a special power of appointment among her children by her will gave, devised, bequeathed, & appointed all her real & personal estate not thereby otherwise

disposed of, including all property over which she had a power of appointment, unto her trustees upon certain trusts, including a trust to pay the income to her husband for life, & from & after his decease in trust for all her children in equal shares:—*Held*: testatrix by dealing with all her property in the mass could not be considered to have shown an intention to exercise her special powers, although she used the word "appoint."—*Re SANDERSON, SANDERSON v. SANDERSON* (1912), 106 L. T. 26; 56 Sol. Jo. 291.

**586. Two powers in reference to same property**—Whether reference to property shows intention as to both powers.—*Re ACKERLEY, CHAPMAN v. ANDREW*, No. 562, *ante*.

**587. Appointment of part of property—Whether remainder appointed by inference.**—The mere fact that the donee of a special power of appointment has dealt with part of the appointable property is not enough to justify the inference that in other parts of the document he is dealing with the rest of the property.—*Re NICHOLL, Re PERKINS, NICHOLL v. PERKINS* (1920), 125 L. T. 62; *sub nom. Re NICOLL, Re PERKINS, NICOLL v. PERKINS*, 65 Sol. Jo. 8.

(b) *Donee With or Without Other Property Answering Reference.*

**588. Donee without other property answering reference.**—*EWART v. EWART*, No. 379, *ante*.

**589. — Mixed reality & personality.**—A *feme covert* in pursuance of a power reserved to her in the marriage settlement, devises different parts of the settled estate, & also lands after purchased by her with the produce of it, to several persons; & gives all the rest of her property to her residuary legatee, & exor.:—*Held*: by the residuary clause, both real, & personal estate passed as by appointment.—*CHURCHILL v. DUBIGN* (1754), 9 Sim. 447, n.; *Keny. Ch. 68*; 96 E. R. 1310, L. C.

*Annotations*:—*Consd. Wright v. Cadogan* (1761), 2 Eden, 239; *Field v. Moore* (1855), 7 De G. M. & G. 691. *Appl. Shelford v. Adlam* (1856), 23 Beav. 10; *A.-G. v. Wilkinson* (1866), 14 L. T. 725. *Reid. Harvey v. Stracey* (1852), 1 Drew. 73; *Atchison v. Le Munn* (1854), 23 L. T. O. S. 502.

**590. — — — — —**—Devise by A. of his real estate to be sold, & the produce, with the personal, to his wife for life, with power to her, to appoint a moiety by deed or will, executed in the presence of two witnesses. The estate was not sold: the wife having no other real estate, by will duly executed to pass real estate, gave specific legacies, some described to have been her husband's; & devised "all the rest, residue, & remainder of her estate & effects of what nature or kind so ever, & whether real or personal, & all her plate, linen, china, & other utensils which she should be possessed of or interested in, or entitled to, at her decease," to B. for his own use & benefit, & appointed him exor. The power, as to the moiety of the real & personal estate, is well executed by the residuary clause.—*STANDEN v. MACNAB* (1797), 6 Bro. Parl. Cas. 193; 2 E. R. 1021, H. L.; *affg. N. C. sub nom. STANDEN v. STANDEN* (1795), 2 Ves. 589, L. C.

*Annotations*:—*Consd. Hales v. Margerum* (1796), 3 Ves. 296. *Distd. Langham v. Nenny* (1797), 3 Ves. 467; *Itce d. Roade v. Roade* (1799), 3 Term Rep. 118. *Expld. Bradly v. Westcott* (1807), 13 Ves. 445. *Consd. Bullock v. Fladgate* (1813), 1 Ves. & B. 471. *Distd. Jones v. Curry* (1818), 1 Wilk. Ch. 24. *Appl. Lewis v. Lowellyn* (1823), Turn. & R. 104. *Consd. Doe d. Nowell v. Roake* (1825), 2 Bing. 497; *Hougham v. Sandys* (1827), 2 Sim. 95. *Distd. Lovell v. Knight* (1831), 1 L. J. Ch. 47. *Reid. Lempiere v. Valpy* (1832), 5 Sim. 198; *Miller v. Travers* (1832), 8 Bing. 244; *Dummer v. Pitcher, Pitcher v. Dummer* (1833), 2 My. & K. 262; *Morrice v. Langham* (1840), 11 Sim. 260; *Evans v. Evans* (1856), 23 Beav. 1. *Mentd. Rishton v. Cobb* (1839), 5 My. & Cr. 145.



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*Sub-sect. 3, C. (b), & D.]*

**591.** ———.] —Testatrix having by her marriage settlement power by will or deed to appoint certain funds, but it not appearing that she was possessed of any other property, by her will dated in 1822, not referring in terms to the power, gave "all her property & estate whatsoever & wheresoever, & of what nature, kind, quality soever the same might be," to her husband his exors., administrators, & assigns, for his & their own use & benefit absolutely:—*Held*: an execution of the power.

Although the words of the will do not mention the particular fund which was subject to the power, as it does not appear she had any other property, there was none other on which this will would operate (STUART, V.-C.).—*A.-G. v. WILKINSON* (1866), L. R. 2 Bq. 816; 14 L. T. 725; 12 Jur. N. S. 593; 14 W. R. 910.

*Annotation*:—*Distd.* Humphrey v. Humphrey (1877), 36 L. T. 91.

**592.** ——— *Realty.*] —*WALLOP v. PORTSMOUTH (LORD)* (1752), Sugden on Powers, 8th ed. App. 916.

*Annotation*:—*Distd.* Lovell v. Knight (1831), 1 L. J. Ch. 47.

**593.** ———.] —Testator having a power of appointment over certain freehold & copyhold estates, & being seised of other freehold estates, devises all his freehold & copyhold estates, without reference to the power:—*Held*: an execution of the power as to the copyhold estates, but not as to the freehold estates which were subject to the power.—*LEWIS v. LEWELLYN* (1823), Turn. & R. 104; 37 E. R. 1034.

*Annotations*:—*Appld.* Napier v. Napier (1826), 1 Sim. 28. *Consd.* Hughes v. Turner (1835), 3 My. & K. 666; *Innes v. Sayer* (1851), 3 Mac. & G. 606. *Refd.* Lovell v. Knight (1831), 1 L. J. Ch. 47.

**594.** ———.] —(1) Where a donor recommends or directs, that the donee, at her death, shall give his personal property to such of his family or such of his relations as she shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin. (2) If the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import.

(3) It is well settled that if a donee of a power has no freehold estate except that which is the subject of the power the will of the donee giving freehold estate with it so far deemed an execution of the power. . . . There is no distinction between freeholds & leaseholds in the nature of the subjects. . . . A general gift of money's securities for moneys & other personal chattels . . . stand on very different principles; & as to them the will must refer to them as the subjects of the power or they will not pass (LEACH, M.R.).—*GRANT v. LYNAM* (1828), 4 Russ. 32; 6 L. J. O. S. Ch. 120; 38 E. R. 815.

*Annotations*:—*As to* (1) *Refd.* Re Doakin, Starkey v. Eyres, [1894] 3 Ch. 565. *Generally, Mentd.* Lilcy v. Hey (1842), 1 Haro, 580.

**595.** ———.] —S. was seised of lands in the county of Surrey, as to one moiety in fee by descent. The other moiety was limited to her for her life, with a power to appoint an estate in fee by deed or will, with remainders over in default of appointment. S. by her will devised all her freehold estates in the county of Surrey to J. for life, on the condition, that out of the rents he should keep them in repair. At his death the lands chargeable with an annuity were by this will devised to the children of J. with remainders

over. S. died, leaving J. surviving; & she, at the respective times of making her will & her death, had no other lands in Surrey but those before stated. Upon the argument of a special verdict, stating these facts, held in the Ct. of Common Pleas, that this was a valid execution of the power: but this judgment was reversed in the Ct. of K. B.

In no instance has a power or authority been considered as executed unless by some reference to the power or authority or to the property which was the subject of it, or unless the provision made by the person entrusted with the power would have been ineffectual, would have had nothing to operate upon, except it were considered as an execution of such power or authority (ALEXANDER, C.B.).—*ROAKE v. DENN* (1830), 4 Bli. N. S. 1; 1 Dow. & Cl. 437; 5 E. R. 1; *sub nom.* DENN d. NOWELL v. ROAKE, 6 Bing. 475, H. L.; *affg.* (1826), 5 B. & C. 720; *reversg.* S. C. *sub nom.* DOE d. NOWELL v. ROAKE (1825), 2 Bing. 497.

*Annotations*:—*Appld.* Doe d. Caldecott v. Johnson (1844), 7 Man. & G. 1047. *Consd.* Re Mills, Mills v. Mills (1886), 34 Ch. D. 186. *Refd.* Lovell v. Knight (1831), 1 L. J. Ch. 47.

**596.** ———.] —*CURTIS v. KENRICK*, No. 243, *ante*.

**597.** ——— *Leaseholds.*] —*GRANT v. LYNAM*, No. 594, *ante*.

**598.** ——— *Legacies.*] —*MACKINLEY v. SISON*, No. 149, *ante*.

**599.** ———.] —A. was, at the date of her will, entitled for life under her marriage settlement, to the dividends of a sum of Consols, with a power of appointment over a portion of such Consols, which, in default of appointment, was to go to her next of kin living at her death. She was also entitled for life under the will of her husband to the dividends of £10,000 Consols, & of various other stocks, with a power of appointment by deed or will attested by two witnesses over one-third part of such sums, & in default of appointment the stock was limited to other parties. By an unattested will not referring to the powers, she gave four several sums, amounting to £3,000 Consols, "in the 3 per cent. Consols" to four charities, & "the remainder in the 3 per cents." & in the other stocks in the settlement, naming them, to other parties:—*Held*: (1) the will operated as an execution of the power under the will of the husband, & also, that the words "the remainder in the 3 per cents." sufficiently showed that the legacies previously given were part of a larger amount of stock in that specific fund, & whether the specific stock referred to might mean stock which testatrix might purchase between the date of her will & her death, or stock existing at the date of her will, still the gifts were specific.

(2) Where a gift is *prima facie* specific, evidence of the state of the property at the date of the will is admissible.

(3) A power well exercised in other respects will, in favour of charities, be deemed to be an effective execution of the power, although the form in which the power has been exercised has not conformed to the requisitions imposed by the instrument creating or giving the power.—*INNES v. SAYER* (1851), 3 Mac. & G. 606; 21 L. J. Ch. 190; 18 L. T. O. S. 120; 16 Jur. 21; 42 E. R. 393, L. C.

*Annotations*:—*As to* (1) *Consd.* Minchin v. Minchin (1871), 19 W. R. 983. *As to* (2) *Appld.* Re Huddleston, Bruno v. Eyston, [1894] 3 Ch. 595.

**600.** ———.] —*SHELFORD v. ACLAND*, No. 401, *ante*.

**601.** ———.]—A power to appoint among such of testator's children as should be living at the death of the donee of the power, in such proportions as the donee of the power should direct, does not authorise an exclusive appointment to one or more of the objects.

Testatrix having a power of appointment over a fund originally invested in £3 10s. per cent. reduced annuities, which at the date of her will were reduced to £3 5s. per cent. annuities, bequeathed to two objects of the power £10 sterling each, & to C., the other object of the power, "all the residue of her property to be found in the £3 10s. per cent. reduced bank annuities, now reduced to £3 5s. per cent., & all other property whatsoever & wheresoever to be by the said C. possessed & enjoyed absolutely during the term of her natural life, & to be disposed of as she should think fit at her death:—*Held*: (1) the power of appointment was well exercised; (2) C. was absolutely entitled to the fund subject to payment thereof of the two sums of £10 each to the other objects of the power.—*Re DAVIDS' TRUSTS* (1859), John. 495; 29 L. J. Ch. 116; 1 L. T. 130; 6 Jur. N. S. 94; 8 W. R. 39; 70 E. R. 517.

*Annotations*:—*As to* (1) *Distd. Re Mattingley's Trusts* (1862), 2 John. & H. 426. *As to* (2) *Consd. Humble v. Bowman* (1877), 47 L. J. Ch. 62. *Generally, Refd. Freeland v. Pearson* (1867), L. R. 3 Eq. 658.

**602.** ———.]—Testatrix having a life interest in a sum of Consols, with a power of appointing the same among her children, who were to share equally in default of appointment, by her will made in 1864, which contained no reference to the power, bequeathed all money belonging to her in Consols, & all the money that she might die possessed of, to her two surviving children, two having previously died, & to a stranger to the power, in equal shares. Testatrix possessed no Consols or other stock other than that subject to the power:—*Held*: the will was a valid exercise of the power as to the two-thirds bequeathed to the surviving children, & the remaining third went to those entitled in default of appointment.—*Re GRATWICK'S TRUSTS* (1865), L. R. 1 Eq. 177; 35 Beav. 215; 11 Jur. N. S. 919; 55 E. R. 877. *Annotation*:—*Refd. Re Struchan, Causton v. Buckler* (1905), 50 Sol. Jo. 75.

**603.** ———.]—*Re STRACHAN, CAUSTON v. BUCKLER* (1905), 50 Sol. Jo. 75.

**604.** ———.]—*Re BUCKLER, CAUSTON v. BUCKLER* (1905), 50 Sol. Jo. 75.

**605. Donee with other property answering subject-matter.**—One having power to appoint lands by will amongst children; & having other lands; by his will, not referring to the power, gives legacies to his several children; & then devises all the rest, residue, & remainder of his lands, etc., & personal estate, after payment of his debts, legacies & funeral expenses, to his eldest son:—*Held*: the power was not thereby executed.—*DOE d. HELLINGS v. BIRD* (1809), 11 East, 49; 103 E. R. 922.

*Annotations*:—*Refd. Re Mills, Mills v. Mills* (1886), 34 Ch. D. 186. *Mentd. Culley v. Doe d. Taylerson* (1840), 3 Por. & Dav. 539.

**606.** ———.]—*ROAKE v. DENN*, No. 595, *ante*.

**607.** ———.]—Testator makes a general devise of all his lands in nine parishes; in five of them he had only lands in fee; in three others he had only lands over which he had a power of appointment; in the other he had lands in fee, & also lands over which his power extended; all the lands pass by his will, except the lands in the latter parish which were subject to his power.—*NAPIER v. NAPIER* (1826), 1 Sim. 28; 5 L. J. O. S. Ch. 65; 57 E. R. 489.

*Annotations*:—*Consd. Lovell v. Knight* (1831), 1 L. J. Ch.

47. *Distd. Innes v. Sayer* (1851), 3 Mac. & G. 606. *Refd. Hughes v. Turner* (1835), 3 My. & K. 666; *Hope v. Hope* (1854), 23 L. T. O. S. 313.

**608.** ———.]—A. settled lands of which he was seised in fee, to such uses as he should appoint by deed or will, & in default of appointment, to the use of himself for life, with remainder over. Afterwards, A. devised all his real estates whatsoever & wheresoever & all his estates, right, title & interest therein, & all leasehold premises whatsoever, to which he might be at the time of his decease entitled, & all his household furniture, money, etc., & all other his real & personal estate whatsoever & wheresoever, upon certain trusts. At the time of making the will, & also at the time of his death, A. was seised in fee of lands besides those subject to the power:—*Held*: the devise was not a good execution of the power.—*DAVIES v. WILLIAMS* (1834), 1 Ad. & El. 588; 3 Nev. & M. K. B. 821; 3 L. J. K. B. 217; 110 E. R. 1332.

**609.** ———.]—Leaseholds were settled on A. for life, with remainder to his wife, for life, with remainder to such child or children as he should appoint, & in default amongst them equally. A. renewed the leases in his own name, & by his will confirmed the settlement, & gave all "his freeholds & leaseholds" to his son, & a legacy to his daughter; he died, having other leaseholds besides those settled:—*Held*: the will was not an execution of the power.—*TANNER v. ELWORTHY* (1841), 4 Beav. 487; 5 Jur. 1099; 40 E. R. 427.

#### D. Admissibility of Evidence relating to State of Property.

**610. Where evidence admissible.**—*LOWNDS v. LOWNDS*, No. 569, *ante*.

**611. Realty.**—Parol evidence is not admissible to show the inadequacy of the personal estate of testatrix to satisfy the purposes of the will; but with regard to real estate, parol evidence would be admissible for that purpose, if an intention to pass realty appeared on the will.—*JONES v. CUNRY* (1818), 1 Swan. 66; 1 Wils. Ch. 24; 36 E. R. 300.

*Annotations*:—*Refd. Doe d. Nowell v. Roake* (1825), 2 Bing. 497; *Hougham v. Sandys* (1827), 2 Sim. 95; *Lovell v. Knight* (1829), 3 Sim. 275; *Lempriere v. Valpy* (1832), 5 Sim. 108; *Innes v. Sayer* (1851), 3 Mac. & G. 606; *Evans v. Evans* (1856), 23 Beav. 1; *Re Mills, Mills v. Mills* (1886), 34 Ch. D. 186. *Mentd. Parker v. Marchant* (1842), 1 Y. & C. Ch. Cas. 290.

**612.** ———.]—*GRANT v. LYNAM*, No. 594, *ante*.

**613. Onus of proof.**—(1) A. devised a messuage, etc., to B. & his assigns, for life, & from & after his decease, to the use of all or such one or more of the child or children of B. lawfully to be begotten to commence & take effect at such times & in such shares, manner & form, & for such estates & interests, & subject to such payments, conditions, & limitations, as B., by any deed or writing, or by his last will, etc., should direct, limit, appoint, etc., & for want of such appointment, to the use of all & every the son & sons, daughter & daughters of B., as tenants in common in tail, with cross remainders, & for want of such issue, to C. in tail. B., by his will, gave, devised, & bequeathed all his real & personal estate, to trustees, on trust to pay & apply the clear yearly rents & profits of his real estate as follows, one-third to his wife for life, if she should so long continue his widow, & the other two-thirds unto & for the benefit of his three sons in equal shares & proportions, & to be paid & applied to & for their benefit & advantage, or the benefit & advantage of the survivors or survivor of them, & the issue of such of them as should die leaving lawful issue, in such manner as

**Sect. 9.—Expression of intention to exercise powers:**  
*Sub-sect. 3, D.; sub-sects. 4 & 5.]*

the trustees or the survivor of them should think proper; &, in case two of his sons should die without leaving issue, then he gave & devised his real estate to the surviving son, his heirs & assigns for ever:—*Held*: this will was not a good execution of the power, inasmuch as it contained no reference to the power, or to the property that was the subject of the power, or to anything from which it could naturally be inferred that B., in framing his will, had the power in his contemplation.

(2) No evidence was given at the trial by either party, as to whether or not B. possessed any other real estate upon which his devise could operate:—*Held*: the *onus probandi* rested upon the party setting up the will as an execution of the power, & it lay upon him to establish the negative proposition that B. possessed no such property.—*DOE d. CALDECOTT v. JOHNSON* (1844), 7 Man. & G. 1047; 8 Scott, N. R. 761; 14 L. J. C. P. 17; 4 L. T. O. S. 172; 135 E. R. 425; *sub nom.* *DOE d. CALDECOTT v. JOHNSON*, 3 L. T. O. S. 37.

**614. — Personalty.]**—*JONES v. CURRY*, No. 611, *ante*.

**615. — —.]**—*GRANT v. LYNAM*, No. 594, *ante*.

**616. — —.]**—*INNES v. SAYER*, No. 590, *ante*.

**617. — — Gift not specific.]**—*Re HUDDLESTON; BRUNO v. RYSTON*, No. 504, *ante*.

**Surrounding circumstances as evidence of intention.]**—*See* Nos. 512–515, *ante*.

**SUB-SECT. 4.—WHERE DONEE HAS BOTH POWER AND AN INTEREST.**

**618. Whether property passes by virtue of ownership or of power.]**—*Feoffment* to such uses as the feoffor shall appoint by will, the use vests in the feoffor till declaration made according to the power; after declaration, the estates limited shall take effect by force of the feoffment; the will is but declaratory. If in such case the feoffor by his will devises the land itself as owner of it, without any reference to his authority, the land shall pass by the will. A feoffment to the use of a man's will, & to the use of him & his heirs, is all one. If the will as such would be inoperative to pass the land, the devise shall operate as a limitation of the use by virtue of the power.—*CLERE'S CASE* (1600), 6 Co. Rep. 17 b; Jenk. 260; 77 E. R. 279; *sub nom.* *CLERE v. PARKER*, Cro. Eliz. 877; *sub nom.* *PARKER v. CLERE*, Moore, K. B. 567; *sub nom.* *CLERE v. PARKER*, Cro. Jac. 31.

**Annotations:—***Consd.* *King v. Welling* (1672), 3 Keb. 95; *Loicester's Case* (1676), 1 Vent. 278; *Thoulinson v. Dighton* (1711), 10 Mod. Rep. 31; *Fitzgerald v. Fauconberge* (1729), Fitz-G. 207; *Buckland v. Barton* (1793), 2 Hy. Bl. 136; *Standon v. Standon* (1795), 2 Ves. 589; *Maundrell v. Maundrell* (1805), 10 Ves. 246; *Itce d. Berkeley v. York* (Archbp.) (1805), 6 East, 86; *Morgan d. Surman v. Surman* (1808), 1 Taunt. 289; *Langley v. Sneyd* (1822), 7 Moore, C. P. 165; *Logan v. Bell* (1845), 1 C. B. 872. *Reid*, *Lovies's Case* (1613), 10 Co. Rep. 78 a; *Colt & Glover v. Coventry & Lichfield* (Bp.) (1617), Hob. 140; *Alford's Case* (1662), O. Bridge. 584; *Wilson v. Garrett* (1675), 3 Keb. 536; *Parker v. Kett* (1701), 1 Ld. Raym. 658; *Orby v. Mohun* (1706), 2 Freem. Ch. 291; *Maddison v. Andrew* (1747), 1 Ves. Sen. 57; *Hurst v. Winchelsea* (1758), 2 Keny. 444; *Denn d. Nowell v. Roake* (1830), 6 Bing. 475; *Doe d. Caldecott v. Johnson* (1844), 7 Man. & G. 1047; *Mentd.* *Udal v. Udal* (1648), Alyn. 81; *Clerk v. Withers* (1704), 6 Mod. Rep. 290.

**619. —.]**—*TOMLINSON v. DIGHTON*, No. 120, *ante*.

**620. —.]**—Husband having a power of appointment paramount the right to dower, in default thereof to himself for life, remainder to his right heirs, if the power could have effect, yet a purchaser taking by a conveyance adapted to pass the interest in the estate, as a limitation of the fee was held to take it in that way, not by way of appointment & therefore subject to dower.—*MAUNDRELL v. MAUNDRELL* (1802), 7 Ves. 567; 32 B. R. 228; *affd.* (1805), 10 Ves. 246, L. C.

**Annotations:—***Consd.* *Roach v. Wadham* (1805), 2 Smith, K. B. 376; *Logan v. Bell* (1845), 1 C. B. 872; *Hughes v. Wells* (1852), 9 Haro. 749. *Reid*, *Tawlin v. Burgess* (1814), 2 Ves. & B. 382; *Ray v. Pung* (1821), 5 Madd. 310; *Tunstall v. Trappes* (1830), 3 Sim. 286; *L. v. Oundle* (1834), 1 Ad. & El. 283; *Glass v. Richardson* (1852), 9 Haro. 698; *Sing v. Leslie* (1864), 2 Hem. & M. 68. *Mentd.* *Ex p. Knott* (1806), 11 Ves. 609; *Mockreth v. Symmons* (1808), 15 Ves. 329; *Doe v. Hilder* (1819), 2 B. & Ald. 782; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Frere v. Moore* (1820), 8 Price, 475; *Peacock v. Burt* (1834), 4 L. J. Ch. 33; *Wilnot v. Pike* (1845), 5 Haro. 14; *Itce v. Itce* (1854), 2 Drow. 73; *Carter v. Carter* (1857), 3 K. & J. 617; *Bates v. Johnson* (1859), John. 304; *Trosser v. Itce* (1859), 28 Beav. 68; *Pease v. Jackson* (1868), 3 Ch. App. 578, n.; *Pileher v. Itawlin* (1872), 7 Ch. App. 259; *Spencer v. Clarke* (1878), 9 Ch. D. 137; *Taylor v. Russell*, [1891] 1 Ch. 8; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231.

**621. —.]**—A. & his wife, & B., & C., having a joint power of appointing certain lands, which in default of appointment stood limited, subject to a life interest reserved to C. in part of them, to A. in fee, by lease & release, being a settlement made in contemplation of the marriage of B., granted, bargained, sold, released, conveyed, directed, limited, & appointed the premises to M., to hold the same to him & his heirs, to the old uses, until the marriage, & after the marriage, as to certain parts of the lands, to the use of A. & his wife during the life of the longest liver, to be in bar of her dower, & as to other parts, to the use of A. for life, & the use of C. for life respectively; remainder to the use of M. during the lives of A. & his wife, & of C. respectively, in order to preserve contingent uses; remainder to the use of B. & her intended husband during the life of the longest liver of them; remainder to the use of M. to support contingent uses; remainder to the use of M. for a term of five hundred years, upon certain trusts; remainder to the use of the first & other sons of the marriage successively in tail; remainder to the use of the daughters in tail; remainder to the use of A. & his heirs:—*Held*: the release operated not as an appointment under the power, but as a conveyance of the interest; & therefore, that the legal fee did not vest in M.—*WYNNE v. GRIFFITH* (1826), 1 Russ. 283; 38 E. R. 110; *previous proceedings* (1825), 5 B. & C. 923; 3 Bing. 179.

**Annotations:—***Reid*, *Avarne v. Brown* (1844), 14 Sim. 303. *Mentd.* *Brown v. Nowall* (1837), 2 My. & Cr. 558.

**622. — Power destroyed.]**—A person having a power, by marriage arts., to charge an estate of which he was tenant for life, with intermediate remainders, with a contingent fee to himself, executes the power by will; the contingent fee afterwards comes to him: though, by the accession of the fee, the power is gone; yet the provision made by the will shall be served out of his estate in fee.—*CROSS v. HUDSON* (1789), 3 Bro. C. C. 30; 29 E. R. 390, L. C.

**Annotations:—***Consd.* *Sing v. Leslie* (1864), 2 Hem. & M. 68. *Reid*, *Roe d. Berkeley v. York* (Archbp.) (1805), 6 East, 86.

**623. — Grant of estate & exercise of power.]**—A. having both a power & an interest, the estate being conveyed to such uses as he should appoint, & in default of appointment, to him in fee, conveys by lease & release, using also words of appointment: the deed operates as a convey-



*Sect. 9.—Expression of intention to exercise powers :  
Sub-sect. 5 & 6. Sect. 10 : Sub-sect. 1, A. & B.]*

**632. — Appointment by surviving wife after void joint appointment.]**—A husband, upon marriage, settled an estate to the use of himself for life, with remainder to the use of trustees, to preserve contingent remainders, with remainder to the use of trustees for a term of years, to secure a jointure for the wife, with remainder to the use of such children of the marriage as the husband & wife jointly, or, in default of a joint appointment, the survivor of them should appoint, with remainder, in default of such appointment, to the children of the marriage equally, with remainder to the right heirs of the husband. The husband became bankrupt, & after his bankruptcy, he & his wife made a joint appointment in favour of two of the children of the marriage. The husband then died, & a bill having been subsequently filed by a person claiming under the bankruptcy, for an account of the rents of the settled estate, the wife thereupon executed a separate appointment in favour of the same children, which she stated in her answer:—*Held*: (1) the joint appointment was inoperative, on the ground that the husband could not, by a subsequent execution of the power, deprive his assigns of an estate which had been once vested in them by his bankruptcy; (2) such joint appointment could not be considered as the separate appointment of the wife, who survived; (3) the wife's separate appointment after the husband's death was a good exercise of the power; (4) the account of the rents prayed by the bill could not be extended beyond the date of that appointment.—*HOLE v. ESCOTT* (1838), 4 My. & Cr. 187; 8 L. J. Ch. 83; 2 Jur. 1059; 41 E. R. 74, L. C.

*Annotations*:—*As to* (1) *Distd.* *Lee v. Olding* (1856), 25 L. J. Ch. 580. *Reid.* *Re Cooper, Cooper v. Slight* (1884), 27 Ch. D. 565. *As to* (3) *Reid.* *De Serre v. Clarke* (1874), 43 L. J. Ch. 821. *Generally, Mentd.* *Notldidge v. Green* (1875), 33 L. T. 220; *Oliver v. Lowther* (1880), 28 W. R. 381; *Re Jakeman's Trust* (1883), 23 Ch. D. 344; *Re Boddingfield & Herring's Contract*, [1893] 2 Ch. 332.

**633. — —.]**—*CARVER v. RICHARDS*, No. 380, ante.

**634. — Exercise pendente lite—Action to declare first appointment invalid.]**—In a suit to have an appointment, under a discretionary power, declared invalid, a subsequent appointment *pendente lite* upheld.—*WARD v. TYRRELL* (1858), 25 Beav. 563; 27 L. J. Ch. 749; 31 L. T. O. S. 279; 4 Jur. N. S. 779; 53 E. R. 752.

#### SUB-SECT. C.—CONFIRMATION OF INVALID EXERCISE.

**635. Acceptance by appointee.]**—In order to make the acceptance of a gift under a supposed power of appointment operate as a confirmation of the power, there must be full knowledge, on the part of the person accepting the gift, of the invalidity of the power.

T., on his marriage with E., settled a sum of £10,000 upon trust for himself for life, with remainder to E. for life, with remainder, in default of children of the marriage, to the then present children of E. by her former marriage, other than A., her eldest son, who should attain the age of twenty-one years, if more than one, in equal shares, & in default of such younger children, in trust for A., his exors., administrators & assigns. After the death of T., there being no children of the marriage, E., erroneously believing that she had a power of appointment, at the request of D., one of her younger children by the former

marriage, affected to appoint a portion of the fund in his favour, & assigned to him her life interest therein. She afterwards by will made a general appointment in favour of B., her only other child. By the death of A. in the lifetime of E., D. became her eldest son:—*Held*: neither the acceptance of the appointment nor of the life interest amounted to a confirmation by D. of E.'s power of appointment.—*SANDEMAN v. MACKENZIE* (1861), 1 John. & H. 613; 30 L. J. Ch. 838; 5 L. T. 175; 7 Jur. N. S. 1231; 70 E. R. 880.

*Annotations*:—*Mentd.* *Domville v. Winnington* (1884), 26 Ch. D. 382; *Shuttleworth v. Murray*, [1901] 1 Ch. 819.

**636. Confirmation by deed poll—Operating as re-appointment.]**—(1) The donee of a power executed a deed whereby he was expressed to confirm a prior appointment, & also to appoint certain further funds, & the deed contained a power to revoke the appointment thereby made. The confirmation was in law an appointment:—*Held*: the power of revocation applied only to that part of the deed which was expressed in terms of appointment, & not to that part which was expressed in terms of confirmation.

(2) The direction that that money shall be provided out of the funds & property which at the death of the tenant for life shall be subject to the trusts is not to be read, or understood as a direction that it should be taken out of any part of those funds & property that might have been validly appointed to other persons; unless indeed there had been a deficient fund in which case this first appointment would have had priority (*LORD SELBORNE, C.*).—*MORGAN v. GRONOW* (1875), L. R. 16 Eq. 1; 42 L. J. Ch. 410; 28 L. T. 434, L. C.

*Annotation*:—*Reid.* *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54.

#### SECT. 10.—OPERATION OF APPOINTMENT.

##### SUB-SECT. 1.—EXTENT OF EXERCISE OF POWER.

###### A. In General.

**637. Governed by intention of donee of power.]**

—By a marriage settlement certain funds were vested in trustees upon trust for such person or persons as the wife, notwithstanding coverture, should appoint, & in default of appointment, upon trusts for certain persons. By her will the wife, in exercise of the power, appointed that the trustees should stand possessed of the trust funds in trust to pay certain legacies, including a legacy of £2,000, which lapsed by reason of the death of the legatee in the lifetime of testatrix, & after directing that her funeral expenses & expenses of proving her will, & also that the legacies should be paid free of duty, she bequeathed all the residue of her personal estate to her nephew, who died in her lifetime:—*Held*: the will showed an intention on the part of testatrix to dispose of the whole of the trust fund, so as to take it out of the settlement, & the balance, after paying the legacy duty & expenses, belonged to the husband, as administrator, & not to the persons under the trust in default of appointment in the settlement.—*Re PINNIDE'S SETTLEMENT* (1879), 12 Ch. D. 667; 48 L. J. Ch. 741; 41 L. T. 579; 28 W. R. 178.

*Annotations*:—*Consd.* *Re Van Hagan, Sperling v. Rochfort* (1880), 18 Ch. D. 18; *Osborne v. Holyoake* (1882), 31 W. R. 236. *Appld.* *Coxon v. Rowland*, [1894] 1 Ch. 406. *Distd.* *Re Boyd, Kelly v. Boyd*, [1897] 3 Ch. 232. *Appld.* *Re Marten, Shaw v. Marten*, [1903] 1 Ch. 314. *Reid.* *Re Ickeringill's Estate, Hinsley v. Ickeringill* (1881), 17 Ch. D. 151; *Willoughby Osborne v. Holyoake* (1882), 22 Ch. D. 238; *Rous v. Jackson* (1885), 29 Ch. D. 621.

**638. —.]**—Testator gave to his mother a general testamentary power of appointment over

real estate, provided that, should his mother die without any will, then the estate was to go to E. The mother by will gave all her real estate, including that over which she had any power of appointment, to trustees in trust for G., who died in her lifetime:—*Held*: there was no distinction between real & personal estate, & the property belonged to the trustees of the mother's will, subject to a resulting trust for her heir-at-law, if any.

The true rule appears to me to be that the question in all cases of the class now before me is one of intention, namely, whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the particular disposition expressed (JESSEL, M.R.).—*Re VAN HAGAN, SPERLING v. ROCHFORD* (1880), 16 Ch. D. 18; 50 L. J. Ch. 1; 44 L. T. 161; 29 W. R. 84, C. A.

*Annotations*:—*Apld.* *Re Scott, Scott v. Haabury*, [1891] 1 Ch. 298. *Consd.* *Re Elen, Thomas v. McKeehle* (1893), 68 L. T. 816; *Coxon v. Rowland*, [1894] 1 Ch. 406. *Distd.* *Re Boyd, Kelly v. Boyd*, [1897] 2 Ch. 232. *Refd.* *Re Ickeringill's Estate, Hinsley v. Ickeringill* (1881), 17 Ch. D. 151; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Pryce, Lawford v. Pryce* (1911), 105 L. T. 51.

639. —.]—(*Oxley v. Rowland*, No. 610, *post*).

640. Appointed sum & general residue treated as one fund—Partial failure of trusts of appointed sum—Whether passing as unappointed.]—(1) Testatrix, having a power over a sum of money, appointed it to A. & B., on certain trusts, & she also gave them, on trust, her residuary personal estate, after payment of her debts. She made no beneficial bequest of her residue, & appointed two other persons her exors. The trusts declared of the appointed fund did not exhaust it:—*Held*: the surplus fell into the residue, & did not pass as unappointed.

(2) A. had, under her father's will, a power to appoint £10,000. By changes in the investment, the fund had increased to £11,495, of which £10,000 was lent on mtge. to C., & £1,495 on mtge. to A. By her will, after reciting that under her father's will she had power to appoint £10,000, A., in exercise of her power, appointed "the sum of £10,000 now secured on mtge. of C.'s estate, & any other moneys representing the same":—*Held*: the whole £11,495 was well appointed.—*LEFEVRE v. FREELAND* (1857), 24 Beav. 403; 53 E. R. 413.

*Annotations*:—*As to* (2) *Refd.* *Hoare v. Osborne* (1864), 33 L. J. Ch. 586. *Generally*, *Refd.* *Bristow v. Skirrow* (1870), L. R. 10 Eq. 1; *Re Van Hagan, Sperling v. Rochfort* (1880), 16 Ch. D. 18.

641. Rules applicable to real as well as to personal estate.]—*Re VAN HAGAN, SPERLING v. ROCHFORD*, No. 638, *ante*.

#### B. Appointment to Appointee Direct.

642. Appointees also executors—Lapse of gift to two appointees.]—By a marriage settlement certain real & personal property was vested in trustees to be dealt with & disposed of as the wife should from time to time, by deed, appoint, & until such appointment, upon trust, during the lives of the husband & wife, to pay the income to the wife for her separate use, & if the wife should die first, then the property to be held in trust for such persons as she should, by will, appoint, & in default of appointment, for the husband

for life, & after his decease for other persons absolutely; & the settlement contained a full covenant to settle all other property of the wife. There were no children of the marriage; & soon after it had taken place the lady exercised the first power, & resettled the property, with this difference, that she then excluded her husband from any life interest in it. On the same day she made her will, whereby, in exercise of the powers reserved to her, she appointed the property upon trusts for conversion & payment of debts & legacies, & as to all the residue of her real & personal estate, after answering the purposes aforesaid, she gave & bequeathed the same "to the persons thereafter appointed her exors., in equal shares," & appointed A., B. & C. her exors., of whom A. attested her will, & B. predeceased her:—*Held*: (1) the gift was to A., B. & C. as individuals, & C. took one-third only of the residue; (2) the remaining two-thirds went under the settlement trusts, as in default of appointment.—*HOARE v. OSBORNE* (1864), 33 L. J. Ch. 586; 10 L. T. 20, 258; 10 Jur. N. S. 383, 604; 12 W. R. 397, 661.

*Annotations*:—*As to* (1) *Refd.* *Re Penell's Settlement, Trusts* (1879), 48 L. J. Ch. 741. *As to* (2) *Distd.* *Willoughby Osborne v. Holyoake* (1882), 22 Ch. D. 238. *Consd.* *Coxon v. Rowland*, [1894] 1 Ch. 406.

643. Appointee predeceasing appointor — Whether property devolves as in default of appointment.]—*Re DAVIES' TRUSTS*, No. 452, *ante*.

644. —.]—Testator by his will bequeathed a legacy of £770 to M. I. in trust for testator's daughter A. for her life, & after her decease in trust for such persons as she should by deed or will appoint, & in default of appointment in trust for M. I. A. by her will gave & bequeathed all her real & personal estate to her two sisters, M. & L., their heirs, exors., administrators, & assigns, in the shares following, namely, one-third to M. & two-thirds to L., & appointed L. sole extrix of her will, & charged her said property & effects with the payment of her debts & funeral & testamentary expenses. L. having predeceased A.:—*Held*: A. had by her will shown an intention to make the legacy of £770 part of her property for all purposes, & the two-thirds which had been appointed to L. passed therefore to the next-of-kin of A., & not to M. I. as in default of appointment.—*Re ICKERINGILL'S ESTATE, HINSLEY v. ICKERINGILL* (1881), 17 Ch. D. 151; 50 L. J. Ch. 304; 29 W. R. 500.

*Annotations*:—*Apld.* *Coxon v. Rowland*, [1894] 1 Ch. 406. *Distd.* *Re Boyd, Kelly v. Boyd*, [1897] 2 Ch. 232.

645. —.]—A married woman, having a general power of appointment over real & personal property, by her will, after desiring that the same should operate upon all property in which she had any interest or over which she had any power of appointment or disposition, left & appointed all her property, other than certain legacies, which she had power to dispose of, between her three brothers, charging it with her debts, & directing that the proceeds of the sale of certain jewellery should fall into "her residuary estate." One of the brothers predeceased her:—*Held*: she had treated the property, the subject of the power, as her own, so that the gift over, in default of appointment, contained in the original instrument, did not take effect, & there was, therefore, an intestacy.—*WILLOUGHBY OSBORNE v. HOLYOAKE* (1882), 22 Ch. D. 238; 48 L. T. 152; *sub nom.* *Re WILLOUGHBY-OSBORNE*,

#### PART IV. SECT. 10, SUB-SECT. 1.—B.

643.1. Appointee predeceasing appointor—Whether property devolves as in default of appointment.]—*Re DE LUSI'S TRUSTS* (1879), 3 L. R. Ir. 232.—IR.



**Sect. 10.—Operation of appointment: Sub-sect. 1, B. & C. (a) & (b).]**

**WILLOUGHBY-OSBORNE v. HOLYOAKE**, 52 L. J. Ch. 331; *sub nom.* **OSBORNE v. HOLYOAKE**, 31 W. R. 236.

**Annotation** :—**Apld.** **Coxon v. Rowland**, [1894] 1 Ch. 406.

**646.** ———.]—Testatrix having, under a deed of settlement, a general power of appointment over certain real estate, gave all the real & personal estate which she might be possessed of or entitled to, or of which by virtue of any power or authority she was competent to dispose, “in manner following”; & then, after making certain specific devises & bequests in which she treated the subjects of her gifts as her own, she gave the property forming the subject of the power to her husband, & also made him her residuary legatee. Throughout her will she drew no distinction between property which belonged to her & property over which she had only a power of disposition. Her husband predeceased her:—**Held**: she had indicated her intention that the power should be exercised, & that the property subject to it should be deemed hers for all purposes; & consequently, it went to her heirs, & not as in default of appointment under the settlement.—**COXON v. ROWLAND**, [1894] 1 Ch. 406; 63 L. J. Ch. 179; 70 L. T. 89; 42 W. R. 568; 38 Sol. Jo. 98; 8 Ll. 525.

**Annotations** :—**Distd.** **Re Boyd, Kelly v. Boyd**, [1897] 2 Ch. 232. **Apprvd.** **Re Marton, Shaw v. Marton**, [1902] 1 Ch. 314. **Refd.** **Re Pryce, Lawford v. Pryce**, [1911] 2 Ch. 286.

**647.** ———.]—Testatrix, who had a general testamentary power of appointment over £5,000, after reciting the power, bequeathed the said sum of £5,000 & also all the residue of her real & personal estate not otherwise disposed of by her equally among her eight nephews & nieces, by name, & appointed an exor.; by a codicil she gave various legacies out of her “own moneys,” & by another codicil she referred to the fact that she had by her will given “a certain fund therein named,” & also the residue of her estate, to her said nephews & nieces. Testatrix was possessed of considerable personal estate in addition to the £5,000. Two of the appointees having died in the lifetime of testatrix:—**Held**: she had not indicated a sufficient intention to make this £5,000 her own for all purposes, & consequently two-eighths of the fund lapsed, & went as in default of appointment.

It is true she appoints an exor., & if her own estate had been insufficient to pay her debts & the legacies which are not expressly payable out of her own property, then no doubt the £5,000 would have been applicable to make good the deficiency & to that extent the exor. might have had recourse to it. But her own property was more than sufficient to pay all her debts & legacies & the fact that an exor. might for a limited purpose have had a right to reach the fund would not in itself be sufficient to take the fund for all purposes away from the persons entitled in default of appointment (**ROMER, J.**).—**Re BOYD, KELLY v. BOYD**, [1897] 2 Ch. 232; 66 L. J. Ch. 614; 77 L. T. 76; 45 W. R. 648.

**Annotations** :—**Follgd.** **Re Russell Skinner, Marriott v. Ensor** (1924), 68 Sol. Jo. 440. **Refd.** **Re Marton, Shaw v. Marton** (1901), 85 L. T. 704.

**648.** ———.]—A married woman had power, in the event of her husband surviving her, to appoint the income of a fund to him during his life. She had also, in the same event, a general power to appoint by will the capital of the fund as she should think fit. By her will she appointed out of the capital of the fund several sums, includ-

ing £1,100 to D. “in satisfaction of a debt to that amount due from me to her.” & she further appointed that, subject as aforesaid, the trustees should pay the whole of the income of the fund to her husband during his life. The husband survived her. There was in fact no debt due from her to D. but there was a debt of £1,100 due from her husband to D., & the evidence satisfied the ct. that, in the appointment of the £1,100 she intended to refer to that debt. She had at her death separate property applicable to the payment of her debts, but that property was insufficient for the purpose by more than £1,100. Some time after her death the husband paid the debt to D.:—**Held**: the appointment had not failed, but was effective, & the £1,100 must be applied in payment of the debts of testatrix.—**Re HODGSON, DARLEY v. HODGSON** [1899] 1 Ch. 666; 68 J. L. Ch. 313; 80 L. T. 276; 47 W. R. 443.

**649.** ———.]—Where testator gave a power of appointment to his daughter & declared trusts in default of appointment to other persons, & the daughter's appointment was held an exercise of a general power of dividing the fund in equal shares between four named people, & one of the four appointees died before the death of the daughter, & the daughter appointed no trustees of her will:—**Held**: there was no sufficient indication of the daughter's intention to take the fund out of testator's estate, & accordingly, that such fourth share lapsed & did not form part of the estate of the donee of that power, the daughter, but passed as in default of appointment under the trusts of testator's will.—**Re RUSSELL SKINNER, MARRIOTT v. ENSOR** (1924), 68 Sol. Jo. 440.

**C. Appointment to Trustees.**

**(a) Of Instrument Creating Power.**

**650. Appointee predeceasing appointor—Property devolves as in default of appointment.**—Testatrix exercising a general testamentary power of appointment:—**Held**: upon the construction of the will, not to have made the property the subject of the power her own for all purposes, so that on the death of the appointee in her lifetime the gift over in default of appointment took effect.

The appointment of an exor. is not a sufficient indication of intention to make the property included in the power assets for all purposes.—**Re THURSTON, THURSTON v. EVANS** (1886), 32 Ch. D. 508; 55 L. J. Ch. 564; 54 L. T. 833; 34 W. R. 528.

**Annotations** :—**Refd.** **Re Boyd, Kelly v. Boyd**, [1897] 2 Ch. 232; **Re Power, Re Stone, Acworth v. Stone**, [1901] 2 Ch. 659; **Re Fearnside, Baines v. Chadwick**, [1903] 1 Ch. 250.

**651.** ———.]—**Unless intention shown to make fund appointor's property.**—**Re PINEDA'S SETTLEMENT**, No. 637, *ante*.

**652.** ———.]—Testatrix, who had a general power of appointment over the funds comprised in her marriage settlement, by her will in exercise of the power appointed that the trustees of the settlement should stand possessed of £9,000, part of the funds, in trust for six persons named in the will; & in further exercise of the power she appointed that the trustees should stand possessed of the residue of the funds in trust as to £1,000 for W., & as to the residue thereof in trust for H. &, after bequeathing some specific & pecuniary legacies, testatrix made the following bequest: “As to the rest & residue of my real & personal estate I devise, bequeath, & appoint the same, subject to the payment thereof of



my debts, funeral & testamentary expenses, unto H." H. died before testatrix. Testatrix had personal estate of her own, but she had no real estate:—*Held*: testatrix had by her will exercised the power for all purposes & had blended the settlement funds with her own property, & the appointed fund, so far as it had lapsed by the death of H., went, subject to the payment thereof of her debts & funeral & testamentary expenses & her pecuniary legacies, to her next of kin, & not to the persons entitled under the settlement in default of appointment.—*Re MARTEN, SHAW v. MARTEN*, [1902] 1 Ch. 314; 71 L. J. Ch. 203; 85 L. T. 704; 50 W. R. 209; 46 Sol. Jo. 163, C. A.

**653. — Trustees of settlement also executors of appointor.**—This is a clear case in which testatrix has appointed the fund in question, & has clearly not tried or intended to make it her own. The persons whom she has appointed to be the exors. of her will are, it is true, the present surviving trustees of the will of her husband, & on this it has been sought to show an intention that any unappointed part of the fund shall belong to her estate. But she directs & appoints that the trustees of her husband's will for the time being shall hold the fund upon the trusts of her husband's will. There is no blending of the funds or attempt to deal with the funds as part of her estate. The share which has lapsed must devolve as in default of appointment & the legacies given by the will of testatrix must be paid out of her own estate (SWINFEN RADY, J.).—*Re (REED, THOMAS v. HUDSON)* (1905), 49 Sol. Jo. 566.

*Annotation*:—*Apld. Re Orlebar, Wynter v. Orlebar*, [1908] 1 Ch. 136.

(b) For Appointee.

**654. Whether property falls into residue of appointor—Appointee predeceasing appointor.**—Testator directed that, in case of one of his daughters having no child, his trustees should stand possessed of a sum of £3,000 & the stock upon which it should be invested, including the accumulations of the surplus dividends which should not have been applied in manner in the will mentioned, during the daughter's minority, upon such trusts as the daughter should by will appoint, & in default of appointment, or in case of appointment, as to such parts of the £3,000 as should not be effectually comprised therein, or whereof the trusts to be thereby limited should either never take effect, or should determine, upon the trusts by his will declared of his own residuary estate. The daughter, having no child, by her will, after reciting that the £3,000 & the accumulated dividends had been blended with funds to which she was absolutely entitled in a sum of £6,700 Consols, standing in the names of trustees, proceeded, in express execution of the power, to direct that the £3,000, & the stock upon which that sum or the surplus dividends should have been invested, should be transferred to certain trustees named in her will, upon trust, as to £2,700 Consols for her mother, & as to £250 Consols for another person, & as to the residue, upon the trusts after declared of her residuary estate. She then proceeded to give what she described as "all the residue of my stock in the public funds, & all my moneys, & securities for money, & all the residue of my estate & effects," to the same trustees, upon trust to convert & to invest in the funds such part as should not already be so invested, & to stand possessed of all such funds, & also of the residue of the trust

funds which should remain after paying & satisfying the several legacies of stock before directed to be paid or transferred thereout to her mother & the other person referred to, upon certain trusts which she proceeded to declare. The mother died in the daughter's lifetime:—*Held*: the £2,700 Consols was not well appointed, & it was subject to the trusts declared by testator of his residuary estate.—*EASUM v. APPLEFORD* (1840), 5 My. & Cr. 50; 10 L. J. Ch. 81; 4 Jur. 981; 41 E. R. 292, L. C.

*Annotations*:—*Consd. Re Harries' Trust* (1859), John. 199. *Distd. Brickendon v. Williams* (1869), L. R. 7 Eq. 310. *Consd. Champney v. Davy* (1879), 11 Ch. D. 949; *Re Van Hagan, Sperling v. Rochfort* (1880), 16 Ch. D. 18; *Re Elen, Thomas v. McKechnie* (1893), 68 L. T. 816. *Reid. Lefevre v. Froeland* (1857), 24 Beav. 403; *Bernard v. Minshull* (1859), John. 276; *Tatham v. Drummond* (1864), 2 Hem. & M. 262; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276; *Swete v. Tindal* (1874), 31 L. T. 223; *Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348; *Re Cruddas, Re Smith, Cruddas v. Smith* (1900), 69 L. J. Ch. 355; *Re Whitrod, Burrows v. Base*, [1926] Ch. 118. *Mondt. Re Currie, Bjorkman v. Kimberley* (1888), 36 W. R. 752.

**655. —**—A lady had a general power of appointing a trust fund by deed or will, & in default, half was limited to A. & the other to B. By her will, she appointed the fund to her exor. & made it chargeable with her debts & some legacies, & she gave half the residue, composed of the appointed fund & her own property, to A. A. predeceased testatrix & the bequest to him lapsed:—*Held*: the moiety of the fund subject to the power thus appointed in favour of A. passed to the appointor's next of kin, as part of her estate undisposed of, & not to the exors. of A. as in default of appointment.—*CHAMBERLAIN v. HUTCHINSON* (1856), 22 Beav. 444; 52 E. R. 1179.

*Annotations*:—*Consd. A-G. v. Brackenbury* (1863), 1 H. & C. 782. *Distd. Hoare v. Osborne* (1864), 35 L. J. Ch. 586. *Apld. Re Davlos' Trusts* (1871), L. R. 13 Eq. 163. *Reid. Brickendon v. Williams* (1869), L. R. 7 Eq. 310; *Bristol v. Skirrow* (1870), L. R. 10 Eq. 1; *Re Van Hagan, Sperling v. Rochfort* (1880), 16 Ch. D. 18; *Re Scott, Scott v. Hanbury*, [1891] 1 Ch. 298.

**656. —**—Under a marriage settlement, personally, the property of the wife, was assigned to trustees upon trust for the separate use of the wife for life, then for the husband for life, & in default, which happened, of children of the marriage, if the husband should survive the wife, which also happened, as to one-third of the corpus for the husband absolutely, & as to two-thirds, as the wife should, notwithstanding coverture, appoint, & in default of appointment for the persons who would at the death of the survivor be the next of kin of the wife. Afterwards a decree for a divorce *a mensâ et thoro* was pronounced, & the husband, by deed, for valuable consideration from the wife assigned to the trustees of the settlement all his share & interest whatsoever, whether in his marital right or otherwise, in the property comprised in the settlement upon trust, as the wife should by deed or will appoint, & after her death, in default of appointment, for her next of kin as if she had died without a husband. The wife, by will, in exercise of her power, appointed the fund to two of the three trustees of the settlement, & directed that they, whom she appointed exors., should stand possessed of the same upon trust to sell, & out of the proceeds stand possessed of the sum of £1,000, & also of her residue, after the decease of a tenant for life, upon trust for her two nieces in equal shares absolutely. She also appointed, gave, & bequeathed all my

PART IV. SECT. 10, SUB-SECT. 1.—C. (b).

a. *Appointee predeceasing appointor—Whether property devolves as in default of appointment.*—*BURKE IRWIN'S TRUSTS, BARRETT v. BARRETT*, [1918] 11 L. R. 350.—IR.

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plate, linen, books, pictures, jewels, household furniture, & stores, all of which are my separate property, or have arisen from my separate savings, together with any other separate property & savings which I may have at my death," to a legatee absolutely. One of the nieces died in her lifetime:—*Held*: the share of the funds which lapsed did not pass by the residuary clause under Wills Act, 1837 (c. 26), s. 27; further, the share of the funds which lapsed passed to the next of kin of testatrix, & not to the persons interested in default of appointment under the settlements.—*WILKINSON v. SCHNEIDER* (1870), L. R. 9 Eq. 423; *sub nom. WILKINSON v. SCHNEIDER, Re LE BLANC*, 39 L. J. Ch. 410.

*Annotations:—Appl. Re Davies' Trusts* (1871), L. R. 13 Eq. 163. *Consid. Re Van Hagan, Sperling v. Rochfort* (1880), 16 Ch. D. 18; *Re Elen, Thomas v. McKechnie* (1893), 68 L. T. 816. *Reid. Bristow v. Skirrow* (1870), L. R. 10 Eq. 1; *Rous v. Jackson* (1885), 29 Ch. D. 521; *Re Scott, Scott v. Hanbury*, [1891] 1 Ch. 298.

**657.** ———.—*Re DAVIES' TRUSTS*, No. 452, *ante*.

**658.** ———.—*By a marriage settlement, dated in 1863, after reciting that B., the wife, was "seised of or otherwise well entitled to" the freeholds therein described, subject to the life estate of J., & that she was entitled to leasehold premises & certain personal estate, the freeholds were conveyed to trustees, subject to the life estate of J., & the leaseholds & the personal estate were assigned to them, upon trust as to £10,000 for B. for life, & afterwards for A., the husband, for life, & subject thereto, as to all the realty & personalty, as B. should appoint, & in default in trust for B. for life, & if she should predecease her husband, in trust as to the realty for her heirs, & as to the personalty for her next of kin, as if she had died unmarried. The settlement contained the usual covenant for further assurance. At the date of the settlement it was believed that B. was entitled to the entirety of the freeholds & leaseholds, subject to the life estate of J., whereas she was entitled to only thirteen-sixteenths thereof, & J. was then, & to the time of his death, entitled to three-sixteenths. J. died in 1866, having by his will given his property to B. B. made her will in 1880, & in exercise of the powers in the settlement, & of every other power, gave all the freeholds & leaseholds comprised in the settlement to W. & T. P. equally; & she gave all the rest of her personal estate to trustees to pay the income to her husband for life, & afterwards to divide such estate equally between P., W., & T. She declared that her exors. should have power to sell her real & personal estate. B. made a codicil in 1880, revoking the gift of any moneys or other properties which she should have accumulated from or purchased with the income of the property comprised in the settlement or the corpus of any property not included in the settlement & otherwise acquired, & giving the same to her husband. T. died in B.'s lifetime, without issue. The questions were, who was entitled to the share of the residuary personal estate, the gift of which lapsed by the death of T.; who was entitled to the three-sixteenths of the freeholds; & who was entitled to the interest in such three-sixteenths, the gift of which lapsed by the death of T.:—*Held*: B. had made the personal estate which was included in the residuary gift part of her own assets, & so far as it lapsed, it passed to her next of kin, as though at her death it had belonged to her absolutely.—*Re HORTON, HORTON v. PERKS, HORTON v. CLARK* (1884), 51 L. T. 420.*

**659.** ———.—*By the will of E. certain personal estate was given in trust for L., an infant, for life, for her separate use without power of anticipation, & after her death for such persons as she should by deed or will appoint. By a settlement made on the marriage of L. who was still an infant & a ward of ct., with the sanction of the ct. under the Infant Settlement Act, 1855 (c. 43), appointed that the estate subject to the power should, subject to her own life interest under the will, go to & become vested in the trustees of the settlement upon trust for her separate use during the joint lives of herself & her husband, with remainder to the survivor for life, & subject thereto upon the usual trusts in favour of the children of the marriage, & in default of children as L. should appoint, & in default of appointment for the persons who would have been entitled to her personal estate under the Statute of Distribution if she had died intestate & without having been married. L. died shortly after the marriage still an infant without children & intestate. L. was an illegitimate child, therefore there was no one who could take under the ultimate trust in default of children:—*Held*: the effect of L.'s execution in the settlement of the power given by her will was to make the property part of her estate for all purposes, & not only so far as to carry out the trusts of the settlement, & the persons entitled under the settlement having failed, the property belonged to her husband.—*Re SCOTT, SCOTT v. HANBURY*, [1891] 1 Ch. 298; 60 L. J. Ch. 461; 63 L. T. 800; 39 W. R. 204.*

**660.** ———.—*Appointment if appointee survives third party—Appointee predeceasing party.*—*By a settlement a general power of appointment over certain stocks, funds, & securities was given to P., & it was provided that in default of appointment the settled property should go to the next of kin of P. By his will, dated in 1866, P., after making an appointment of part of the property, appointed the residue to J. & R. upon trust to convert & pay certain legacies, & to pay the ultimate residue to E., if she should be living at the death of C., & he constituted H. his residuary legatee. E. survived P., but predeceased C.:—*Held*: H., the residuary legatee, was entitled to the ultimate residue of the settled property.—*Re ELEN, THOMAS v. McKECHNIE* (1893), 68 L. T. 816.*

*Annotation:—Distd. Re Andrews, Public Trustee v. Vincent* (1922), 66 Sol. Jo. 284.

*D. Appointment to Executors of Donee.*

**661. Fund becomes general assets of appointor.**—*A. having power to appoint £700 which was to be raised under the trusts of a term, by her will, appointed that sum to the persons whom she made her exors., in trust; but she did not declare expressly any trust of that sum. She then bequeathed her personal estate to the same persons, in trust, & subject to the payment of her debts & legacies:—*Held*: the £700 ought to be raised, & applied in the same manner as the testatrix's personal estate.—*GOODERE v. LLOYD* (1830), 3 Sim. 538; 57 E. R. 1100.*

*Annotation:—Reid. Re Van Hagan, Sperling v. Rochfort* (1880), 16 Ch. D. 18.

**662.** ———.—*By a post-nuptial settlement, certain moneys to become payable on three policies of insurance on the life of R. were vested in trust for B. for life, & after her death, upon trust for the appointees of R. In 1821 R. appointed the moneys so to become payable to his exors. & administrators. By an order, in a suit instituted for the purpose of carrying into effect the trusts of*

673. ---.]— By deed of settlement estates were conveyed in trust for J. the husband for life, then to the wife for life, or until the youngest child of the marriage should attain twenty-one, & after the decease of both of them & after the attainment by the youngest child to twenty-one, to the use of all & every the children of J. by his wife, for such estates, in such shares, with such limitations, & subject to such charges, the same limitations & charges, if any, being for the benefit of some other or others of the said children, as J. should by deed or will appoint: & in default of appointment to all the children of the marriage in tail, with cross remainders, J. by will, in execution of the power, appointed the settled estates upon trusts for sale, & he declared the trusts, of the proceeds to be: as to one-sixth, to pay the income in the manner therein mentioned, as to one other sixth, in trust thereout to pay to testator's son T. £150, to testator's son-in-law B. £120, & to testator's son S. £30, & as to the residue of the said sixth, to pay the interest to testator's

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daughter C., the wife of W., for her separate use, & after her decease the share to which she would become entitled during her life in the said trust funds, to be in trust for all & every her children in equal shares: & as to all the remaining sixth parts, in trust for all testator's other children by his then wife, & the child or children of any then deceased or who might die in testator's lifetime, as tenants in common. J., testator, had six children. M., one of his daughters, married B. the son-in-law mentioned in the will, & died in testator's lifetime, leaving a son:—*Held*: the gift of £120 to B. was an invalid appointment, he not being an object of the power; the gift of the life interest to testator's daughter C. was good, but subject to the same & to the two gifts of £150 & £30 the share was unappointed; the sixth share to which M. would have been entitled had she been living, was unappointed.—*RATCLIFFE v. HAMPSON* (1855), 26 L. T. O. S. 102; 1 Jur. N. S. 1104; 4 W. R. 67. *Annotation*:—*Dbd. Re Moredith's Trusts* (1876), 3 Ch. D. 757.

**674.** —[—]—A tenant for life had a power to appoint, £5,900 Consols. She appointed £1,400 to each of her three sons, but not to vest until her death, & reserved to herself a power of revocation. She also appointed, irrevocably, to her daughter the residue of the £5,900, after setting apart a sufficient portion to satisfy the appointment to the three sons, to vest in the daughter *instantly*:—*Held*: the appointment to the daughter comprised only a residue, after deducting the £4,200; & the appointment in favour of two of the sons having failed by their deaths in the life of the appointor, the shares intended for them went as in default of appointment.—*LAKIN v. LAKIN* (1865), 34 Beav. 443; 12 L. T. 517; 11 Jur. N. S. 522; 13 W. R. 704; 55 E. R. 707.

*Annotations*:—*Apld. Re Bringlee's Trusts* (1872), 26 L. T. 58; *Swete v. Tindal* (1874), 31 L. T. 223. *Mentd. Re Phené's Trusts* (1870), 5 Ch. App. 139.

**675.** —[—]—E. by will appointed a legacy of £100 part of the fund to a stranger to the power; & appointed the balance of the fund, after payment of legacies to objects of the power, which balance amounted to £260, to pay her debts; & "should any surplus remain," she gave it to E., who was one of the objects of the power:—*Held*: (1) the £100 was unappointed, & did not pass to E.; but (2) the £260 was well appointed to E. freed from the charge of the debts, which failed as an invalid appointment.—*Re JEAFFRESON'S TRUSTS* (1866), L. R. 2 Eq. 276; 35 L. J. Ch. 622; 12 Jur. N. S. 660.

*Annotations*:—*Generally, Consd. Champney v. Davy* (1879), 11 Ch. D. 949. *Mentd. Re Barker's Trusts* (1883), 48 L. T. 573.

**676.** —[—]—By a settlement of 1835, £16,000 was vested in trustees, upon trust for A. for life; & after her decease, upon trust for her children as she should appoint. By a settlement of 1847, £5,000 Consols was vested in trustees, upon trust for A. for life; & after her decease, upon trust for her children or grandchildren, such grandchildren to be born in her lifetime, as she should appoint. A. by her will, after referring generally to these settlements, appointed "all such real or personal estate as she should have power to appoint or otherwise dispose of" to trustees, upon trust to sell, & out of the proceeds of sale to invest a sum of £3,500 & to pay the income thereof to her daughter B. for life, & after her death, for her children as therein mentioned: & "as to the residue of the proceeds of the said

sale" she devised & bequeathed the same to C. At the death of A., her daughter B. was unmarried:—*Held*: the £3,500 must be considered as appointed ratably out of both funds; also, subject to B.'s life interest the £3,500 remained unappointed, & did not pass to C. under the residuary gift.—*SWETE v. TINDAL* (1874), 31 L. T. 223.

**677.** —[—]—**Unless intention to appoint whole fund subject to previous appointments.**—A wife having power to appoint £4,000 to any of her kin; & for want of appointment, to go according to the statute, appoints it by will to her nephew, "upon condition" that he paid his mother an annuity of £100. She then bequeathed to her niece S. all the rest & residue of what she had power to dispose of. The nephew dying in her lifetime, the appointment as to him was void, but not so as to the annuitant, & the remainder was held to pass by the above residuary bequest.—*OKE v. HEATH* (1748), 1 Ves. Sen. 135; 27 E. R. 940, L. C.

*Annotations*:—*Consd. Taylor v. George* (1814), 2 Ves. & B. 378. *Distd. Easum v. Appleford* (1840), 5 My. & Cr. 56; *Cowper v. Mantall* (1856), 22 Beav. 223; *Bernard v. Minshull* (1859), John. 276. *Consd. Re Harries' Trust* (1859), John. 199. *Apld. Re Moredith's Trusts* (1876), 3 Ch. D. 757. *Reid. Marlborough v. Godolphin* (1750), 2 Ves. Sen. 61; *Re Marten, Shaw v. Marten*, [1902] 1 Ch. 314; *Re Moses, Beddington v. Beddington*, [1902] 1 Ch. 100.

**678.** —[—]—Power to appoint among nephews & nieces does not extend to great nephews, etc. & if part be appointed not pursuant to the power, the money so appointed lapses into, & passes under, the appointment of the residue which was properly appointed.—*FALKNER v. BUTLER* (1765), Amb. 514; 27 E. R. 332.

*Annotations*:—*Consd. Easum v. Appleford* (1840), 5 My. & Cr. 56; *Carter v. Taggart* (1848), 16 Sim. 423. *Apld. Re Harries' Trust* (1859), John. 199; *Re Moredith's Trusts* (1876), 3 Ch. D. 757. *Consd. Champney v. Davy* (1879), 11 Ch. D. 949. *Reid. Lakin v. Lakin* (1865), 34 Beav. 443; *Re Whitrod, Burrows v. Base*, [1926] Ch. 118.

**679.** —[—]—Testatrix having power under her late husband's will, to dispose of £10,000 Consols, recited the power, & then proceeded thus: "Now I do give & bequeath the said £10,000 Consols in manner following: that is to say I give, to G. the sum of £500 sterling"; I give, to my exors., the sum of £600 Consols in trust to pay the dividends to S. during her life, & after her decease, the £600 to sink into the residue of my estate; I give & bequeath, to H., his exors., etc., all the rest & residue of the said £10,000 Consols, after deducting therefrom the legacies above-mentioned. G. died in testatrix's lifetime:—*Held*: the £500 given to him was not to be deducted from the £10,000 Consols.—*CARTER v. TAGGART* (1848), 16 Sim. 423; 60 E. R. 938.

*Annotations*:—*Apld. Re Harries' Trust* (1859), John. 199. *Consd. Lakin v. Lakin* (1865), 34 Beav. 443; *Champney v. Davy* (1879), 11 Ch. D. 949. *Reid. Re Whitrod, Burrows v. Base*, [1926] Ch. 118.

—[—]—(1) Where a definite fund is subject to a power of appointment by will, & by a will purporting to be made in exercise of the power, one sum, part of the fund is appointed to one person & another sum, other part of it, to another; & "all the rest" or "all the remainder" of the fund to a third; the third appointee cannot claim a share which may lapse in consequence of the death of either of the former appointees in the lifetime of testator.

(2) But if there is upon the will a plain indication of an intention to appoint the whole that may remain strictly in the shape of residue, or to appoint the entire fund charged only with the sums specified in the preceding appointments, then the residuary clause will be read as an appointment not

of the mere balance of the fund after the sums so previously appointed have been deducted from it, but of the entire fund subject to the preceding appointments, the ct. acting upon the manifest intention of testator to dispose of the entire fund over which he has a power of appointment.—*Re HARRIES' TRUST* (1859), *John*. 199; 70 E. R. 395.

*Annotations*.—*As to* (1) *Consd. Lakin v. Lakin* (1865), 34 Beav. 443. *Apld. Sweto v. Tindal* (1874), 31 L. T. 223. *Reid. Re Meredith's Trusts* (1876), 3 Ch. D. 757. *As to* (2) *Consd. Champney v. Davy* (1879), 11 Ch. D. 949. *Reid. Re Whitrod, Burrows v. Base*, [1926] Ch. 118. *Generally, Reid. Tatham v. Drummond* (1864), 2 Hem. & M. 262; *Re Currie, Bjorkman v. Kimberley* (1888), 36 W. R. 752.

**681.** ———.]—Under an exclusive power to appoint to children, the children being entitled in default of appointment in equal shares, the donee, by will, appointed the whole fund to trustees, upon trust as to £1,200, to pay the income to one of her children, J., for life, & after his death, for his children; & if J. should die without leaving children who should attain vested interests, then that the £1,200 should be “added to & form part of the residue of” the trust estate. The trusts of the residue were in favour of daughters for life with testamentary powers. J. died leaving children. It being admitted that the gift to J.’s children was excessive:—*Held*: on J.’s death the £1,200 was not undisposed of, but was well appointed by the residuary gift.—*Re MEREDITH'S TRUSTS* (1876), 3 Ch. D. 757; 25 W. R. 107.

**682.** ———.]—Testatrix having a testamentary power of appointment over a trust fund in favour of her children only, purported by her will to appoint to three of her children, including F. & B., one-fourth each, & the remaining fourth to a grandchild, not an object of the power: & “all the rest, residue, & remainder of my personal estate & effects whatsoever & wheresoever, & of what nature or kind soever, & over which I have any power of disposal by this my will, I give & bequeath the same unto & equally between my said sons F. & B., share & share alike”:—*Held*: the residuary gift operated as an appointment to F. & B. of the one-fourth badly appointed to the grandchild.—*Re HUNT'S TRUSTS* (1885), 31 Ch. D. 308; 55 L. J. Ch. 280; 54 L. T. 69; 34 W. R. 247.

#### B. Abatement.

##### (a) Appointment of Insufficient Fund in Aliquot Shares.

**Abatement generally.**]—See EXECUTORS, Vol. XXIII., pp. 416–427, Nos. 4880–4981.

**683. Shares abate ratably.**]—Mrs. C. had a power to appoint three sums of £10,000 each, the first, under her father's will, amongst her children; the second, under her mother's will, to any person; & the third, also under her mother's will, amongst her children. In 1830 the second sum was appointed to her husband, & paid to him. In 1838 the legacy duty was paid on the third sum, which reduced it to £9,900. In 1842 she purported to appoint the two sums of £10,000 under her mother's will to her two daughters equally; & in 1843 she, by her will, appointed £9,900, described as derived from her father, to her daughter, A. B., & £10,000, also described as settled by her father & mother, to the other daughter C. D., & she confirmed the deeds of 1842, so far as they were valid, & not inconsistent with her will; & declared that, if she had exceeded

her powers, her will should have effect under the doctrine of election. The ct. having come to the conclusion that Mrs. C., when she made her will, believed she had the power of appointing £19,900, & appointed £9,900 to A. B., & £10,000 to C. D.:—*Held*: the doctrine of *Page v. Leapingwell* (1812), 18 Ves. 463, applied, & as testatrix had then only the power of appointing the first sum of £10,000, it must be divided between the two legatees in the proportion of 99 to 100.—*LAURIE v. CLUTTON* (1851), 15 Beav. 65; 51 E. R. 460.

**684. Effect of lapse of one share—Other shares entitled to benefit.**]—The donee of a testamentary power of appointment over a fund of £7,000 exercised the power by appointing sums of £1,995, £4,000, £4,000, & £5, amounting in all to £10,000. The appointee of one of the sums of £4,000 died in testator's lifetime:—*Held*: the other appointees, & not the persons who would take in default of appointment, were entitled to the benefit of the lapse.—*EALLES v. DRAKE* (1875), 1 Ch. D. 217; 45 L. J. Ch. 51; 24 W. R. 184.

*Annotations*.—*Consd. Wilson v. Kenrick* (1885), 31 Ch. D. 658. *Reid. Re West, Denton v. West*, [1921] 1 Ch. 533.

##### (b) Appointment of Residue of Insufficient Fund.

**685. Residue not appointed as fixed sum—Residue bears all loss.**]—Testator having a power of appointment by will over a sum of stock, bequeathed two sums of £5,000 & £500 sterling thereout to A. & B., & the residue to his son. The stock became in equity liable to his debts, & by payment thereof, & of the costs of the suit, the fund became less than £5,500 sterling:—*Held*: the pecuniary & residuary legatees were not liable to abate proportionately; but the residuary gift failed altogether.—*PETRE v. PETRE* (1851), 14 Beav. 197; 18 L. T. O. S. 14; 15 Jur. 693; 51 E. R. 262.

*Annotations*.—*Apld. Baker v. Farmer* (1868), 37 L. J. Ch. 820. *Consd. De Lisle v. Hodges* (1874), L. R. 17 Eq. 440; *Re Orford, Neville v. Cartwright, Cartwright v. del Balzo* (1895), 73 L. T. 681; *Re Margetta, Smith v. Margetta* (1906), 50 Sol. Jo. 290. *Reid. Springett v. Jennings* (1871), 6 Ch. App. 333; *Re Saunders-Davies, Saunders-Davies v. Saunders-Davies* (1887), 34 Ch. D. 482. *Montd. Re Chisholme, Goddard v. Brodie*, [1902] 1 Ch. 457.

**686.** ———.]—A donee of a power of appointment over a gross sum of money which in default of appointment was to be divided equally among her children appointed a specific sum which she described as being “part of” the gross sum; but she did not make any appointment of the residue. The gross sum proving deficient:—*Held*: the specific sum appointed was to be paid in full & not ratably out of the deficient gross sum.—*BOOTH v. ALINGTON* (1856), 6 De G. M. & G. 613; 26 L. J. Ch. 138; 28 L. T. O. S. 211; 3 Jur. N. S. 49; 5 W. R. 107; 43 E. R. 1372, L. C.

*Annotations*.—*Distd. Miller v. Huddleston* (1868), 16 W. R. 478; *Gilbert v. Whitfield* (1882), 52 L. J. Ch. 210. *Consd. Wilson v. Kenrick* (1885), 31 Ch. D. 658. *Reid. De Lisle v. Hodges* (1874), L. R. 17 Eq. 440; *Re Saunders-Davies, Saunders-Davies v. Saunders-Davies* (1887), 34 Ch. D. 482; *Re Cruddas, Re Smith, Cruddas v. Smith* (1900), 69 L. J. Ch. 353.

**687.** ———.]—Where testatrix appointed £600 to a trustee upon trust to invest & pay £75 to each of her daughters, & to apply the income of the residue for the benefit of her granddaughter till she attained seventeen, & then to pay £100 more to each of her daughters, & apply the income of the residue for the benefit of her granddaughter till she attained twenty-one, & then to pay such residue to the granddaughter for her own absolute

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use & benefit; & the fund had been diminished by certain costs & was insufficient:—*Held*: the gift of the residue to the granddaughter was not a gift of a fixed sum, but only of what might be left after payment of the fixed legacies, & therefore the legacies to the daughters must be paid in priority, & were not liable to abate *pari passu* with the residue.—*HARLEY v. MOON* (1861), 1 Drew. & Sm. 623; 31 L. J. Ch. 140; 6 L. T. 411; 7 Jur. N. S. 1227; 10 W. R. 146; 62 E. R. 516.

*Annotations*:—*Apld.* *Re Margetts, Smith v. Margetts* (1906), 50 Sol. Jo. 290; *Baker v. Farmer* (1868), 3 Ch. App. 537.

**688.** ———.]—By deed & by will two funds of £37,914 & £800 Consols were settled, with powers of varying investments, upon trusts for the nephews & nieces of R., subject to a power in R. of exclusive appointment among them. R. made & revoked a series of appointments, & ultimately, by a deed poll in Nov. 1870, at which time the fund had been reduced to £27,170 Consols & £8,000 cash, R., after reciting a desire to revoke the subsisting appointment of the two funds, & to appoint the same amongst his nephews & nieces named, in the shares & proportions & in manner expressed, in pursuance of that desire appointed that the trustees should stand possessed of the two funds "or other the stocks, funds, & securities" of which the same then consisted, or thereafter should or might consist, or upon which the same or any part thereof was then or thereafter should or might be invested, upon trust as to £7,000 Consols, part of the £37,914 & £800 Consols, or other the stocks, funds, or securities of which the same might consist, for his nephew, S. absolutely. R. then appointed in like manner further sums, making an aggregate of £37,000 Consols, in trust for the four nieces & nephew named; & the residue of the two several sums of Consols or other the stocks, funds, or securities, etc., in trust for his niece C. The trust funds at the death of R. were insufficient to pay the £37,000 Consols:—*Held*: the gift to C. was residuary & not specific, & it failed altogether.—*DE LISLE v. HODGES* (1874), L. R. 17 Eq. 440; 43 L. J. Ch. 385; 30 L. T. 158; 22 W. R. 363.

*Annotations*:—*Consd.* *Re Phillips, Eddowes v. Phillips* (1897), 66 L. J. Ch. 714. *Reid.* *Re Cruddas, Re Smith, Cruddas v. Smith* (1900), 69 L. J. Ch. 355.

**689.** ———.]—Testatrix, in exercise of a general power of appointment, made several appointments of, in each case, "so much & such part of" the said trust funds as should be of the "clear" value of a specified sum of money in each case, & lastly made an appointment of "all the residue" of the said trust funds. The will disposed of no other property except that subject to the power, & contained no direction for payment of testamentary expenses, probate or legacy duty:—*Held*: the testamentary expenses & probate duty, & the legacy duty on the specified portions of the trust funds, must be paid out of that part of the trust funds which was lastly appointed as residue.

*Qu.*: Whether the residue was residue for all purposes so as, for example, to include a lapsed share, if any.—*Re CURRIE, BJORKMAN v. KIMBERLEY (LORD)* (1888), 57 L. J. Ch. 743; 59 L. T. 200; 36 W. R. 752.

*Annotations*:—*Apld.* *Re Saunders, Saunders v. Gore*, [1898] 1 Ch. 17; *Re Coxwell's Trusts, Kinloch-Cooke v. Public Trustee*, [1910] 1 Ch. 83. *Reid.* *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457.

**690. Residue appointed as fixed proportion—Abatement ratably.]**—Where a sum of £5,000 was appointed upon certain trusts, subject to a power

of appointing to the amount or value of £1,000 each, one of which had been exercised, but the fund proved insufficient:—*Held*: the appointees of the £1,000, & the persons entitled to the residue of the fund, must abate proportionately.—*MILLER v. HUDDLESTONE* (1868), L. R. 6 Eq. 65; 37 L. J. Ch. 421; 18 L. T. 203; 16 W. R. 478.

*Annotation*:—*Distd.* *Gilbert v. Whitfield* (1882), 52 L. J. Ch. 210.

**(c) Successive Appointments of Insufficient Fund.**

**691. Loss borne by latest appointees.]**—(1) A donee of a power affecting two sums of stock of different descriptions appointed a gross amount, part of one of them, & exceeding one-fourth part of it. Afterwards she executed, successively, deeds purporting to appoint aliquot parts of both funds as one subject, & without noticing the previous appointment of the gross sum, which was never severed from the mass. The appointees comprised all the parties entitled, subject to the appointment, & the aliquot parts so appointed amounted to four-fifths, thus exceeding, with the earliest appointment, the entirety of one of the funds:—*Held*: the successive appointments of the aliquot parts operated upon aliquot parts of the whole of each fund, & therefore, the loss arising from the deficiency of the one fund fell upon the last appointees.

(2) The costs of the suit occasioned by the above circumstances were directed to be apportioned between the two funds, & the amount payable by each fund apportioned between the several interests in that fund; but wherever a share had been sold or incumbered, the additional costs occasioned by such sale or incumbrance were to be borne by that particular share.—*TROLLOPE v. ROUTLEDGE* (1847), 1 De G. & Sm. 662; 10 L. T. O. S. 224; 11 Jur. 1002; 63 E. R. 1240.

*Annotations*:—*As to* (1) *Consd.* *Stroud v. Norman* (1854), Kay, 313; *Wilson v. Kenrick* (1885), 31 Ch. D. 658. *Reid.* *Gilbert v. Whitfield* (1882), 52 L. J. Ch. 210. *As to* (2) *Foll.* *Moore v. Dixon* (1880), 49 L. J. Ch. 807; *Re Orford, Neville v. Cartwright, Cartwright v. del Balzo* (1895), 73 L. T. 681; *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457.

**692.** ———.]—*MORGAN v. GRONOW*, No. 636, ante.

**693.** ———.]—The donee of a special power to appoint, subject to a life interest, a sum of £3,000, raisable out of the proceeds of two policies & of certain real property, made three appointments by successive deeds of £1,000, described as part of the £3,000, in favour of three objects of the power. The property available eventually, owing to the insolvency of the insurance office, fell short of £3,000:—*Held*: the appointees took according to priority of appointment, & not ratable portions of the fund.—*STOKES v. BRIDGMAN* (1878), 47 L. J. Ch. 759.

*Annotations*:—*Foll.* *Gilbert v. Whitfield* (1882), 52 L. J. Ch. 210. *Consd.* *Wilson v. Kenrick* (1885), 31 Ch. D. 658.

**694.** ———.]—The donee of a special power to appoint by deed or will a sum of £10,000, which was invested on mtge., made successive revocable appointments by deed of sums of £3,000, £1,200, £1,000, & £1,000, respectively described as part of the £10,000, to three objects of the power, & by his will confirmed these appointments, & appointed the remaining £3,800 amongst objects of the power. The mtge. security eventually proved insufficient to realise the £10,000:—*Held*: the appointees took according to priority of appointment, & not ratable portions of the fund.—*GILBERT v. WHITFIELD* (1882), 52 L. J. Ch. 210; 48 L. T. 383.

**695.** ———.]—By deed of Oct. 1860, the donee of a power of appointing £6,000 amongst his



children, irrevocably appointed £500 to his daughter B., & subject to revocation, appointed the £5,500 residue to his daughter C. By a subsequent deed the appointment of £5,500 was revoked, & the hereditaments subject to the power were charged with £1,600 to C. & £3,900 to B., in lieu of the £5,500 charged by the first deed, & "subject & without prejudice to the trusts for raising the £500," trusts for raising the £1,600 & £3,900 were declared. This deed contained a power of revocation & new appointment, confined, however, to the £3,900. By a subsequent deed the appointment of £3,900 was revoked & that sum was appointed between B. & C. in the proportions of £300 to B. & £3,600 to C., in addition to the sums of £500 & £1,600 then respectively remaining charged thereon, & it was directed that all the sums raisable under the trusts of the term under the three deeds should be charged & chargeable on the property *pari passu* & without priority:—*Held*: the £500 irrevocably appointed by the first deed had priority over the other charges, & this priority was unaffected by the direction that the charges should rank *pari passu* & without priority; & accordingly, subject to any question as to election, the £500 had priority, & the several charges amounting to £5,500 stood subsequent to the £500, but *inter se* ranked *pari passu*.

Where under a power to appoint a definite fund among special objects an appointment is made of aliquot parts of the fund, or of parts of the fund exhausting the whole by one instrument, or by several instruments, which form one transaction & ought to be construed together, there *primâ facie* there is no priority, & the several parts of the fund, if the fund proves deficient, must abate ratably.

Where under a like power several sums are appointed by successive independent deeds, there *primâ facie* the sums or parts appointed, not being aliquot parts, have priority according to the dates of the deeds (CHITTY, J.).—WILSON v. KENRICK (1885), 31 Ch. D. 658; 55 L. J. Ch. 525; 54 L. T. 461; 2 T. L. R. 214.

#### C. Accretion.

696. Appointment extends to accretions.]—Testatrix had power to dispose by will of property which she enjoyed under the residuary gift of her brother; a part of this property consisted of £7,000 bank stock, which, after the brother's death, was increased by a bonus to £8,750. Testatrix in her will, made shortly after the bonus was declared, described the bank stock as consisting of £7,000; the ct. decreed that the £8,750 passed by force of general expressions which plainly manifested an intention to bequeath all that testatrix derived from her brother.—MATTHEWS v. MAUDE (1830), 1 Russ. & M. 397; 8 L. J. O. S. Ch. 106; 39 E. R. 153.

Annotation:—Mentl. Ricketts v. Harding (1870), 23 L. T. 780.

697. —.]—CARVER v. BOWLES, No. 902, *post*.

698. —.]—Testator bequeathed certain shares of the residue of his estate to trustees, upon trust to accumulate for such of his issue as his widow should by deed or will appoint. The widow by her will, referring to the power, appointed certain definite sums to the issue, on the express supposition that the shares would realise a certain sum per share; but if not, then she directed that the legatees should receive in proportion to their respective bequests:—*Held*: the appointment extended to the accumulations of

the shares.—THOMPSON v. TEULON, TEULON v. TEULON (1852), 22 L. J. Ch. 243; 1 W. R. 97.

699. —.]—LEFEVRE v. FREELAND, No. 640, *ante*.

700. —.]—Under the will of M. her nephew T. was tenant for life of one-fourth share of the funds, subject to the trusts of her will, with power after his death to appoint so much of the trust funds as he might be "entitled or presumptively entitled" to, among his children.

By his will he, in exercise of the power of appointment given to him by the will of his aunt M., appointed the sum of £5 to be paid out of his share of the trust funds, subject to the said will, to each of his children who should survive him, except his son P., & he appointed the remainder of his share to his son P. absolutely; & testator gave & bequeathed all the other property of every description belonging to him, or of which he should have power to dispose by his will, to his son P. for his own use, but subject to the payment of testator's debts, funeral & testamentary expenses. P. survived his father. The question was raised whether the will of T. operated as an exercise of the power of appointment given to him by the will of M. as regarded an accrued as well as his original share of the trust fund:—*Held*: the will operated as an appointment of the accrued share.—*Re* DENTON, BANNERMAN v. TOOSEY (1890), 63 L. T. 105.

701. —.]—A father by his will gave to trustees a sum of £30,000, to be invested as he directed, upon trust to pay the interest & annual proceeds thereof to his daughter during her life, & after her death the same sum, together with the interest & annual proceeds thereof, was to be held on such trusts as the daughter should appoint in favour of her children or grandchildren, with a trust over in default of appointment. The daughter by her will recited verbatim the gift in the father's will, & then, in exercise of the power, appointed that "the said sum of £30,000, together with the interest & the annual proceeds thereof, by the said will of my father to be held in trust for me, my children & grandchildren, & over which I have such power of appointment as aforesaid," should after her death be held by the trustees of her father's will upon trust as to £1,000 "part thereof" for her daughter E.; upon trust as to five sums of £1,000, £4,000, £6,000, £6,000, & £3,000 respectively, each of which was described as "other part of the said sum of £30,000," on trust for five others of her children, respectively, & upon trust as to another sum of £6,000, which was described as "the residue of the said sum of £30,000" for her other child. At the time of her death the securities on which the £30,000 had been invested were worth £39,000:—*Held*: testatrix was dealing with the fund as an invested fund, & that the whole of it was appointed in the proportions indicated by her will.—*Re* CRUDDAS, CRUDDAS v. SMITH, [1900] 1 Ch. 730; 69 L. J. Ch. 355; 82 L. T. 514; 44 Sol. Jo. 361, C. A.

#### SUB-SECT. 3.—ADEMPTION.

##### A. In General.

Ademption generally.]—See EQUITY, Vol. XX., pp. 449–494, Nos. 1743–2236.

702. Appointments subject to ademption.—Whether under general or special power.]—For the purposes of the question whether an appointment under a testamentary power has been



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trustees. A. subsequently made other similar appointments to her other two daughters on their marriages, but did not appoint the whole of the trust funds. The original settlement contained the usual gift over in default of appointment & a hotchpot clause drawn in the ordinary form. Upon the unappointed part of the trust fund having become divisible on the death of the tenant for life:—*Held*: the values of the appointed stocks were to be ascertained as on the date of the death of the tenant for life, & not as on the respective dates of the appointments.—*Re KELLY'S SETTLEMENT TRUSTS, GUSTARD v. BERKELEY*, [1910] 1 Ch. 78; 79 L. J. Ch. 60; 101 L. T. 555; 54 Sol. Jo. 12.

*Annotation*:—*Mentd. Re West, Denton v. West*, [1921] 1 Ch. 533.

**B. Appointment Executed Prior to Creation of Power.**

See Sect. 9, sub-sect. 2, B. (b), *ante*.

**SUB-SECT. 6.—PROPERTY RENDERED ASSETS BY APPOINTMENT.**

**A. In General.**

See Administration of Estates Act, 1925 (c. 23), s. 32.

**723. Property appointed under general power.]**

—A. by marriage settlement having a power to charge the estate with any sum not exceeding £3,000 for such purposes as he thought fit, by deed appoints the £3,000 as a collateral security for quiet enjoyment of an estate he had sold; & if no incumbrance did appear the appointment was to be void; & by will devises the £3,000 to his daughter. Upon a bill by the creditors of A. the £3,000 was decreed to be applied to the payment of his debts.

The ct. has not gone so far, as where a man has power to raise money, if he neglect to execute that power, to do it for him; although I think that may be reasonable enough & agreeable to equity in favour of creditors (LORD GUILDFORD, LORD KEEPER).—*LASSELLS v. CORNWALLIS* (LORD) (1704), 2 Vern. 465; Prec. Ch. 232; 23 E. R. 908; *sub nom. CORNWALLIS'S* (LORD) CASE, Freem. Ch. 279; 12 Mod. Rep. 614.

*Annotations*:—*Consd. Re Lawley, Zaiser v. Lawley* (1902), 51 W. R. 150. *Reid. Hinton v. Toye* (1739), 1 Atk. 465; *Townshend v. Windham* (1750), 2 Ves. Sen. 1; *Buckland v. Barton* (1793), 2 Hy. Bl. 136; *Holmes v. Coghill* (1802), 7 Ves. 499; *Ewart v. Ewart* (1853), 11 Haro. 276; *O'Grady v. Wilmot*, [1916] 2 A. C. 231. *Mentd. Willis v. Brady* (1740), Barn. Ch. 64.

**724.** —[Before the marriage of E. with M., it was agreed that £300, till it could be laid out in the purchase of lands, should be settled in trust for E. for life, for M. for life, & in default of issue, to the use of such person, & for such estate as she should by any deed direct or appoint, & for want of such appointment, to her right heirs for ever. M. by deed poll appoints the £300 to be paid to her husband, to be employed by him to such charitable uses, or other intents & purposes as he should think fit. E. by will devises to defts. W., S., & A., £100 apiece, being the money charged on the estate of his wife's father, & declared in his will that such disposition was in pursuance of the directions. The creditors of E. bring their bill to have the £300 applied to the payment of his debts, as a part of his assets. This is not a naked

power only to convey to charitable uses, but ought to be considered as a part of the assets of E., & applied in payment of his debts.—*HINTON v. TOYE* (1739), 1 Atk. 465; 28 E. R. 296.

**725.** —[A. had a power to charge a sum of money on land, by deed or will, & executes it by a voluntary deed; the ct. in favour of the creditors of A. will consider it as personal assets, & lay hold of it for their benefit.—*PACK v. BATHURST* (1745), 3 Atk. 269; 26 E. R. 957, L. C.

**726.** —[A general power of appointment given over an estate in lieu of a present interest in it, having been executed voluntarily, though for a daughter, was held to be assets in favour of creditors.—*TOWNSHEND (LORD) v. WINDHAM* (1750), 2 Ves. Sen. 1; 28 E. R. 1, L. C.

*Annotations*:—*Consd. Holmes v. Coghill* (1806), 12 Ves. 206; *Holloway v. Millard* (1816), 1 Madd. 414; *Ewart v. Ewart* (1853), 11 Haro. 276. *Distd. Re Roper, Roper v. Doncaster* (1888), 39 Ch. D. 482. *Consd. Re Guodalla, Lee v. Guodalla's Trustees*, [1905] 2 Ch. 331; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20. *Reid. Hurst v. Winchelsea* (1759), 2 Keny. 444; *Thorpe v. Goodall* (1811), 17 Ves. 460; *Platt v. Routh* (1840), 6 M. & W. 756; *Scarf v. Souby* (1849), 1 H. & Tw. 426; *Patch v. Shore* (1862), 2 Drew. & Sm. 589; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *O'Grady v. Wilmot*, [1916] 2 A. C. 231. *Mentd. Ward v. Shallet* (1750), 2 Ves. Sen. 16; *Doe d. Otley v. Manning* (1807), 9 East, 59.

**727.** —[Testator bequeathed certain stock to trustees upon such trusts & subject to such powers, etc., as A. should by deed or will direct or appoint; & in default of appointment, upon trust to pay the dividends to A. during her life, & after her decease to pay the principal amongst her children. After testator's death A. executed a deed according to the mode described by the will; by which, after reciting that she was desirous of executing the power, she directed the trustees to transfer the fund to herself & a new trustee, upon such trusts & subject to such powers, etc., as A. should by deed, with or without power of revocation & new appointment, or by her last will, direct & appoint, with certain limitations over in default of appointment, similar to those contained in the will; in pursuance of which deed the fund was transferred into the names of A. & the new trustee. A. afterwards, by will, by virtue & execution of that power, appointed the fund to be transferred to certain persons, in trust that the same might be consolidated with & become part of her residuary estate, & follow the dispositions thereof thereafter mentioned:—*Held*: the deed executed by A. being an exercise of the power under the original will, the property thereby became liable to her debts, & became her personal estate, in which she had a beneficial interest.—*A.-G. v. STAFF* (1833), 2 Cr. & M. 124; 4 Tyr. 14; 3 L. J. Ex. 6; 149 E. R. 700.

*Annotations*:—*Consd. Platt v. Routh* (1840), 6 M. & W. 756. *Reid. Vandiest v. Fynmore* (1834), 6 Sim. 570.

**728.** —[A. was tenant for life of a trust fund, with a general power to appoint by will, & in default, it was settled on pltf. A. ordered the trustees to pay over the fund to her on an indemnity, & she afterwards appointed the fund to pltf. & others, who filed a bill to make the trustees liable for a breach of trust:—*Held*: by the appointment, the fund became assets for answering A.'s liabilities, of which the indemnity was one, & therefore, the trustees were not liable.—*WILLIAMS v. LOMAS* (1852), 16 Beav. 1; 51 E. R. 675.

*Annotation*:—*Reid. O'Grady v. Wilmot*, [1916] 2 A. C. 231.

**729.** —[Freehold estates over which testator has a general power of appointment, &

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**d. Whether property comprised in limited or special power.]—DOYLE v. COYLE**, [1895] 1 I. R. 205.—IR.

which he appoints by his will, are assets for payment of his simple contract debts, but are only applicable for that purpose after all testator's own property has been previously so applied.—*FLEMING v. BUCHANAN, DOWNS v. BUCHANAN* (1853), 3 De G. M. & G. 976; 1 Eq. Rep. 186; 22 L. J. Ch. 886; 22 L. T. O. S. 8; 43 E. R. 382, L. JJ.

*Annotations*.—*Apprvd. Boyfus v. Lawley*, [1903] A. C. 411. *Consd. O'Grady v. Willmot*, [1916] 2 A. C. 231. *Reid. Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510; *Re Devon's S. M., White v. Devon, Re Steer, Steer v. Dobell*, [1896] 2 Ch. 502; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Wernher, Wernher v. Bolt*, [1918] 2 Ch. 82.

**730.** —[—]G., tenant in tail, & nephew of C., tenant for life in possession, who was without issue male, joined with C. in a disentailing deed to bar the estate tail of G., & all remainders expectant thereon; & subject to all estates antecedent to the estate tail of G., they limited the lands to such uses as they should jointly appoint, with remainder to the old uses. An immediate annuity of £2,250 was then granted by C. during his life, & secured upon his life estate to G., in consideration of which C. & G., joined in appointing the estates, after the death of C. to trustees for three thousand years; & subject thereto, to the use of G. in fee. The trusts declared of the term were to raise £25,000 & stand possessed of £5,000 for such purposes as C. should appoint, & of the £20,000 for the purposes of a deed, by which C. & G. declared that it was to be held by the trustees for the three daughters of C., their husbands & issue, in equal shares. A further declaration was also made that the £25,000 on G. coming into possession of the estates, but not otherwise, should be a debt payable by G. upon the death of C.:—*Held*: the general power to appoint the £5,000 reserved by the purchaser, & exercised for the general purposes of his will, made the fund a part of his general assets, & no succession duty was payable upon it.—*Re JENKINSON* (1857), 24 Beav. 64; 26 L. J. Ch. 241; 28 L. T. O. S. 280; 3 Jur. N. S. 279; 5 W. R. 301; 53 E. R. 281.

*Annotations*.—*Consd. A.-G. v. Deane* (1861), 5 L. T. 122; *A.-G. v. Abdy* (1862), 32 L. J. Ex. 9. *Distd. A.-G. v. Floyer, A.-G. v. Smythe* (1862), 31 L. J. Ex. 404. *Reid. A.-G. v. Yelverton* (1861), 7 H. & N. 306; *Re Ramsay's Settlement*, (1861), 30 Beav. 75; *Fryer v. Morland* (1876), 3 Ch. D. 675; *A.-G. for Ireland v. Rathdonnell*, [1896] W. N. 141.

**731.** —[—]*GRIFFITH-BOSCAWEN v. SCOTT*, No. 402, *ante*.

**732.** —[—]A married woman having separate personal estate, & also a general power to appoint personal estate by will, bequeathed & appointed, after legacies, all her property to her exors. on trust for payment of her debts, & funeral & testamentary expenses, & certain legacies, & then in trust for persons named. She survived her husband, & after his death became entitled to other personal estate, & died without republishing her will:—*Held*: the separate personal property & the personal estate accruing after the coverture must contribute ratably, & before the appointed estate, to the payment of the funeral & testamentary expenses, & any debts contracted by testatrix after the coverture.—*Re WILLIAMS, GREEN v. BURGESS* (1888), 59 L. T. 310.

**733.** —[—]Where a power of appointment is exercised by a general bequest in a will the property appointed is included in & passes by the bequest according to the terms of the will, & not as if a separate execution of the power were read into the will. The property is therefore not necessarily postponed, as a fund liable for payment of his debts, to other assets of testator.—*WILLIAMS v. WILLIAMS, Re HARTLEY, WILLIAMS v. JONES*,

[1900] 1 Ch. 152; 69 L. J. Ch. 79; 81 L. T. 804; 48 W. R. 245.

**734.** —[—]The donee of a general testamentary power of appointment over a fund borrowed money & as security covenanted with the lender that he would make a will appointing that the loan should be a first charge on the fund & that he would not revoke the will. He made a will accordingly & died:—*Held*: the lender was not entitled to priority as regards the fund over the appointor's general creditors; for personalty appointed by will under a general power is subject to the payment of the appointor's debts, as declared by *Knight Bruce, L.J.*, in *Fleming v. Buchanan, Downs v. Buchanan*, No. 729, *ante*.—*BEYFUS v. LAWLEY*, [1903] A. C. 411; 72 L. J. Ch. 781; 89 L. T. 309, H. L.; *affg. S. C. sub nom. Re LAWLEY, ZAISER v. LAWLEY*, [1902] 2 Ch. 799, C. A.

*Annotations*.—*Consd. O'Grady v. Willmot*, [1916] 2 A. C. 231. *Reid. Re Purdie's Settlement, Rose v. Hill* (1904), 48 Sol. Jo. 524; *Stamp Duties Commr. v. Stephen*, [1904] A. C. 137; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Wernher, Wernher v. Bolt*, [1918] 2 Ch. 82. *Mentd. Re Whitehead, Whitehead v. Street* (1913), 108 L. T. 368.

**735.** —[—]The execution by testator of a general power of appointment makes the appointed fund assets for the payment of his debts (*FARWELL, L.C.*).—*Re HADLEY, JOHNSON v. HADLEY*, [1909] 1 Ch. 20; 78 L. J. Ch. 254; 100 L. T. 54, C. A.

*Annotations*.—*Consd. Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286. *Distd. O'Grady v. Willmot*, [1916] 2 A. C. 231. *Reid. Re Benzon, Bower v. Chetwynd*, [1914] 2 Ch. 68. *Mentd. Re Scott, Scott v. Scott*, [1916] 2 Ch. 288.

**736.** —[—]A domiciled Dutchwoman having under an English will a general testamentary power of appointment over personal property, made a will in Dutch form, but executed & attested as required by English law, whereby she appointed her husband sole heir of all of which the law in force at the time of her death should allow her to dispose in his favour, & appointed him her exor. According to Dutch law testatrix could not dispose of more than seven-eighths of her own estate in this way, the remaining one-eighth going to her mother:—*Held*: the effect of the will being to make the appointed property assets of testatrix for all purposes, the disposition became subject to the law of the domicile, & the husband was therefore beneficially entitled to no more than seven-eighths of the appointed property, the remaining one-eighth going to the mother.—*Re PRYCE, LAWFORD v. PRYCE*, [1911] 2 Ch. 286; 80 L. J. Ch. 525; 105 L. T. 51, C. A.

**737.** —[—]Fund paid to appointor.]—*Re NEWNHAM'S ESTATE, AMOORE v. ELMSLIE* (1881), 16 L. J. N. C. 58.

*Annotations*.—*Distd. Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 799. *Reid. Re Purdie's Settlement, Rose v. Hill* (1904), 48 Sol. Jo. 524.

**738. Necessity for exercise of power.**—(1) A power, unless executed, not assets for debts. (2) A subsequent codicil will not by the mere effect of republishing the will be an execution of the power. Though the rule is settled, perhaps with some violation of principle, but with no practical inconvenience, that equity will aid a defective execution of a power, the want of execution cannot be supplied.—*HOLMES v. COGHILL* (1806), 12 Ves. 206; 33 E. R. 70, L. C.

*Annotations*.—*As to* (1) *Reid. Ewart v. Ewart* (1853), 1 Eq. Rep. 536; *Re Lovelace's Settlement*, (1859), 28 L. J. Ch. 489; *Jackson v. Orlin* (1871), 19 W. R. 547; *Asby v. Costin* (1888), 21 Q. B. D. 401; *Re Roper, Roper v. Doncaster* (1888), 39 Ch. D. 482; *Re Creed, Thomas v. Hudson* (1905), 49 Sol. Jo. 566; *O'Grady v. Willmot*, [1916] 2 A. C. 231. *As to* (2) *Apld. Hixon v. Oliver* (1806), 13 Ves. 108; *Cowper v. Mantell* (No. 1), *Cooper v. Mantell*

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(No. 1) (1856), 22 Beav. 223. *Reid. Hope v. Hope* (1854), 5 Giff. 13. *Generally, Reid. Fleming v. Buchanan, Downs v. Buchanan* (1853), 3 De G. M. & G. 976.

**Married woman donee of power.]—See HUSBAND & WIFE, Vol. XXVII., pp. 142–146, Nos. 1163–1184.**

**Effect of bankruptcy.]—See BANKRUPTCY, Vol. V., pp. 740–743, Nos. 6392–6415.**

**Liability to estate duty.]—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 30, 31, Nos. 177–190.**

**B. Direction for Payment of Debts and Appointment of Executor.**

**739. Direction to pay debts.]—**A married woman died in 1849, possessed of savings of her separate estate, amounting to £997, & having a power of appointment over £21,000 Consols, subject to her husband's life interest. By her will she directed first, that all her debts should be paid, & she then specifically bequeathed all her ready money. Her debts were paid out of the £997:—*Held*: on the death of the husband in 1855, the specific legatee was entitled to be repaid the £997 out of the fund over which she had a power of appointment.

The remainder of that fund will then be divided according to the trusts of the settlement, as in default of appointment (*ROMILLY, M.R.*).—*LAING v. COWAN* (1857), 24 Beav. 112; 53 E. R. 300.

*Annotation:—Reid. Re Boyd, Kelly v. Boyd, [1897] 2 Ch. 232.*

**740. —.]—Re DAVIES' TRUSTS, No. 452, ante.**

**741. —.]—**I have no doubt that testator when he made his will had not the slightest intention of providing for the creditors in his bkpcy., but what I have to find out is not what the intention of testator may be, but what is the intention as expressed in the will. Testator has inserted in his will a clause providing for payment to his exors. of all testamentary, burial, & other necessary expenses incurred by his death & all other debts owing by him at his decease. This clause is entirely unnecessary as regards the testamentary debts, & it is sufficient for him to say, having regard to the arguments addressed to him & to the provisions of the Bankruptcy Act, 1883 (c. 52), that the debts provable in bkpcy. are due by testator & are strictly those owing at the date of his death as he has not obtained his discharge, & that therefore the will provides for the payment of those debts (*JOYCE, J.*).—*Re IMRAY (DECEASED), HUNWICK v. CHAPMAN* (1905), 50 Sol. Jo. 59.

**742. Appointment of executor—Coupled with bequest of legacies.]—Re SEARROOK, GRAY v. BADDELEY, No. 453, ante.**

**SUB-SECT. 7.—DIVESTING OF VESTED ESTATES.**

**743. Property vests in person entitled in default of appointment.]—**Money by marriage arts. to be laid out in land, to uses of husband & wife for life, then to the children, as they should appoint; in default of appointment, equally; if but one, to that one in tail, reversion to husband in fee. One daughter: the trustee pays it to her & her husband; she not being *sui juris*, not separately examined; the payment not sufficient to make it considered as money, & sister of the half-blood may claim the reversion in fee from the father; but the husband of the other sister, who was tenant in

tail, will be tenant by curtesy. The power of appointment puts not the inheritance in abeyance.

—*CUNNINGHAM v. MOODY* (1748), 1 Ves. Sen. 174; 27 E. R. 965, L. C.

*Annotations:—Consd. Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497. *Appl. Doe v. Martin* (1790), 4 Term Rep. 39. *Reid. Pulteney v. Darlington* (1783), 1 Bro. C. C. 223; *Doe d. Tanner v. Dorvell* (1794), 5 Term Rep. 518; *Smith v. Camelford* (1795), 2 Ves. 698; *Goodtitle v. Otway* (1796), 1 Bos. & P. 576; *Cave v. Holford* (1798), 3 Ves. 650; *Phipps v. Ackers* (1842), 9 Cl. & Fin. 583; *Standington v. Hall* (1879), 11 Ch. D. 652. *Mentd. Doe v. Hutton* (1804), 3 Bos. & P. 643.

**744. —.]—**Grandmother under a power, creates, by deed, a term to commence after her death for raising money for younger children; as their father should appoint: If no appointment, equally; if but one, besides the eldest, then to that one; if none except the eldest, then to him; if no eldest son, then to her own exors. At the date of the deed there was one grandson & one granddaughter. The father afterwards had another son, & died without appointment. The eldest son having died under age:—*Held*: the whole sum belonged to the daughter, & the younger son having thus become an eldest son, was excluded.—*TEYNHAM (LORD) v. WEBB* (1751), 2 Ves. Sen. 198; 28 E. R. 128, L. C.

*Annotations:—Consd. Northumberland v. Egremont* (1759), 1 Eden, 435; *Sandeman v. Mackenzie* (1861), 1 John. & H. 613; *Ellison v. Thomas* (1862), 1 De G. J. & Sm. 18. *Reid. Lawrence v. Mapps* (1759), 1 Eden, 453; *Lincoln v. Pelham* (1804), 10 Ves. 166; *Matthews v. Paul* (1819), 3 Swan. 328; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Windham v. Graham* (1826), 1 Russ. 331; *Scarsbrick v. Skelmersdale* (1840), 4 Y. & C. Ex. 78; *Lyddon v. Ellison* (1854), 19 Beav. 565; *Reid v. Hoare* (1884), 26 Ch. D. 363; *Re Stawell's Trusts, Poole v. Diversdale*, [1909] 1 Ch. 534. *Mentd. Wilbraham v. Scarsbrick* (1840), 1 H. L. Cas. 173, n.

**745. —.]—SMITH v. CAMELFORD (LORD), CAMELFORD (LORD) v. SMITH, No. 880, post.**

**746. —.]—**A marriage settlement contained a covenant by the husband & wife to settle all property then vested in the wife. At the time of the marriage the wife was entitled, in default of appointment to the children, grandchildren, or issue of her father's marriage, to the funds settled by her father's marriage settlement. These funds were afterwards appointed to the wife absolutely for her separate use:—*Held*: they were subject to the above-mentioned covenant.—*Re FROWD'S SETTLEMENT* (1864), 4 New Rep. 54; 10 L. T. 367.

*Annotations:—Consd. De Serre v. Clarke* (1874), L. R. 18 Eq. 587; *Sweetapple v. Horlock* (1879), 11 Ch. D. 745.

**747. —.]—Re O'CONNELL, MAWLE v. JAGOE, No. 30, ante.**

**748. — Income distributable pending appointment—After cesser of life interest.]—**Bequest of £3,000 to J., the wife of C. for the use of her younger children, to be distributed as she should appoint: in default, equally. All J.'s children by C. being born at the time of the will & death of testator, it was held vested as a present legacy to them, subject to variation as between them; but not to extend to her children by a future marriage. The period of vesting being as above, one who was a younger child at testator's death, & became an elder afterwards, was held entitled. Interest on legacies from the end of one year from the death of testator: except as between parent & child. In the principal case, the legacies being vested, the interest allowed for maintenance, equally subject to the mother's reasonable variation.—*COLEMAN v. SEYMOUR* (1749), 1 Ves. Sen. 209; 27 E. R. 987, L. C.

*Annotations:—Consd. Horsley v. Chaloner* (1750), 2 Ves. Sen. 83. *Appl. Re Master's Settlement, Master v. Master*, [1911] 1 Ch. 521. *Reid. Kemp v. Kemp* (1801), 5 Ves. 849. *Mentd. Re Harris's Trusts* (1854), 2 Eq. Rep. 1110.

**749. —.]—**By a marriage settlement, dated Sept. 4, 1878, a sum of £10,000 was

settled upon trust for the wife for life, & after her death, in the events which happened, upon trust for the husband for life, or until he should become bkpt. & subject as aforesaid the trustees were to hold the said sum & the income thereof upon trust for the children or other issue of the marriage as the spouses should by deed jointly, or as the survivor should by deed or will, direct & appoint, & in default of appointment for all the children who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry, in equal shares. The wife died in 1905, & in 1906 the husband, who had left for Australia many years before, was adjudicated bkpt. There were three children of the marriage, all of whom had attained twenty-one, & one of them was married & had three infant children. So far as was known to the trustees, no appointment had been executed under either of the powers contained in the settlement. Upon a summons by the trustees of the settlement to obtain directions as to how they should deal with the income of the settled property during the life of the husband & pending the exercise of the subsisting power of appointment:—*Held*: upon the authority of *Coleman v. Seymour*, No. 748, *ante*, the income of the trust fund was distributable in equal shares amongst the children of the marriage until & unless they were superseded by the exercise of the power.—*Re MASTER'S SETTLEMENT, MASTER v. MASTER*, [1911] 1 Ch. 321; 80 L. J. Ch. 190; 103 L. T. 895; 55 Sol. Jo. 170.

750. ———. [Divested on exercise of power.] — Settlement of £10,000, the interest to be paid to the husband & wife for their lives, & after their death, the principal to all or such of their children as the husband should appoint; & in default, as the wife should appoint; & for want of such appointment, to all the children equally at twenty-one or marriage. There were two children: one died in the lifetime of the father: then the father died:—*Held*: the other was entitled to the money after the death of the mother, & to have it secured in her lifetime; a contingent vested interest in the children, subject to be divested on appointment.—*GORDON v. LEVI* (1758), Amb. 364; 27 E. R. 241.

751. ———. [By a marriage settlement lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all & every the children of the marriage, or such of them, & for such estates, etc., as the husband & wife should appoint; & for want of such appointment, to the use of all & every the child or children, equally, if more than one, as tenants in common; & if but one, then to such only child, his or her heirs or assigns for ever; remainder over; in the deed was contained a power enabling the settlers to revoke the uses of the settlement, & the trustees to sell the estate, & convey it to a purchaser, so as the purchase-money should be paid to the trustees, & not the settlers, & invested in the purchase of other lands to the same uses:—*Held*: the remainder to the children was a vested remainder in fee of each child when born, liable, however, to be divested by an appointment by the parents; & consequently, no appointment having been made, the remainder to the children could not be defeated by a deed of revocation by the parents & a conveyance by them & the trustees to a purchaser, who paid the consideration money to the settlers, not to the trustees, which was never laid out in the purchase of any other lands.—*DOE d. WILLIS v. MARTIN* (1790), 4 Term Rep. 39; 100 E. R. 882.

*Annotations*:—*Apld.* *Doe d. Tanner v. Dorrell* (1794), 5 Term Rep. 518. *Consd.* *Smith v. Camelford* (1795), 2

Ves. 698; *Goodtitle v. Otway* (1790), 1 Bos. & P. 576; *Roper v. Hallifax* (1817), 8 Taunt. 845; *Cockerell v. Cholmeley* (1830), 10 B. & C. 564; *Ricketts v. Loftus* (1849), 14 Q. B. 482; *Watkins v. Williams* (1851), 3 Mac. & G. 622; *Wickham v. Wing* (1865), 6 New Rep. 21; *Lambert v. Thwaites* (1866), L. R. 2 Eq. 151; *Re Master's Settlement, Master v. Master*, [1911] 1 Ch. 321. *Reid*, *Owen v. Smyth* (1796), 2 Hy. Bl. 595; *Driver v. Frank* (1814), 3 M. & S. 25; *Thornton v. Bright* (1836), 2 My. & Cr. 230; *Phipps v. Ackers* (1842), 9 Cl. & Fin. 583; *Re Llewellyn's Settlement, Official Receiver v. Evans*, [1921] 2 Ch. 281. *Mentd.* *Roe v. Briggs* (1812), 16 East, 406; *Cornfoot v. Fowke* (1839), 9 L. J. Ex. 297; *Udell v. Atherton* (1861), 7 H. & N. 172.

752. ———. [Bequest to A. for life, with power on her marriage to appoint the interest to her husband for life, & a recommendation to dispose of the principal after her own death & the determination of the preceding trusts among the children of B., the recommendation being held an absolute trust, it is a vested interest in all the children, subject to be divested by appointment; & there being no appointment, children born after the death of testator, & those who died in the life of A., are entitled with the rest.—*MALIM v. BARKER* (1796), 3 Ves. 150; 30 E. R. 942.

*Annotation*:—*Mentd.* *Parker v. Bolton* (1835), 5 L. J. Ch. 98.

753. ———. [Bequest of testator's property to his wife to bring up & educate his children, & when they should come of age to settle on them what she should deem prudent, reserving to herself a sufficient maintenance; & at her death, the property remaining to be equally divided amongst his children; with a gift to trustees for the children, in case of the marriage of his widow:—*Held*: the widow took a life interest in the property, with a power to settle or appoint the same on or to the children of testator, but not on or to his grandchildren; & the children took vested interests in the property, at testator's death, liable to be divested by such appointment.—*KENNERLEY v. KENNERLEY* (1852), 10 Hare, 160; 20 L. T. O. S. 29; 16 Jur. 649; 68 E. R. 880.

754. ———. [At the date of his bkpcy. L. was the sole surviving object of a power of appointment vested in his father, & he was also entitled to a vested but defeasible interest in a moiety of the fund in default of appointment. Two days after the date of his certificate his father made an appointment under the power of the whole fund in his favour:—*Held*: bkpt. as appointee was entitled to the whole fund as against his assignees in bkpcy.—*LEE v. OLDING* (1856), 25 L. J. Ch. 580; 28 L. T. O. S. 49; 2 Jur. N. S. 850; 4 W. R. 398.

*Annotations*:—*Consd.* *Re Vizard's Trusts* (1866), L. R. 1 Eq. 667. *Apld.* *De Serro v. Clarke* (1874), L. R. 18 Eq. 587. *Consd.* *Sweetapple v. Horlock* (1879), 11 Ch. 1. 745.

755. ———. [A fund stood limited by will, upon trust for a person for life, remainder to all or such one or more of the children or issue of testator's deceased brother A., in such shares & in such manner as the tenant for life should appoint, & in default of appointment to the children of A. equally. F., one of the children of A., assigned all his property to a trustee for his creditors, by a deed in the form of Bkpcy. Act, 1861 (c. 134), Schedule D. This deed was duly registered, but F. never obtained an order of discharge. After this the tenant for life appointed the fund by will to the children of A. equally. All the children of A. living at testator's death survived the tenant for life, so that F. took the same share under the appointment as he would have taken in default of appointment:—*Held*: the deed did not pass after-acquired property, F.'s interest, in default of appointment, was defeated by the appointment which gave him an interest liable to be defeated by lapse & which, therefore, must be considered a

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new interest, & consequently, the share of F. did not pass to the trustee.

**Qu.:** whether an appointment by deed to F. of the same share as he would have taken in default of appointment would not also have given him a new interest.—*Re VIZARD'S TRUSTS* (1866), 1 Ch. App. 588; 35 L. J. Ch. 804; 14 L. T. 815; 12 Jur. N. S. 680; 14 W. R. 1000, L. J.J.

**Annotations:—***Apld. De Serre v. Clarke* (1874), L. R. 18 Eq. 587. *Consd. Sweetapple v. Horlock* (1879), 11 Ch. D. 745; *Itc Maddy's Estate, Maddy v. Maddy*, [1901] 2 Ch. 820. *Refd. A.-G. v. Selborne*, [1902] 1 K. B. 388; *Re Rush, Warre v. Rush*, [1922] 1 Ch. 302.

**756. ———.]**—By a post-nuptial settlement certain freehold property was conveyed to trustees upon trust to pay the rents to W., & his wife during their lives, & after the decease of the survivor upon trust to sell & divide the proceeds amongst all & every the children of W., in such shares & proportions as he should by will appoint. There were seven children living at the date of the settlement, one of whom died before W., who died without executing the appointment:—**Held:** the property was vested in all the children, liable to be divested by the execution of the power; & the power not having been executed, the representatives of the deceased child were entitled to his share.—*LAMBERT v. THWAITES* (1866), L. R. 2 Eq. 151; 35 L. J. Ch. 406; 14 L. T. 159; 14 W. R. 532.

**Annotations:—***Apld. Wilson v. Duguid* (1883), 24 Ch. D. 244. *Consd. Re Master's Settlement, Master v. Master*, [1911] 1 Ch. 321. *Apld. Re Llewellyn's Settlement, Official Solicitor v. Evans*, [1921] 2 Ch. 281. *Refd. Re Charles, Bracey v. Royal National Lifeboat Institution*, [1923] 2 Ch. 407.

**757. ———.]**—Testator gave his residuary estate to trustees upon trust to pay the income to his daughter for life for her separate use, & after her death to pay the fund to the children of the daughter as she should by deed or will appoint & in default of appointment amongst them equally. The daughter appointed by deed the whole of the fund amongst her children giving *pltf.*, who was one of them, a specified sum for her separate use absolutely. *Pltf.* after the death of her grandfather, & before the date of the appointment by her mother, married a Frenchman domiciled in France. He died before the date of the appointment, & there was one child only of the marriage. There was no settlement on the marriage, & the French law of community applied, under which the child became entitled in the absence of any contrary declaration by the donor, to half the property acquired by her mother during the marriage:—**Held:** *pltf.* must be considered to have acquired the appointed fund from the date of the appointment only, & the fund not having been acquired during the marriage, did not become subject to the law of community; the fact of the gift being expressed to be for the separate use was a sufficient declaration to exclude the law of community.—*DE SERRE v. CLARKE* (1874), L. R. 18 Eq. 587; 43 L. J. Ch. 821; 31 L. T. 161; 23 W. R. 3.

**Annotation:—***Consd. Sweetapple v. Horlock* (1879), 11 Ch. D. 745.

**758. ———.]**—Under a marriage settlement real estate stood limited to H., the husband, for life, with remainder to the use of such of the children or issue of the marriage as he should by deed or will appoint; & in default of appointment, to the use of the children of the marriage equally as tenants in common in fee. There was issue of the marriage two children only, a son & a daughter. The daughter married, & by her marriage settlement she & her intended husband covenanted with the trustees for the conveyance & settlement of all

property which she then was "seised of, or interested in, or entitled to," upon the trusts therein mentioned, including in effect reversionary interests. The daughter survived her husband, & thereupon H. by deed appointed the real estate comprised in the original settlement, subject to his life estate, to his son & daughter equally in fee, the daughter thus taking the same share as she would have taken, in default of appointment:—**Held:** inasmuch as the reversionary moiety appointed to the daughter constituted a new interest acquired by her subsequently to the date of her settlement, such moiety was not bound by the covenant in her marriage settlement.—*SWEETAPPLE v. HORLOCK* (1879), 11 Ch. D. 745; 43 L. J. Ch. 660; 41 L. T. 272; 27 W. R. 865.

**Annotations:—***Fold. Re Jackson's Will* (1879), 13 Ch. D. 189. *Apld. Re Maddy's Estate, Maddy v. Maddy*, [1901] 2 Ch. 820. *Apprvd. A.-G. v. Selborne*, [1902] 1 K. B. 388. *Apld. Jackson v. Stamps Comr.*, [1903] A. C. 350. *Distd. Re Bulteel's Settlement, Bulteel v. Manley*, [1917] 1 Ch. 251; *Parr v. A.-G.*, [1926] A. C. 239. *Refd. Re Ware, Cumberlege v. Cumberlege-Ware* (1890), 45 Ch. D. 269; *Re Walpole's Marriage Settlement, Thomson v. Walpole*, [1903] 1 Ch. 928; *Re Bath's Settlement, Thynne v. Stewart* (1914), 111 L. T. 153; *Re Rush, Warre v. Rush*, [1922] 1 Ch. 302.

**759. ———.]**—*Re JACKSON'S WILL*, No. 128, *ante*.

**760. ———.]**—*Pltf.*, born in 1875, was an only child. Her father died in 1886. She married in Jan. 1892, being then entitled under the settlement made on the marriage of her father & mother, dated Apr. 15, 1874, subject to the exercise by her mother of the power of appointment contained in that settlement in favour of the issue of the marriage, & to her mother's life interest to the property comprised in the settlement. By a voluntary settlement dated July 27, 1892, after reciting that the property comprised in the settlement of Apr. 15, 1874, was vested in trustees upon trust to pay the income to *pltf.*'s mother for life, & upon her death upon trust for *pltf.*, her heirs, exors., administrators, & assigns, *pltf.* conveyed all her reversionary property under the settlement of Apr. 15, 1874, to trustees upon trust for conversion & to pay the income to herself for life, then to her husband for life, & on the death of the survivor, on the usual trusts for the benefit of their issue, with a trust in default of issue in favour of *pltf.* The settlement contained no covenant to settle after-acquired property, & no power of revocation. In Aug. 1897, *pltf.*'s mother, in exercise of the power contained in the settlement of Apr. 15, 1874, irrevocably appointed that the trustees of that settlement should stand possessed of the property therein comprised in trust for *pltf.*, her exors., administrators, & assigns absolutely. There was no issue of the marriage between *pltf.* & her husband:—**Held:** the deed of July 27, 1892, only passed the interest which *pltf.* held under the deed of Apr. 15, 1874, & did not comprise the interest taken by her under the appointment.—*LOVETT v. LOVETT*, [1898] 1 Ch. 82; 67 L. J. Ch. 20; 77 L. T. 650; 46 W. R. 105; 42 Sol. Jo. 81.

**Annotations:—***Apld. Re Maddy's Estate, Maddy v. Maddy* (1901), 2 Ch. 820. *Distd. Re Bulteel's Settlement, Bulteel v. Manley*, [1917] 1 Ch. 251; *Parr v. A.-G.*, [1926] A. C. 239. *Refd. Re Walpole's Marriage Settlement, Thomson v. Walpole*, [1903] 1 Ch. 928; *Re Rush, Warre v. Rush*, [1922] 1 Ch. 302.

**761. ———.]**—By the marriage settlement of M., dated in 1854, property was settled upon trust, after the deaths of himself & his wife should jointly appoint; & in default of such appointment, as the survivor should appoint; & in default of any appointment, in trust for all the children who should attain twenty-one in equal shares.

There were only two children who attained twenty-one. One of them, C., by an antenuptial agreement, agreed to settle "all her half or other share & interest whatsoever" in the property subject to the trusts of the original settlement. The agreement provided that the settlement should contain certain specified provisions, & generally such other agreements, clauses, & provisions as were "usually inserted in settlements of a like kind." M. & his wife, who predeceased him, made no joint appointment under the deed of 1854, but by his will, in exercise of his power, he appointed the sum of £2,000 to C. absolutely:—*Held*: a covenant to settle after-acquired property was not a "usual" clause in settlements of a like kind with that to be executed in accordance with the agreement for a settlement, & the £2,000 was not bound by the agreement.—*Re MADDY'S ESTATE, MADDY v. MADDY*, [1901] 2 Ch. 820; 71 L. J. Ch. 18; 85 L. T. 341; 45 Sol. Jo. 673.

**762.** ———.]—By a settlement made by a father on the marriage of his son who was a party to the deed an estate was conveyed by the father to trustees to such uses as the father & son should by deed jointly appoint, & in default of & until such appointment to the use of the father for life, & after his decease to the son in fee simple in case he should survive his father; but if he died in the lifetime of his father leaving a son who should attain the age of twenty-one years, then to the use of that son & if there was no such son who attained the age of twenty-one years, then to the settlor in fee simple. By a subsequent deed the settlor & his son, in exercise of the power of appointment in the settlement, jointly appointed the estate to the son in fee. On an information claiming succession duty:—*Held*: the son took the estate by a new title under the deed of appointment, & not by a succession the title to which had been accelerated by the surrender or extinction of any prior interest within Succession Duty Act, 1853 (c. 51), s. 15, & succession duty was not payable.—*A.-G. v. SELBORNE (EARL)*, [1902] 1 K. B. 388; 71 L. J. K. B. 289; 85 L. T. 714; 66 J. P. 132; 50 W. R. 210; 18 T. L. R. 111; 46 Sol. Jo. 103, C. A.

*Annotations*:—*Consd. Re Bath's Settlement, Thynne v. Stewart* (1914), 111 L. T. 153. *Reid. Re Walpole Marriage Settlement, Thomson v. Walpole*, [1903] 1 Ch. 928; *Tremayne v. Tasheleigh*, [1908] 1 Ch. 681; *Northumberland v. E. R. Comrs.*, [1911] 2 K. B. 343; *Re Rush, Warre v. Rush*, [1922] 1 Ch. 302. *Mentd. A.-G. v. Milne*, [1914] A. C. 705.

**763.** ———.]—*TREMAINE v. RASHLEIGH*, No. 32, *ante*.

**764.** ———.]—The exercise of a power of appointment divests the estates limited in default of appointment & creates new estates, & that, too, whether the property be real or personal (*HAMILTON, J.*).—*NORTHUMBERLAND (DUKE) v. INLAND REVENUE COMRS.*, [1911] 2 K. B. 343; 80 L. J. K. B. 866; 104 L. T. 506; *en appeal*, [1911] 2 K. B. 1011, C. A.

#### SUB-SECT. 8.—DISTRIBUTION OF PROPERTY.

**765. Appointment under general power—Executors of appointor.**—Where a married woman who was the donee of a general power of appointment executed it by will, & appointed as exors. persons who were neither appointees, nor the trustees of the settlement:—*Held*: it was the duty of the exors., & not of the trustees of the deed conferring the power, to distribute the property appointed among the appointees.

*Qu.*: whether this would be so in the case of any donee of a power.—*Re PHILBRICK'S SETTLEMENT* (1865), 5 New Rep. 502; 34 L. J. Ch. 368; 12 L. T. 261; 11 Jur. N. S. 558; 13 W. R. 570.

*Annotations*:—*Consd. Re Hoskin's Trusts* (1877), 5 Ch. D. 229; *Re Treasure, Wild v. Stanham*, [1900] 2 Ch. 648. *Expld. Re Moore, Moore v. Moore*, [1901] 1 Ch. 891. *Consd. Re Peacock's Settlement, Kelcey v. Harrison*, [1902] 1 Ch. 552; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20. *Reid. Re Marten, Shaw v. Marten* (1901), 71 L. J. Ch. 203; *O'Grady v. Willmot*, [1916] 2 A. C. 231.

**766.** ———.]—Under a settlement a sum of £10,000 secured by mtge. was vested in trustees upon trust for E., the wife of W., for her life, & after her death for W. for his life, & subject as aforesaid, upon trust for such persons as E. should by deed or will appoint, & in default of appointment for W. E. made a will, by which she directed that W. should enjoy the income of the fund during his life subject to payment of two annuities; & she directed certain pecuniary legacies to be paid, after the death of W. out of one moiety of the fund, & she gave the other moiety of the fund & the residue of her property to W. whom she appointed exor. The trustees of the settlement paid over the whole trust fund to W. & part of the £5,000 applicable to the payment of the pecuniary legacies was lost by him:—*Held*: the payment to W. was proper, & the trustees were not answerable for the loss.—*HAYES v. OATLEY* (1872), L. R. 14 Eq. 1; 41 L. J. Ch. 510; 26 L. T. 816.

*Annotations*:—*Consd. Re Hoskin's Trusts* (1877), 5 Ch. D. 229. *Reid. Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *O'Grady v. Willmot*, [1916] 2 A. C. 231.

**767.** ———.]—The law is now settled that where a *feme covert* or other donee of a general power of appointment over a fund of personality makes an appointment of the fund by will & appoints an exor. the exor. is entitled to receive the appointed fund.—*Re HOSKIN'S TRUSTS* (1877), 5 Ch. D. 281; 46 L. J. Ch. 817; 25 W. R. 770, C. A.

*Annotations*:—*Consd. Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *Re Peacock's Settlement, Kelcey v. Harrison*, [1902] 1 Ch. 552. *Reid. Turner v. Hancock* (1882), 20 Ch. D. 303; *Re Treasure, Wild v. Stanham*, [1900] 2 Ch. 648; *Re Moore, Moore v. Moore*, [1901] 1 Ch. 691; *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 799; *Re Marten, Shaw v. Marten*, [1902] 1 Ch. 314; *Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250; *Stamps Duties Comrs. v. Stephen*, [1904] A. C. 137; *Re Dodson, Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286; *O'Grady v. Willmot*, [1916] 2 A. C. 231; *Re Wernher, Wernher v. Beit*, [1918] 2 Ch. 82. *Mentd. Re Bradford* (1883), 11 Q. B. D. 373.

**768.** ———.]—Under a settlement, testator had a general power of appointment by will. In 1892 he made his will whereby he appointed the fund to ptfr. & appointed him exor. In 1900 a receiving order was made against testator, & on Oct. 1, 1900, he was adjudicated bkpt. In 1904 he died without having obtained his discharge, & also indebted to various persons for debts incurred since the date of the receiving order:—*Held*: the fund should be paid to ptfr. as exor., for the benefit of the subsequent creditors, & the question of retainer by ptfr. did not arise.—*Re GUEDALLA, LEE v. GUEDALLA'S TRUSTEE*, [1905] 2 Ch. 331; 75 L. J. Ch. 52; 94 L. T. 94; 54 W. R. 77; 12 Mans. 392.

*Annotations*:—*Reid. Re Bonzon, Bower v. Chetwynd*, [1914] 2 Ch. 68; *Re Mathieson* (1928), 70 Sol. Jo. 1161.

**769.** ———.]—**Administrator with will annexed.**—An administrator with the will annexed can give a valid receipt for settled personality appointed by will under a general power, even where the appointor was a married woman who died before the coming into operation of Married Women's Property Act, 1882 (c. 75).—*Re PEACOCK'S*



**Sect. 10.—Operation of appointment: Sub-sects. 8 & 9.]**

**SETTLEMENT, KELCEY v. HARRISON**, [1902] 1 Ch. 552; 71 L. J. Ch. 325; 86 L. T. 414; 50 W. R. 473; 40 Sol. Jo. 297.

**Annotation:—***Reid, O'Grady v. Willmot*, [1916] 2 A. C. 231.

**770. Appointment under special power—Trustees of original settlement.]—**Where a person having a special power of appointment, over a fund of personalty appoints to trustees for the objects of the power, the ct., though recognising the validity of such an appointment will not, as a matter of right, transfer the fund to the trustees appointed by the donee of the power.—**BUSK v. ALDAM** (1874), L. R. 19 Eq. 16; 44 L. J. Ch. 119; 31 L. T. 370; 23 W. R. 21.

**Annotations:—***Apld. Re Tyssen, Knight-Bruce v. Butterworth*, [1894] 1 Ch. 56. *Expld. Re Paget, Re Mellor, Mellor v. Mellor*, [1898] 1 Ch. 290. *Follid. Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125; *Re Mackenzie, Thornton v. Huddleston*, [1917] 2 Ch. 58. *Reid, Scotney v. Lomer* (1886), 31 Ch. D. 380; *Re Purdie's Settlement, Rose v. Hill* (1904), 48 Sol. Jo. 524.

**771. ———.]—**(1) Testator, who had under a settlement a power of appointment over leasehold & other personal estate among his children or grandchildren or other issue, by his will, which contained no reference to the power, gave "all the real & personal estate & effects whatsoever, & wheresoever, whether in possession, reversion, remainder, or expectancy, over which at the time of my decease, I shall have any beneficial disposing power by this my will" to trustees, upon trusts partly for persons who were objects of the power, & partly in excess of the power:—*Held*: the use of the word "beneficial" did not conclusively show that testator could not have intended to exercise a power which he could not exercise for his own benefit or the benefit of his estate.

(2) There being, in the opinion of the ct., upon the will taken as a whole, a sufficient indication of an intention to exercise the power:—*Held*: the power was exercised by the will, the trusts, so far as they were in excess of the power, being inoperative.

Testator gave a moiety of the property on trust for his daughters who should survive him, & attain twenty-four, in equal shares. Testator's youngest daughter was more than three years old at the time of his death:—*Held*: (3) the appointed fund ought to be retained by the trustees of the settlement on the trusts of the will, so far as they were valid.—**VON BROCKDORFF v. MALCOLM** (1885), 30 Ch. D. 172; 55 L. J. Ch. 121; 53 L. T. 263; 33 W. R. 934.

**Annotations:—***As to (1) Reid, Re Slack's Settlement, Re Slack, Butt v. Slack*, [1923] 2 Ch. 359. *As to (2) Consd. Re Cotton, Wood v. Cotton* (1888), 40 Ch. D. 41. *Apld. Re Milner, Bray v. Milner*, [1899] 1 Ch. 563; *Re Rickman, Stokes v. Rickman* (1899), 80 L. T. 518. *Consd. Re Weston's Settlement, Neaves v. Weston*, [1906] 2 Ch. 620. *Reid, Re Clarke's Settlement, Trust, Wanklyn v. Streetfield*, [1916] 1 Ch. 467. *As to (3) Reid, Re Paget, Re Mellor, Mellor v. Mellor* (1886), 78 L. T. 72; *Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125. *Generally, Reid, Re Thompson, Thompson v. Thompson*, [1906] 2 Ch. 199; *Re Paul, Public Trustee v. Pearce*, [1921] 2 Ch. 1.

**772. ———.]—**By a marriage settlement a fund was vested in trustees, upon trust, after the death of the survivor of the husband & wife, for the children of the marriage at twenty-one or marriage, in such shares & in such manner as the husband & wife should by deed jointly appoint, with remainders over. There were six children of the marriage, all of whom attained twenty-one. The husband & wife executed a deed, by which they appointed that the trustees should, after the death of the survivor of the husband & wife, stand possessed of one-sixth part of the trust fund in

trust for R., one of the daughters, her exors. & administrators, for her separate use, & it was declared that the appointment was made to her upon certain trusts for the benefit of E., another of the daughters:—*Held*: the one-sixth part thus appointed ought not to be transferred to R., as trustee under the appointment, but ought to be retained by the trustees of the settlement.—**Re TYSSSEN, KNIGHT-BRUCE v. BUTTERWORTH**, [1894] 1 Ch. 56; 63 L. J. Ch. 114; 60 L. T. 689; 42 W. R. 172; 38 Sol. Jo. 58; 8 R. 22.

**Annotations:—***Follid. Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125. *Reid, Re Paget, Re Mellor, Mellor v. Mellor*, [1898] 1 Ch. 290; *Re Purdie's Settlement, Rose v. Hill* (1904), 48 Sol. Jo. 524.

**773. ———.]—**Testator directed his trustees to set apart & invest a certain fund in their own names & to stand possessed thereof upon trust to pay the income to his niece for life & after her decease to stand possessed thereof upon trust for her children & grandchildren at such ages or times "in such shares & manner" as she should appoint. The niece appointed that her uncle's trustees should after her death assign, convey, & make over the fund to the trustees of her own will to hold upon certain trusts in settlement on her daughters & their children:—*Held*: though the appointment was good as to the beneficial interests, the original trustees must continue to hold & administer the fund.—**Re MACKENZIE, BAIN v. MACKENZIE**, [1916] 1 Ch. 125; 85 L. J. Ch. 197; 114 L. T. 283.

**774. ———.]—***Re MACKENZIE, THORNTON v. HUDDLESTON*, No. 514, *ante*.

**775. ———.]—**Unless power authorises direction to transfer.]—Property was assigned to trustees in trust for S. for life, & after her death to such of her issue as she should by will appoint. S. by her will appointed two-fifths of the property to two trustees, of whom N. was the survivor, in trust to pay the income to her son till he should attain the age of forty years, & then in trust for her son, his exors. & administrators: provided that in case her son should assign his share in the property, then the appointment for his benefit should be void, & the two-fifths should be held in trust for the other objects of the power. The son died under the age of forty, without having assigned his share, leaving a will of which B. was exor. After the death of S., L. & N. were appointed exors. of the original settlement. N. afterwards, with the consent of the son's exor., obtained possession of the son's share. Subsequently N. misappropriated the fund. The persons beneficially interested under the son's will recovered judgment against B. for wilful default in allowing the property to remain in N.'s hands; & B. being dead his exor. brought an action against L. to make him liable for the loss of the fund:—*Held*: inasmuch as the son of S. had the absolute interest in the fund, & B., his exor., had consented to its being paid to N., neither B. nor his personal representative could recover against L., the trustee of the settlement, on the ground of wilful default. *Qu.*: whether in a suit by beneficiaries under the son's will the trustees of the settlement would be held to have been justified in handing over the property to the trustees of S.'s will.—**SCOTNEY v. LOMER** (1886), 31 Ch. D. 380; 55 L. J. Ch. 443; 54 L. T. 194; 34 W. R. 407, C. A.

**Annotations:—***Follid. Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125. *Reid, Re Tyssen, Knight-Bruce v. Butterworth*, [1894] 1 Ch. 56; *Re Paget, Re Mellor, Mellor v. Mellor*, [1898] 1 Ch. 290; *Re Purdie's Settlement, Rose v. Hill* (1904), 48 Sol. Jo. 524.

**776. ———.]—**By a marriage settlement real estate was conveyed to trustees upon



trust after the death of the survivor of the husband & wife "to pay & transfer the said hereditaments & premises" to the children of the marriage as the survivor of the husband & wife should appoint. The settlement contained powers for the trustees to sell the property during the lives of the husband & wife & the survivor & during the lifetime of any child. The husband survived his wife & by his will appointed the property to trustees on trust for sale & conversion & directed them to stand possessed of the proceeds upon a series of complicated trusts for the benefit of his children. The trustees of the will purporting to act under the trust for sale therein contained contracted to sell the property. The purchaser took the objection that the proper persons to sell were the representatives of the last surviving trustee of the settlement:—*Held*: inasmuch as the trustees of the settlement were directed to "pay & transfer" the property to the appointees the trust for sale by the trustees of the will was expressly authorised by the terms of the power & overrode the powers of sale contained in the settlement; the trustees of the will were therefore the proper persons to sell the property & could call for a conveyance of the legal estate.—*Re ADAMS' TRUSTEES' & FROST'S CONTRACT*, [1907] 1 Ch. 695; 76 L. J. Ch. 408; 96 L. T. 833; 51 Sol. Jo. 427.

*Annotation*:—*Distd. Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125.

#### SUB-SECT. 9.—COSTS THROWN ON APPOINTED FUNDS.

**Costs in administration actions generally.**—*See* EXECUTORS, Vol. XXIV., pp. 845 *et seq.*

**777. Costs of action—Borne ratably by appointed & unappointed funds.**—*WARREN v. POSTLETHWAITE*, No. 244, *ante*.

**778.** — — —. *J.* by will, directed his trustees to convert his property into money, & after investing the same, to pay the interest, etc., unto his daughter E. for her life; & after her death he gave all his estate to her children in such shares as she should appoint; & in default of appointment, unto all of them in equal shares; but in case she should die without leaving any child, then he directed his trustees to raise the sum of £3,000, & to pay the same to the grandchildren, living at the time of the death of his daughter, of his cousin R., in equal shares; & after the sum should be raised, testator directed his trustees to convey his estate unto such person as E. should by deed or will appoint; & in default of appointment, he gave the same unto the persons who at the decease of E. should be her next of kin. *J.* empowered his daughter by her will to apportion all or any interest etc., to be paid to her husband for his life. E. intermarried with W., & by her will appointed that the estate made subject to her appointment should become vested in her husband, W., for his own absolute use, & appointed the rents, etc., to be paid to him. The chief clerk certified that there were four grandchildren of R. living at the time mentioned, & they, not parties to the suit, presented a petition praying that they might be at liberty to attend & take part on the hearing of the cause, & might be paid their costs of substantiating their claim as if they had been parties:—*Held*: the costs of the grandchildren in proving that they composed the class entitled must be borne by the fund, & not by the general estate; but the costs of all parties, & the costs of the petition, must be paid out of the general estate.—*BOYCOTT v. NEWMAN* (1856), 2 Jur. N. S. 702; 4 W. R. 707.

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**779.** — — —. *J.*—By the exercise of the usual power of appointment in a marriage settlement the shares of children were appointed unequally, but were equalised, or nearly so, by a division of the unappointed property under a hotchpot clause:—*Held*: the costs of an action to administer the trusts of the settlement must be paid ratably out of the appointed & unappointed shares.—*MOORE v. DIXON* (1880), 15 Ch. D. 566; 49 L. J. Ch. 807; 29 W. R. 12.

*Annotations*:—*Apld. Re Orford, Noville v. Cartwright, Cartwright v. del Balzo* (1895), 73 L. T. 681. *Reid. Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457.

**780.** — — —. *J.*—P. made a will which exercised a general power of appointment in favour of his son, but in such a manner as to make the appointed fund part of his estate for payment of debts, & also disposed of his general estate. He afterwards married & died without having made a fresh will. It was admitted that by virtue of the Wills Act, 1837 (c. 26), s. 18, the will was revoked as to general estate, but was not revoked so far as it was an exercise of the power. Testator's son was a person of unsound mind not so found, & a receiver of his estate had been appointed in Lunacy. This action was brought by testator's widow, claiming administration. The son, who was his sole next of kin, was made deft. & appeared by the receiver. The receiver claimed that the administration should be granted to him for the use of the son:—*Held*: the grant must be made to the widow, but must be a general grant of administration with so much only of the will annexed as related to the appointed fund, not a grant of administration limited to the appointed fund. The costs of all parties were ordered to be paid out of the whole estate, including the appointed fund.—*In the Estate of POOLE, POOLE v. POOLE*, [1919] P. 10; 88 L. J. P. 77; *sub nom. Re POOLE, POOLE v. POOLE*, 35 T. L. R. 143; 63 Sol. Jo. 179.

**781.** — — *Borne ratably by appointees.*—*TROLLOPE v. ROUTLEDGE*, No. 691, *ante*.

**782.** — — —. *J.*—By a marriage settlement certain funds were settled upon trust to invest & pay the annual produce during the joint lives of the husband & wife as therein mentioned, & after the death of one of them to the survivor for life, & after the death of the survivor to distribute among the children of the marriage as the husband & wife should jointly appoint, & in default thereof as the survivor should by deed or will appoint. The husband died without exercising the joint power of appointment, & the wife made several successive appointments in favour of certain of her children, & appointed the residue in favour of another child. The wife having died, & an action having been brought for the administration of the trusts of the settlement, & it appearing that the appointees had assigned, in some cases to two or three persons, & incumbered their shares:—*Held*: the costs must be borne ratably by the appointed shares, one set of costs to be allowed to each child in respect of the several appointments to him, the several assignees of such appointments to stand on the same footing, & to divide the costs allowed in respect of such child's share ratably between them.—*Re HILL'S SETTLEMENT TRUSTS, HILL v. EQUITABLE REVERSIONARY INTEREST SOCIETY, LTD.* (1896), 75 L. T. 477; 41 Sol. Jo. 142.

**783. Costs of administration—Borne ratably by appointed & unappointed funds.**—*Married Women's Property Act, 1882* (c. 75), has not altered the devolution of the undisposed of separate personality of a married woman. Accordingly, on the death of a married woman without disposing

**Sect. 10.—Operation of appointment: Sub-sect. 9.**  
**Sect. 11: Sub-sects. 1 & 2.]**

of her separate personality, the quality of separate property ceases, & the right of the husband to such undisposed of personality accrues as if the separate use had never existed. A married woman who had a power of appointment over certain trust funds, & was also possessed of separate estate her title to which had accrued before the Married Women's Property Act, 1882 (c. 75), died in 1887, having in the same year made a will, by which she exercised her power of appointment over the trust fund & appointed exors., but made no disposition of her separate property. Probate of the will was granted to the exors. according to the altered practice introduced by the Probate Rules of 1887, i.e. in the ordinary form without any exception or limitation:—*Held*: the expenses of proving the will, including the probate duty, must be apportioned ratably between the appointed & undisposed of property in the same manner in which they would have been apportioned under a grant *caterorum* before the change in the form of the grant: but the costs of the proceedings in which the questions were determined must fall upon the undisposed of property, as they were occasioned by a contest between the husband & the next of kin.—*Re LAMBERT'S ESTATE, STANTON v. LAMBERT* (1888), 39 Ch. D. 626; 57 L. J. Ch. 927; 59 L. T. 429.

*Annotation*:—*Mentd.* *Surman v. Wharton*, [1891] 1 Q. B. 491.

**784. — Borne ratably by appointees.]**—The donee of a power of appointment over a sum of New 3 per cent Annuities made successive appointment by deed of specific amounts of the annuities, subject to her own life interest, & by will appointed the amount not appointed by deed:—*Held*: the account duty payable under the Customs & Inland Revenue Act, 1881 (c. 12), & costs of administering the fund must be borne by the appointees ratably.—*Re SHAW, TUCKET v. SHAW*, [1895] 1 Ch. 343; 64 L. J. Ch. 283; 71 L. T. 873; 43 W. R. 315; 13 R. 185.

*Annotation*:—*Consd.* *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457.

**785. — —.]**—By a marriage settlement, made in 1841, funds amounting to £100,000 or thereabouts were settled upon trusts to invest in land to be conveyed to the use of the husband for life, with remainder, in the events which happened, subject to certain terms of years for raising portions & other sums to the amount of £40,000 to such uses as the wife should by will appoint. The wife died in Nov. 1886, having by her will appointed £35,000 out of the fund to A., & subject thereto the residue to other persons. The husband died in Dec. 1894, after the passing of the Finance Act, 1894 (c. 30). The fund had never been invested in land. It was admitted that the fund became liable to estate duty on the death of the husband, & that the trustees of the settlement were bound to pay it in the first instance. Several summonses were taken out relating to the property comprised in the settlement, raising, amongst others, the question how, as between the appointees of the £35,000 & the residue, the estate duty & the costs of the summonses were to be borne:—*Held*: according to the general practice of the ct., the costs of administration of an appointed fund, & therefore of the summonses in this case, must be borne ratably by all the appointed

shares, & not thrown on the residue.—*Re ORFORD (COUNTRESS), CARTWRIGHT v. DEL BALZO (DUC)*, [1896] 1 Ch. 257; 65 L. J. Ch. 253; 44 W. R. 383; *sub nom.* *Re ORFORD (EARL), NEVILLE v. CARTWRIGHT, CARTWRIGHT v. DEL BALZO (DUC)*, 73 L. T. 681.

*Annotations*:—*Apld.* *Re Hill's Settltmt. Trusts, Hill v. Equitable Reversionary Interest Soc.* (1896), 75 L. T. 477. *Refd.* *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457. *Mentd.* *Berry v. Gaukröger*, [1903] 2 Ch. 116; *De Quetteville v. De Quetteville* (1905), 92 L. T. 768.

**786. — —.]**—A husband & wife in exercise of a joint power of appointment over a trust fund, subject to their respective life estates therein, amongst the children of the marriage, appointed three sums of £10,000 in trust for their three elder daughters, & appointed the residue, after satisfying the three previous appointments, in trust for their fourth daughter, but so that the appointment should not exceed £10,000. The fund was not sufficient to provide for the appointment of the full sum of £10,000 to the fourth daughter. Upon the distribution of the fund:—*Held*: the general costs of administering the trust fund, including the costs of raising the estate duty payable on the respective deaths of the husband & wife, & the costs of raising the appointed sums, ought to be borne ratably by the four appointed sums.—*Re CHISHOLM, GODDARD v. BRODIE*, [1902] 1 Ch. 457; 71 L. J. Ch. 289; 86 L. T. 183.

*Annotation*:—*Refd.* *Re Grant, Nevinston v. United Kingdom Temperance & General Provident Institution* (1915), 59 Sol. Jo. 316.

**Estate duty.]**—*See ESTATE & OTHER DEATH DUTIES*, Vol. XXI., pp. 30, 31, 40, 41, Nos. 177–190, 225–260.

**Legacy duty.]**—*See ESTATE & OTHER DEATH DUTIES*, Vol. XXI., pp. 51, 52, Nos. 336–340.

**Succession duty.]**—*See ESTATE & OTHER DEATH DUTIES*, Vol. XXI., pp. 93, 94, Nos. 684–692.

**SECT. 11.—POWERS OF REVOCATION AND NEW APPOINTMENT.**

**SUB-SECT. 1.—INTENTION TO REVOKE.**

**787. Necessity for.]**—An appointment expressed to be made in exercise of every power enabling the appointor, does not extend to property which the appointor cannot appoint without the exercise of a power of revocation, if there be other property to which the appointment can apply. Therefore, where the donee of a power under a settlement to be exercised by deed or will, partially exercised it by deed, reserving a power of revocation, & afterwards by her will, by virtue of every power contained in the settlement, or “otherwise howsoever,” appointed all the real & personal estate which under the settlement, or otherwise, she had power to appoint:—*Held*: the will operated on the unappointed part only, & was not an exercise of the power of revocation & new appointment.—*POMFRET v. PERRING* (1854), 5 De G. M. & G. 775; 3 Eq. Rep. 145; 24 L. J. Ch. 187; 24 L. T. O. S. 123; 1 Jur. N. S. 173; 3 W. R. 81; 43 E. R. 1071, L. J.

*Annotations*:—*Consd.* *Palmer v. Newell* (1855), 20 Beav. 32. *Distd.* *Bradley v. Bury* (1864), 10 L. T. 868; *Re Jones, Greene v. Gordon* (1886), 34 Ch. D. 65. *Consd.* *Charles v. Burke* (1888), 43 Ch. D. 223, n. *Foldd.* *Re Wall's Trusts, Hardisty v. Wells* (1899), 42 Ch. D. 646. *Consd.* *Re Brace, Welch v. Colt*, [1891] 2 Ch. 671. *Apld.* *Re Salvin, Marshall v. Wolseley*, [1906] 2 Ch. 459. *Foldd.* *Re Thurstby's Settltmt., Grant v. Littledale*, [1910] 2 Ch. 181. *Consd.* *Re Barker's*

**PART IV. SECT. 11, SUB-SECT. 1.**

**e. What shows intention to revoke—Request inconsistent with power of revocation.]**—*Re REILLY & BRADY'S CONTRACT*, [1910] 1 I. R. 258; 43 I. L. T. 117.—*IR.*

Settlmt., *Knocker v. Vernon Jones*, [1920] 1 Ch. 527. *Reid*, *Benham v. Newell* (1855), 24 L. J. Ch. 424; *Bernard v. Minshull* (1859), John. 276; *Re Hall, Rawlings v. Hall* (1903), 19 T. L. R. 420; *Griffiths v. Eccles Provident, Industrial, Co-op. Soc.*, [1911] 2 K. B. 275.

788. —[*Re WELLS' TRUSTS, HARDISTY v. WELLS*, No. 432, *ante*.]

789. What shows intention to revoke—Devise of all lands—No land other than that subject to power.]—If one has made himself tenant for life of lands in D., with a power by any writing, etc., to revoke these uses, & limit new ones, & he afterwards by will devises all his lands in D., etc., to J., having no other lands in D. excepting these, they shall pass, if the will be circumstanced as the power requires, though no mention be made of the power.—*DEG v. DEG* (1727), 2 P. Wms. 412; 24 B. R. 791; *sub nom. DEGG v. MACCLESFIELD (EARL)*, Cas. temp. King, 44, L. C.

*Annotations*.—*Consd. Bally v. Ploughman* (1729), Mos. 95; *Hall v. Kendall* (1730), Mos. 328.

790. — Appointment in exercise of all powers—Where other property than that subject to power.]—*POMFRET v. PERRING*, No. 787, *ante*.

791. —[*A marriage settlement conferred upon the husband & wife a joint power to appoint the trust moneys, stocks, funds & securities comprised in the settlement amongst children & issue, & the settlement contained a power to invest the trust funds in the purchase of real estate. The husband & wife appointed certain real estate purchased out of the trust funds, upon trust upon the death of the survivor for their eldest son, his heirs & assigns, with a power of revocation & reappointment, & subsequently, without referring to the previous appointment, they, in exercise of the power of appointment given to them by the settlement & of every other power enabling them in that behalf, appointed the whole of the trust moneys, stocks, funds, & securities comprised in the settlement, upon trust, subject to their respective life estates, for all their children equally*.—*Held*: the second appointment was not a revocation of the first. *Semble*: if the second appointment had operated to pass the real estate, having regard to the absence of words of inheritance, the children would have taken life estates only.—*Re THURSBY'S SETTLEMENT, GRANT v. LITTLEDALE*, [1910] 2 Ch. 181; 79 L. J. Ch. 538; 102 L. T. 838; 54 Sol. Jo. 581, C. A.

*Annotations*.—*Reid. Re Bostock's Settlmt., Norrish v. Bostock*, [1921] 1 Ch. 432; *Re Lees' Trusts, Lees v. Lees*, [1926] W. N. 220.

792. — General devise or bequest.]—By his will, dated June 12, 1879, P., after appointing trustees & exors. & making certain pecuniary bequests & devises of real estate, bequeathed to them all his personal estate upon certain trusts. Testator made four codicils not affecting the general bequest in the will. By an indenture of settlement, dated Jan. 8, 1880, P. declared that a sum of money should be held by trustees upon trust that they should deal with the same in such manner as the settlor should by any writing or writings revocable or irrevocable, "but not by his last will & testament, or any codicil thereto, unless he should expressly refer to the said trust fund & premises, order & direct, by which writing or writings the trusts of the said indenture might be absolutely revoked, annulled, altered, varied, or otherwise dealt with at the free will & pleasure of the said P."—*Held*: the general bequest did not operate as an exercise of the power of revocation & new appointment contained in the settlement.—*CHARLES v. BURKE* (1888), 43 Ch. D. 223, n.; 60 L. T. 380.

*Annotations*.—*Consd. Phillips v. Cayley* (1889), 43 Ch. D. 222. *Follid. Re Phillips, Robinson v. Burke* (1889), 60

L. T. 808; *Re Brace, Welch v. Colt*, [1891] 2 Ch. 671; *Re Hall, Rawlings v. Hall* (1903), 19 T. L. R. 420. *Apld. Re Salvin, Marshall v. Wolsley*, [1906] 2 Ch. 459.

793. —[*When a general power of appointment of real estate by deed of will has been completely exercised by deed, a power of revocation & new appointment being at the same time reserved, a general devise of real estate by the subsequent will of the donee of the power will not per se amount by Wills Act, 1837 (c. 26), s. 27, to an exercise of the power of revocation & new appointment*.—*Re BRACE, WELCH v. COLT*, [1891] 2 Ch. 671; 60 L. J. Ch. 505; 64 L. T. 525; 89 W. R. 508.

*Annotations*.—*Apld. Re Salvin, Marshall v. Wolsley*, [1906] 2 Ch. 459. *Reid. Re Hall, Rawlings v. Hall* (1903), 19 T. L. R. 420.

794. —[*The principle that a general devise & bequest does not operate under Wills Act, 1837 (c. 26), s. 27, as an exercise of a power of revocation & new appointment applies to the case where the power of revocation & new appointment is that contained in the instrument originally creating it, as well as to the case where the power is that reserved by an appointment made in exercise of the original power*.—*Re GOULDING'S SETTLEMENT, DOBELL v. DUTTON* (1899), 48 W. R. 183.

795. —[*Testator in 1882 effected a policy of insurance on his life for £500, & in that year by an instrument in writing he nominated & appointed certain persons to receive the policy moneys on his death. This instrument was lodged with the insurance society & remained with them until his death. By another instrument of even date he declared that the nominees should hold the policy moneys upon trust to pay the income to his wife for life, & at her death to pay £500 to the Religious Tract Society, & the surplus, if any, to his brother; & he expressly reserved to himself the power by will or writing in his lifetime to revoke or alter the above dispositions & to make fresh dispositions. By his will made subsequently testator cancelled all previous wills & gave an annuity of £500 to his wife, & a legacy of £500 to the Religious Tract Society, & as to the rest of the property which on his wife's decease was not therein disposed of he directed that it should be divided equally between certain of his nephews & nieces*.—*Held*: the will did not revoke the appointment of 1882.—*Re HALL, RAWLINGS v. HALL* (1903), 19 T. L. R. 420.

#### SUB-SECT. 2.—RESERVATION OF POWER TO REVOKE.

796. General rule.]—Where the ct. directed a deed of appointment as to the respective interests of a father & his children to be made within a limited time, & a deed was executed within the time, containing a power of revocation:—*Held*: the intention of the ct. was defeated, & the deed was consequently void.

There can be no doubt that generally speaking that a person exercising a power of appointment may insert a clause of revocation (*LORD BROUGHAM, C.*).—*PIPER v. PIPER* (1834), 3 My. & K. 159; 40 E. R. 61, L. C.

*Annotation*.—*Reid. Cooper v. Martin* (1867), 3 Ch. App. 47, n.

797. Necessity for express reservation.]—(1) Sequestration defeated by revocation & new limitation of uses.

(2) Power of new limitation when incident to power of revocation, though not expressly reserved. Though no man can have a power of revocation

*Sect. 11.—Powers of revocation and new appointment: Sub-sects. 2 & 3.]*

unless he reserves it no man can want a power of limitation unless he excludes himself from it (LORD NOTTINGHAM, C.).—WITHER v. BLAND (1874), 3 Swan. 277, n.; 36 E. R. 802, L. C. *Annotations:—As to (2) Consd.* Colston v. Gardner (1680), 2 Cas. in Ch. 43. *Generally, Mentd.* Wharam v. Broughton (1748), 1 Ves. Sen. 180.

**798.** —[—]—This is a case of value, yet there is no difficulty in it; for when the power was once executed by deed, there being no power reserved by that deed to revoke or alter it, a subsequent limitation by another deed will be void; for the first deed, & the last will, always takes place (LORD NOTTINGHAM, C.).—HATCHER v. CURTIS & ANDERSON (1680), Freem. Ch. 61; 2 Eq. Cas. Abr. 671; 22 E. R. 1058, L. C.

**799.** —[—]—One makes a settlement, with power by deed to revoke it, & by the same deed, or any other, from time to time, to limit new uses; he revokes the settlement, & limits new uses, but reserves no further power to himself; he cannot by virtue of the first power limit any other uses.—HELE v. BOND (1717), Prec. Ch. 474; 24 E. R. 213; *sub nom.* HELI v. BOND, 1 Eq. Cas. Abr. 342, II. L.

*Annotations:—Consd.* Langley v. Brown (1741), 2 Atk. 195. *Apld.* Marlborough v. Godolphin (1750), 2 Ves. Sen. 61. *Consd.* Zouch d. Woolston v. Woolston (1761), 2 Burr. 1136; Saunders v. Evans (1861), 8 H. L. Cas. 721. *Refd.* Toynham v. Webb (1751), 2 Ves. Sen. 198; Montagu v. Kater (1853), 8 Exch. 507.

**800.** —[—]—If an appointment is made in the form of a will it is revocable in its own nature, but that is not the case of a deed without the power of revocation (LORD TALBOT, C.).—HUNGERFORD v. WINTOR (1736), Amb. 839; 27 E. R. 525, L. C. *Annotation:—Mentd.* Northumberland v. Egremont (1768), Amb. 657.

**801.** —[—]—MARLBOROUGH (DUKE) v. GODOLPHIN (LORD), No. 22, *ante*.

**802.** —[—]—TEYNHAM (LORD) v. WEBB, No. 744, *ante*.

**803.** —[—]—By deed of separation the husband, a trader liable to the bkpt. laws, covenants with a trustee for the wife, in consideration of being indemnified from all debts & engagements which might be contracted by her during the separation, to release his remainder in fee in certain estates, of which he was tenant for life, with remainder to the wife for life, with remainder to the issue of the marriage, with remainder to himself in fee, to such uses, etc., as the wife shall by deed or will appoint; with power to the wife to revoke the uses of such deed or will. The wife executes the power by deed, which she retains in her possession, & afterwards alters, & re-executes:—*Held*: the deed of appointment containing no power of revocation, although it was contained in the instrument creating the original power, the re-execution was void, & the original appointment therefore was decreed to be carried into execution.—WORRAIL v. JACOB (1817), 3 Mer. 256; 36 E. R. 98.

*Annotations:—Refd.* Roberts v. Williams (1841), 11 L. J. Ch. 65; Hall v. Hall, Hall v. Hall (1872), L. R. 14 Eq. 365. *Mentd.* Joe v. Thurlow (1824), 2 B. & C. 517; Jones v. Waite (1839), 5 Bing. N. C. 341; Frampton v. Frampton (1841), 4 Beav. 987; Wilson v. Wilson (1845), 14 Shn. 405; Bralley v. Bralley, [1922] P. 15.

**804. Power of appointment in two—Power of revocation reserved to survivor.**—Settlement in pursuance of arts., previous to marriage, to convey to the use of the husband for life; remainder to wife for life; remainder upon trust to convey unto & amongst all & every or any of the children in such parts & proportions, etc., as the husband & wife or the survivor should by deed or writing with or without power of revocation, or by will

appoint: in default of appointment, to the first & other sons in tail male; remainder, subject to trusts that failed, to the heirs of the husband. A joint appointment by deed, subject to a proviso for revocation & reappointment by the husband & wife & the survivor, well revoked by the wife surviving, & by the same deed a reappointment to the daughter & two sons successively for life, with remainders in tail to the grandchildren & the ultimate remainder to the daughter in fee, void for the excess beyond the power, viz. the estates to the grandchildren, & the ultimate limitation upon them to the daughter; & the principle of *cy pres* not applicable. All beyond the life estates of the children therefore to go as in default of appointment.—BRUDENELL v. ELWES (1802), 7 Ves. 382; 32 E. R. 155, L. C.; *previous proceedings* (1801), 1 East, 442.

*Annotations:—Apld.* Eastwood v. Avison (1869), L. R. 4 Exch. 141. *Refd.* Holmesdale v. West (1866), L. R. 3 Eq. 474; *Re* Mortimer, Gray v. Gray, [1905] 2 Ch. 502.

**805.** —[—]—By a marriage settlement a sum of stock was settled upon trust, after the decease of the husband & wife, for the children of the marriage as the husband & wife should by deed, with or without power of revocation, jointly appoint; & in default of such appointment, & so far as any such appointment should not extend, then as the survivor should by deed or will appoint. The husband & wife by deed appointed the fund amongst their children in certain shares. The deed reserved a power of revocation to the husband & wife or the survivor. The wife died, & the husband by deed revoked the former appointment, & irrevocably appointed the fund amongst the children in shares differing from those given by the original appointment:—*Held*: it was competent to the husband & wife to reserve a power to the survivor of them to revoke the joint appointment, & therefore the deed of revocation & new appointment, executed by the husband, was valid.—DIXON v. PYNER (1886), 55 L. J. Ch. 566; 54 L. T. 748; 34 W. R. 528.

*Annotation:—Folld.* *Re* Harding, Rogers v. Harding, [1894] 3 Ch. 315.

**806.** —[—]—By a marriage settlement certain funds were settled upon trust for the children of the marriage in such shares & in such manner as the husband & wife during their joint lives by deed, with or without power of revocation & new appointment, should appoint; & in default of, & subject to such joint appointment, then as the survivor of them should by deed, with or without power of revocation, & new appointment, or by will, appoint. The husband & wife made a joint appointment of part of the trust funds, with a proviso that the appointment thereby made was made "subject to the power of revocation & new appointment mentioned in the settlement." After the death of the wife, the husband executed a deed revoking the joint appointment & making a new appointment of the fund:—*Held*: the husband & wife had power in their joint appointment to reserve a power of revocation & new appointment to the survivor; such a power of revocation & new appointment was effectually reserved in the joint appointment.—*Re* HARDING, ROGERS v. HARDING, [1894] 3 Ch. 315; 63 L. J. Ch. 725; 42 W. R. 677; 38 Sol. Jo. 631; 7 L. 414, C. A.

**807.** —[—]—By a marriage settlement certain property was settled upon trust for the children of the marriage in such shares & manner as the husband & wife during their joint lives by any deed or deeds legally executed by both of them, & either with or without power of revocation &

new appointment, should appoint; & in default of any such joint appointment, & so far as any such appointment should not extend, then as the survivor of them should by his or her will or codicil appoint. The husband & wife made a joint appointment by deed of the settled property with a proviso that it should be lawful for the husband & wife at any time during the joint lives or for the survivor of them during his or her life by any deed or deeds to revoke either wholly or partially the appointment thereby made. After the death of the husband, the wife executed a deed revoking the joint appointment & purporting to make a new appointment of the property:—*Held*: the husband & wife had power in their joint appointment to reserve to the survivor a power of revocation by deed, & the joint appointment had been effectually revoked.—*Re WEIGHTMAN'S SETTLEMENT, ASTLE v. WALNWRIGHT*, [1915] 2 Ch. 205; 84 L. J. Ch. 763; 113 L. T. 719; 31 T. L. R. 480.

**808.** — *Power of revocation reserved to one alone.*—By the settlement made on a marriage a sum of £10,000 was vested in trustees, upon trust to pay the income to the husband during his life; with remainder to the wife during her life or until she should marry again; with remainder, as to the capital, in trust for the issue of the marriage, as the husband & wife should by deed with or without power of revocation & new appointment, jointly appoint &, in default of appointment, as the survivor should by deed or will appoint, &, in default of appointment, for the children of the marriage as therein mentioned; but if there should be only one child who should attain twenty-one or marry, as to one moiety of the trust fund in trust for that only child, & as to the other moiety upon the trusts thereafter declared of the whole fund in case there should be no child of the marriage; & if there should be no child of the marriage, the trustees were, after the determination of the prior trusts & the default of children, which should last happen, to hold the fund in trust for the husband. The decree *nisi* for the dissolution of the marriage was made on Nov. 3, 1886. On May 11, 1887, the husband & wife executed a deed by which, in exercise of the joint power contained in the settlement, they irrevocably appointed that, from & after the death of the husband & the death or re-marriage of the wife, one moiety of the trust fund should be held in trust for R., the eldest of the three children, absolutely, if & when she should attain twenty-one or marry under that age; & by the same deed the husband & wife appointed the other moiety of the fund to R. in the same way, but subject to a power of revocation & new appointment reserved to the husband alone. On May 18, 1887, the day after the decree absolute, another deed was executed by the husband & the divorced wife by which she released her life interest in the trust fund in the event of her surviving the husband, & she also renounced & released to him all power of appointment over the fund. On Nov. 30, 1887, the husband executed a deed poll by which he absolutely revoked the appointment of the second moiety of the trust fund to R. to the intent that the moiety might devolve as if that appointment had not been made, but subject to any appointment to be thereafter made by him. The husband claimed a declaration that the trustees of the settlement ought to treat a moiety of the £10,000 as if there were no child of the marriage:—*Held*: the reservation in the deed of May 11, 1887, of a power of revocation to the husband alone was invalid, & he was not entitled

to call on the trustees to hand over a moiety of the £10,000 to him.—*BURNABY v. BAILLIE* (1889), 42 Ch. D. 282; 58 L. J. Ch. 842; 61 L. T. 634; 38 W. R. 125; 5 T. L. R. 556.

*Annotations*:—*Mentd.* *Evans v. Evans*, [1904] P. 274; *Hensley v. Hensley & Nevill* (1920), 122 L. T. 814; *Gaskill v. Gaskill*, [1921] P. 425.

#### SUB-SECT. 3.—REVOCATION SUBSEQUENT TO EXERCISE OF POWER.

**809. Power revoked not a primary power — Whether uses of original settlement destroyed.**—*WARD v. LENTHALL* (1687), 2 Keb. 269; 1 Sid. 343; 84 E. R. 167.

*Annotations*:—*Distd.* *Montagu v. Kater* (1853), 8 Exch. 507. *Consd.* *Saunders v. Evans* (1861), 8 H. L. Cas. 721. *Refd.* *Sheffield v. Von Donop* (1848), 17 L. J. Ch. 481.

**810.** — — — — —.]—*WITHAM v. BLAND*, No. 797, *ante*.

**811.** — — — — —.] — *SAUNDERS v. EVANS*, No. 814, *post*.

**812. Power revoked a primary power—Original power revived.**—Where an appointment of a trust fund reserved a power of revocation, but did not reserve a power of new appointment:—*Held*: upon the exercise of the power of revocation, a new appointment might be made.—*SHEFFIELD v. VON DONOP* (1848), 7 Haro. 42; 17 L. J. Ch. 481; 12 Jur. 672; 68 E. R. 17.

*Annotation*:—*Refd.* *Saunders v. Evans* (1861), 8 H. L. Cas. 721.

**813.** — — — — —.]—By a settlement, made in 1810, by lease & release on the marriage of H. & M. certain landed estates, then limited to M. for life, with remainder in fee to M., were settled to the use of H. for life, remainder to the use of M. his intended wife in like manner, with remainder to the use of all or any of the children of the marriage, with such limitations or remainders over as H. & M. his wife, should from time to time, by any deed or deeds, writing or writings, with or without power of revocation & new appointment, direct, limit, or appoint; & in default of such joint direction, limitation, or appointment or in case any such should be made which should not be a complete disposition of the hereditaments thereby settled, then, as the survivor of them, H. & M. his wife by deed or by will should direct limit & appoint; & in default of such appointment, joint or several, to certain uses which would give a title to the eldest son. There were two sons of this marriage; & by a deed, dated 1832, H. & M., in exercise of the joint power, appointed the hereditaments, subject to their own life estates, to their youngest son, deft., in fee, subject to a power for them jointly by deed to revoke such appointment, & by the same or any other deed to be by them jointly executed to limit or appoint any other uses in favour of their children which might be warranted by the several powers contained in the settlement of 1810. By a deed of Feb. 4, 1833, H. & M. jointly revoked the uses contained in the deed of 1832, but made no new appointment. On Feb. 19, 1833, M. died & in the following month of May, H. by will, did, in execution of the powers vested in him, direct limit & appoint the hereditaments to deft. in fee:—*Held*: the effect of the revocation of the joint appointment was to restore the uses of the original settlement, including the joint & several powers of appointment, & consequently that the appointment by the will of H. was a valid exercise of the power by the survivor, & deft. was entitled to the property.—*MONTAGU v. KATER* (1853),

**Sect. 11.—Powers of revocation and new appointment: Sub-sect. 3. Sect. 12. Part V. Sects. 1 & 2.]**

8 Exch. 507; 22 L. J. Ex. 154; 20 L. T. O. S. 323.

*Annotations*.—*Refd.* Walker v. Armstrong (1856), 21 Beav. 284; Saunders v. Evans (1861), 8 H. L. Cas. 721.

**814.** ———.]—(1) If there is an original power of appointment, & then an execution of that power, reserving a power only to revoke, followed by a revocation, the original power remains unaffected. & if in the first instrument, executing the original power, there is reserved a power of revocation & of new appointment, such instrument does not constitute a new settlement destructive of the first, nor is the original power thereby exhausted & at an end, but, upon the revocation of such instrument, exists in full force.

(2) If there is a power of appointment to be exercised by deed or will, & the first instrument executing the power is a deed which contains the reservation of a power to revoke & to appoint anew by deed, & then there is a simple revocation of this instrument, the original power, on such revocation, being in full force, there may be a valid execution of it by will as well as by deed.

In 1794, an estate in land was made the subject of a settlement, under which two persons then about to be married were to have life interests, remainder to the use of such person for such estate, etc., as A., the intended wife, by any deed, with or without power of revocation, attested by two

or more witnesses, or by will attested by three witnesses, should from time to time, & as often as she should think fit, appoint. In 1830, A. by deed exercised this power, & the deed contained a power, by deed, to revoke & to make a new appointment. In 1833, a deed revoking that of 1830, & newly appointing, & also reserving power, by deed, to revoke & newly appoint, was executed. This course was exactly repeated in 1835 by a deed of that date. In 1836, A. executed another deed, simply revoking that of 1835. In 1848, by a will reciting the power of 1794, A. declared the uses of the estate:—*Held*: the deed of 1830 had not exhausted the power of 1794, & substituted a new power for it, to be executed only by deed; & consequently on the revocation, in 1836, of the last preceding deed, the power of 1794 was capable of being exercised by A. either by deed or will.—*SAUNDERS v. EVANS* (1861), 8 H. L. Cas. 721; 31 L. J. Ch. 233; 5 L. T. 129; 7 Jur. N. S. 1293; 9 W. R. 501; 11 E. R. 611, H. L.; *reversg.* S. C. *sub nom.* EVANS v. EVANS, EVANS v. SAUNDERS (1863), 1 Drew. 654.

*Annotations*.—*Generally, Refd.* Walker v. Armstrong (1856), 21 Beav. 284. *Mentd.* Saunders v. Richardson (1854), 2 Eq. Rep. 540; Gregg v. Richards, [1926] Ch. 521.

**SECT. 12.—REVOCATION OF APPOINTMENT.**

*See* DEEDS, Vol. XVII., pp. 236, 237, Nos. 511-529; SETTLEMENTS; WILLS.

## Part V.—Appointment Not in accordance with Terms of Power.

**SECT. 1.—IN GENERAL.**

**815. Appointment contrary to intention**—Collected from recitals of deed creating power.]—Power of appointment by a father not well executed: being contrary to the intention, as collected from a reasonable construction of the recital of the deed, which created the power.—*BURLEIGH v. PEARSON* (1749), 1 Ves. Sen. 281; 27 E. R. 1032, L. C.

*Annotation*.—*Refd.* Ranking v. Barnes (1864), 3 New Rep. 660.

**816. Appointment to trustees for sale**—To hold proceeds for objects.]—Covenant to settle an estate in strict settlement; subject to a power to the father, tenant for life, in case there should be any younger child or children, to charge such sum or sums for such younger child or children, payable in such proportions, & at such times, as he should appoint. The power was held well executed by a will directing a sale & appointing the money. *Qu.*: whether the infant issue of tenant in tail was bound by the election of his parent. An appointment by a father not illusory, where he gives other provisions to the object excluded.—*LONG v. LONG* (1800), 5 Ves. 445; 31 E. R. 674, L. C.

*Annotations*.—*Consd.* Kenworthy v. Bate (1802), 6 Ves. 793. *Refd.* Thornton v. Bright (1836), 2 My. & Cr. 230; Sheehy v. Muskerrey (1848), 1 H. L. Cas. 576; *Re* Adams' Trustees & Frost's Contract, [1907] 1 Ch. 695.

**817.** ———.]—Power of appointing real estate well executed by a devise to trustees to sell, & an appointment of the money produced by the sale. Settlement upon such child or children as the father should appoint; appointment excluding one established.—*KENWORTHY v. BATE* (1802), 6 Ves. 793; 31 E. R. 1312.

*Annotations*.—*Consd.* Doe d. Chadwick v. Jackson (1836), 1 Mood. & R. 553; Thornton v. Bright (1836), 2 My. & Cr. 230; Ratcliffe v. Hampson (1855), 26 L. T. O. S. 102; Webb v. Sadler (1873), 28 L. T. 388; *Re* Paget, *Re* Mellor, Mellor v. Mellor, [1898] 1 Ch. 290. *Appld.* *Re* Redgate, Marsh v. Redgate, [1903] 1 Ch. 356. *Expld.* *Re* Adams' Trustees & Frost's Contract, [1907] 1 Ch. 695. *Refd.* Cowx v. Foster (1860), 1 John. & H. 30; Busk v. Aldam (1874), L. R. 19 Eq. 16; Scotney v. Lomer (1885), 29 Ch. D. 535; *Re* Mackenzie, Bain v. Mackenzie, [1916] 1 Ch. 125.

**818.** ———.]—Devise to the use of such of the children of A. B. & their heirs "for such estates," & in such manner & form as A. B. should appoint:—*Held*: upon the context, to authorise an appointment to a grandchild.

A power to appoint an estate authorises an appointment to trustees to sell & divide the produce between the objects.—*FOWLER v. COHN* (1856), 21 Beav. 360; 27 L. T. O. S. 25; 2 Jur. N. S. 315; 4 W. R. 412; 52 E. R. 898.

*Annotations*.—*Consd.* *Re* Pocock's Policy (1871), 6 Ch. App. 449, n.; Webb v. Sadler (1873), 28 L. T. 388; Scotney v. Lomer (1885), 29 Ch. D. 535; *Re* Redgate, Marsh v.

**PART V. SECT. 1.**

**816 i. Appointment to trustees for sale**—To hold proceeds for objects.]—*Re* McLEAN, BULLEN v. PATON, [1926]

V. L. R. 21; 47 A. L. T. 107.—**AUS.** *i. Portion of fund ineffectually appointed—Effect of.*—There is nothing better established than that any portion of a fund, the subject of a power,

which is not appointed effectually, goes as it would have done in default of any appointment.—*ALLOWAY v. ALLOWAY* (1843), 4 Dr. & War. 380; 2 Con. & Law. 517.—**IR.**



*Redgate*, [1903] 1 Ch. 356. *Reid*, *Buck v. Aldam* (1874), L. R. 19 Eq. 16; *Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125.

819. ————]—*Cowx v. Foster*, No. 536, *ante*.

820. ————]—Testator devised real estate to the use of his daughter for life, with remainder to the use of such of her children, for such estates or interests & in such manner as she should by will appoint, & in default of appointment to the use of her children as tenants in common, & he empowered the trustees of his will to sell the property with the consent in writing of the persons for the time being in possession under the foregoing limitations if adult, & if not, then at the discretion of the trustees. By her will the daughter, in exercise of her power, appointed the real estate to trustees in trust for sale & to stand possessed of the proceeds upon trusts for her children:—*Held*: the legal estate was well appointed by the daughter's will to her trustees in trust for sale, & they were therefore the proper persons to sell.

An appointment of real estate under a power to trustees for objects of the power passes the legal estate in it as effectively as if the property appointed were money instead of land.—*Re PAGET, Re MELLOR, MELLOR v. MELLOR*, [1898] 1 Ch. 290; 67 L. J. Ch. 151; 78 L. T. 72; 46 W. R. 328.

821. ————]—The rule laid down in *Kenworthy v. Bate*, No. 817, *ante*, that a power to appoint land is well exercised by an appointment to trustees upon trust for sale, applied to a case where the limitations were equitable & trustees were directed to convey the property to such child or children, & "for such estate or estates, manner & form" as the donee of the power should appoint.—*Re REDGATE, MARSH v. REDGATE*, [1903] 1 Ch. 356; 72 L. J. Ch. 204; 51 W. R. 216.

*Annotations*:—*Apld. Re Adams' Trustees' & Frost's Contract*, [1907] 1 Ch. 695. *Consd. Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125.

822. ————]—Discretionary trust to postpone sale.]—Where a special power to appoint land, including undeveloped building land, to uses for the benefit of all & every or such one or more exclusively of the other or others of the children or other issue of Y., "in such shares & proportions manner & form & for such interest or interests & subject to such restrictions conditions & limitations over in favour of any other or others of such child children or other issue" as the donee of the power shall by deed or will appoint, is exercised by an appointment to the use of trustees upon trust for sale & to hold the proceeds of sale upon settled trusts in favour of objects of the power, it is not an excessive exercise of the power of appointment to confer on the trustees a discretionary power to postpone sale & in the meanwhile the fullest powers of management & leasing.—*Re AINSWORTH, Re YATES, YATES v. WORMALD*, [1921] 2 Ch. 179; 91 L. J. Ch. 15; 125 L. T. 755; 65 Sol. Jo. 680.

823. Appointment to trustees for object.]—A real estate was settled to the use of a father for life, with remainder to the use of all & every or such one or more of his children, for such estate & estates, & in such parts, shares, & proportions, & with such limitations over, & charged with such annual or gross sums, such limitations over & charges to be to or for the benefit of the same children, some or one of them, & in such manner & form as the father should appoint. The father afterwards appointed the estate to trustees & their heirs, upon trust to pay the rents & profits thereof to his daughter, who was a married woman,

for her sole & separate use during the life of her husband, without power of anticipation:—*Held*: the appointment of the estate to trustees for the separate use of the daughter during the joint lives of herself & her husband was a valid exercise of the power.—*THORNTON v. BRIGHT* (1836), 2 My. & Cr. 230; 6 L. J. Ch. 121; 40 E. R. 628, L. C.

*Annotations*:—*Consd. Ewart v. Ewart* (1853), 11 Hare, 276; *Kry v. Capper* (1853), Kay, 163; *Morse v. Martin* (1865), 34 Beav. 500. *Apld. Re Toague's Settlement*, (1870), 22 L. T. 742. *Consd. Re Pocock's Policy* (1871), 6 Ch. App. 449, n.; *Scotney v. Lomer* (1885), 29 Ch. D. 535. *Reid. Re Cunningham's Settlement*, (1871), L. R. 11 Eq. 324; *Buck v. Aldam* (1874), L. R. 19 Eq. 16; *Re Ridley, Buckton v. Hay* (1879), 11 Ch. D. 645; *Cooper v. Laroche* (1881), 17 Ch. D. 368; *Re Mackenzie, Bain v. Mackenzie*, [1916] 1 Ch. 125. *Mentd. Butcher v. Butcher* (1851), 14 Beav. 222; *Ramsden v. Smith* (1854), 2 Drow. 398; *Re Mainwaring's Settlement*, (1866), L. R. 2 Eq. 487; *Re Portadown, Dungannon, & Omagh Junction Ry. Co., Ex p. Young* (1867), 15 W. R. 879; *Re D'Estampes' Settlement, D'Estampes v. Crowe* (1884), 53 L. J. Ch. 1117; *Re Thorne, Thorne v. Campbell-Preston*, [1917] 1 Ch. 360.

824. General power—Authorises appointor to amend trusts in default of appointment.]—A tenant for life & a tenant in remainder having power under a settlement to appoint to uses, by a deed poll indorsed on the settlement, appointed that the settlement should be read & construed as if the words "with any gross sum or sums, other than portions," had been inserted after the word "charging." The intention was to enable the trustees of the settlement to sell any part of the land free from portions charged on the estate by the tenant for life:—*Held*: the tenants for life & in remainder having power to appoint to new uses, the deed poll operated as a due exercise of such power, & therefore the trustees of the settlement had power to sell the lands the subject of a certain contract free from portions.—*Re MCAULIFFE & BALFOUR* (1884), 50 L. T. 353.

*Excessive execution.*]—*See Part VI., Sect. 1, post.*

*Defective execution.*]—*See Part VI., Sect. 2, post.*

## SECT. 2.—POWER TO APPOINT LAND.

825. Power to appoint in fee—Appointment of life estate.]—A power of appointing a fee may be executed at several times, viz. at one time to pass an estate for life & the fee at another.—*BOVEY v. SMITH* (1682), as reported in 1 Vern. 84; 23 E. R. 328, L. C.; *revid.*, 1 Vern. 144; *reid. sub nom. BOVEY v. SMITH* (1692), 15 Lords Journals, 275, H. L.

*Annotations*:—*Mentd. Frogmorton d. Wright v. Wright* (1773), 2 Wm. Bl. 889; *Re Bank of Syria, Owen & Ashworth's Claim, Whitworth's Claim* (1900), 49 W. R. 100.

826. Power to appoint in tail—Appointment of life interest.]—By a deed of Sept. 5, 1837, real estate was conveyed to such uses as Mr. & Mrs. P. should by deed appoint. By a deed of Sept. 9, 1837, Mr. & Mrs. P., in exercise of the power conferred by the deed of Sept. 5, appointed the property to the use of themselves successively for life, with remainder to the use of such of their children in tail as they should jointly by deed appoint, with remainder to such children as tenants in common in tail. By a deed of Mar. 10, 1855, Mr. & Mrs. P., in exercise of the power conferred by the deed of Sept. 5, & of every power & authority enabling them in that behalf, appointed the property successively to themselves for life, & after the death of the survivor to the use of their son E. for life, with remainder to his children & remoter issue as he should appoint, & with a power of jointuring, with remainder to his children as tenants in common in fee:—*Held*: assuming the



**Sect. 2.—Power to appoint land. Sects. 3, 4 & 5.]**

power conferred by the deed of Sept. 9 authorised an appointment to E. for life, there was no intention on the face of the deed of Mar. 10, 1855, to exercise the power, & the appointment was wholly bad.

A power to appoint in tail does not authorise an appointment for life (LINDLEY, L.J.).—*Re PORTER'S SETTLEMENT*, PORTER v. DE QUETTEVILLE (1890), 45 Ch. D. 179; 59 L. J. Ch. 595; 63 L. T. 431, C. A.

**827. Appointment of rentcharge.]—**A. settles lands to the use of himself for life, remainder to such of his four children, & in such shares & proportions as A. by any writing shall appoint. A. may not only limit the land to any of his children, but may charge the land with any rentcharge or sums of money for any of the children.—THWAYTES v. DYE (1688), 2 Vern. 80; 23 E. R. 661, L. C.

**Annotations:—**Consd. Babb & Mountague's Case (1693), 3 Cas. in Ch. 55; Langston v. Blackmore (1755), Amb. 289. *Apld.* Kenworthy v. Bate (1802), 6 Ves. 793. *Consd.* *Re* Redgate, Marsh v. Redgate, [1903] 1 Ch. 356. *Reid.* A.-G. v. Barnes (1708), Glb. Ch. 5; Roberts v. Dixwell (1738), West temp. Hard. 536; Middleton v. Prior (1760), Amb. 828; Thornton v. Bright (1836), 2 My. & Cr. 230; Alexander v. Alexander (1855), 2 Ves. Sen. 640; *Re* Mackenzie, Bain v. Mackenzie, [1916] 1 Ch. 125. *Mentl.* Albermarle v. Bath (1693), Freem. Ch. 193.

**828. ———.]—**TROLLOPE v. LINTON, No. 529, ante.

**829. ———.]—**RICKETTS v. LOFTUS, No. 356, ante.

**SECT. 3.—POWER TO APPOINT AMONG CHILDREN.**

**830. Power to appoint among children of marriage—Exercise to be confined to such children.]—**Power under a marriage settlement to appoint to the children of the marriage, is strictly confined to those children.—GOODITTLE d. RUSSEL v. WEAL (1768), 2 Wils. 369; 95 E. R. 866.

**831. Appointment to child for life with general power of appointment.]—**BRAY v. BREE, No. 349, ante.

**832. ———.]—**Testator gave his property to his wife for life, & after her death to his two daughters, in such proportions as the wife should appoint, but if she made no appointment, then to be equally divided between them, & in case only one survived her mother the whole to the survivor, unless the deceased daughter should leave any children, in which case they should inherit the portion intended for their mother; & he expressed his will to be, that the fortune of each of his daughters should go to her children after her decease, in such proportions as she might direct, but if no appointment, to be equally divided between them. The daughters were both married, & the widow appointed that, after her decease, one moiety should go to such uses as one of the daughters, & as to the other moiety, to such uses as the other daughter should appoint, & in default of appointment, to them absolutely. By a settlement dated the following day, each daughter appointed her moiety to her separate use for life, with remainder to her husband, for life, with remainder to her children, with cross limitations:—*Held*: the appointment & settlements were

effectual, subject to the question whether the limitations of life interests to the husbands were valid.—JEBB v. TUGWELL (1855), 7 De G. M. & G. 663; 25 L. J. Ch. 109; 26 L. T. O. S. 250; 2 Jur. N. S. 54; 4 W. R. 157; 44 E. R. 258, L. J.J.

**833. Appointment to child for life with power of appointment by will—Objects in esse at date of creation of power.]—**Testator bequeathed a sum of stock in trust for all or such one or more exclusive of the others of the children of his niece, as she should by her will appoint; & in default of appointment, in trust for all her children living at his decease. The niece by her will appointed £6,000, part of the stock, to her daughter, for her separate use for life; & after her death, to such persons, etc., as the daughter should by will appoint, & in default of appointment, to the niece's two sons. The two sons & the daughter were the niece's only children, & they were all living at testator's death. After the death of the niece, her two sons & daughter & the husband of the daughter executed a deed by which, after reciting that it was conceived that the testamentary power of appointment given to the daughter was invalid, as being an excessive execution of the power given to her mother, & that it was also conceived that, if that power should be valid & should not be exercised, then & in either event the reversion of the £6,000 expectant on the daughter's death, belonged to her two brothers & to herself & her husband; the parties, in order to obviate any doubts respecting the same & to carry their mother's intention into effect, assigned the fund to two trustees, in trust for the daughter, for her separate use for life, & after her death, for the husband for life, & after his death, for the children of the daughter & her husband, & if they should all die under twenty-one, in trust for the daughter's next of kin; & the daughter alone was empowered to appoint new trustees of the deed. A few months afterwards the daughter made a will, in exercise of the power given to her by her mother, & appointed the fund to her husband absolutely. Some time afterwards she executed a deed, by which she appointed a new trustee of the prior deed. Shortly afterwards she died, leaving her husband & four children surviving:—*Held*: the testamentary power of appointment given to the daughter was valid, the first deed was not intended to operate, unless that power should be either void or not exercised, the daughter's will was a good execution of the power, & was not revoked by the second deed.—PHIPSON v. TURNER (1838), 9 Sim. 227; 2 Jur. 414; 59 E. R. 345.

**Annotations:—***Distd.* Jebb v. Tugwell (1855), 20 Beav. 84. *Apld.* Morse v. Martin (1865), 34 Beav. 500. *Foll.* Stark v. Dakyns (1874), 10 Ch. App. 35. *Reid.* Ewart v. Ewart (1853), 11 Hare, 276; *Re* Hughes, Hughes v. Footner, [1921] 2 Ch. 208.

**834. ———.]—**MORSE v. MARTIN, No. 956, post.

**835. ———.]—**Where, under a special power, an appointment is made giving an invalid power of appointment with a gift over in certain events, the gift over is not invalidated by the invalidity of the power. A power to appoint is not bad because it may be so exercised as to render the appointment void as being too remote. A power to appoint to children absolutely may be exercised by giving a child an estate for life with power to appoint by will. Testator gave certain property upon trust for his granddaughter A. for

**PART V. SECT. 3.**

*g. Appointment to children directed—One child excluded—Validity of ap-*

*pointment.]—Re* ONTARIO LOAN & SAVINGS CO. & POWERS (1886), 12 O. R. 682.—*CAN.*  
*h. Appointment to mentally deficient*

*child & his issue—Effect of subsequent appointment.]—MACGILLIVRAY'S TRUSTEES v. WATSON'S TRUSTEES, [1911] S. C. 1103.—SCOT.*

life, & after her death for her children, or some of them, as she should by deed or will appoint. A., by her will, appointed one-fifth of the fund to each of five children, all of whom were living at the death of the original testator, for life, & directed that, after the death of each child, the share in which the child had a life interest should be held in such manner as the child might by will appoint, with limitations over in default of appointment in favour of the survivors in different events:—*Held*: a good exercise of the power of appointment.—*SLARK v. DAKYNS* (1874), 10 Ch. App. 35; 44 L. J. Ch. 205; 31 L. T. 712; 23 W. R. 118, L. C. & L. JJ.

*Annotation*:—*Reid. Re Abbott, Peacock v. Frigout* (1892), 41 W. R. 154.

**836.**—Objects not in esse at date of creation of power.]—Testatrix, under a settlement, had a special power of appointment amongst children, under which she validly appointed the income of a fund to a child, A., for life, & expressed to give A. a general testamentary power over the corpus, which last-mentioned power was void as tending to perpetuity, & subject to these dispositions, she appointed the residue of the fund to other children, who also took a share of testatrix's own property:—*Held*: the other children could not be called upon to compensate out of their shares in testatrix's own property those who would have benefited under the invalid power, if valid.—*WOLLASTON v. KING* (1869), L. R. 8 Eq. 165, 38 L. J. Ch. 392; 20 L. T. 1003; 17 W. R. 641.

*Annotations*:—*Consd. Bate v. Willats* (1877), 37 L. T. 221; *White v. White* (1882), 22 Ch. D. 555; *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54. *Reid. Morgan v. Gronow* (1873), L. R. 16 Eq. 1; *Champney v. Davy* (1879), 11 Ch. D. 949; *Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1885), 55 L. J. Ch. 46; *Re Brooksbank, Brooksbank v. James* (1886), 34 Ch. D. 160; *Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436; *Re Beale's Settlement, Barrett v. Beales*, [1905] 1 Ch. 256; *Re Oliver's Settlement, Evered v. Leigh*, [1905] 1 Ch. 191; *Re Nash, Cook v. Frederick*, [1910] 1 Ch. 1. *Mentd. Re Chesham, Cavendish v. Dacre* (1886), 31 Ch. D. 466; *Re Macartney, Macfarlane v. Macartney*, [1918] 1 Ch. 300.

**837.** Appointment to separate use of object.]—Under a power to charge an estate with a sum not exceeding £1,000, for the portion or portions of a younger child or younger children, the donee of the power appointed the £1,000 to a married daughter for her separate use, with a restraint upon anticipation during the coverture:—*Held*: the interest of the appointee might lawfully be so restricted by the terms of the appointment.—*DICKINSON v. MORT* (1850), 8 Hare, 178; 68 E. R. 322.

*Annotation*:—*N.F. Re Cunynhame's Trusts* (1871), 24 L. T. 124.

**838.**—[—Where a precatory trust has been created by will in favour of "children," *simpliciter*, the trustee may, in executing the trusts, limit the shares of daughters to their separate use.—*WILLIS v. KYMER* (1877), 7 Ch. D. 181; 47 L. J. Ch. 90; 26 W. R. 161; *sub nom. KYMER v. WILLIS*, 38 L. T. 207.

**839.**—With restraint on anticipation.]—A father having, under his marriage settlement, a power to appoint certain funds at his own death among the children of the marriage, executed the power by appointing part of the trust funds to a married daughter, her exors., administrators & assigns for her separate use, "her receipts to be good discharges for the same, but nevertheless that she should have no power to mortgage, sell, or otherwise dispose of the same or any part thereof in the way of anticipation":—*Held*: the attempted restraint upon anticipation was invalid, but the rest of the appointment was a valid execution of the power.—*Re CUNYNGHAME'S*

*SETTLEMENT* (1871), L. R. 11 Eq. 324; 40 L. J. Ch. 247; 24 L. T. 124; 19 W. R. 381.

*Annotations*:—*Mentd. Re Ridley, Buckton v. Hay* (1879), 11 Ch. D. 645; *Cooper v. Laroche* (1881), 17 Ch. D. 368.

**840.** Suspension of period for payment of capital.]—Under his marriage settlement, A. B. had a power of appointing a fund amongst his children. By his will he appointed the fund equally amongst his eight children; but he afterwards postponed the payment of the capital, partly until the majority of the children, & partly until after the death or marriage of his last surviving unmarried daughter, the unmarried daughters being in the meanwhile entitled to the income:—*Held*: the appointment was valid.—*WILSON v. WILSON* (1855), 21 Beav. 25; 25 L. T. O. S. 211; 52 E. R. 767.

*Annotation*:—*Reid. Re Hughes, Hughes v. Footner*, [1921] 2 Ch. 208.

#### SECT. 4.—POWER TO APPOINT INTEREST.

*Excessive execution.*]—*See* Part VI., Sect. 1, *post*.

**841.** Appointment of capital.]—A power to appoint the "interest" of a fund, held to authorise the appointment of the capital, notwithstanding subsequent powers over & limitation of the said "trust moneys" & the "interest."—*PHILLIPS v. BRYDON* (1858), 26 Beav. 77; 53 E. R. 820.

**842.**—[—Bequest of a share of residue to trustees upon trust to pay the income to C. for life, with a gift over of the principal, & a proviso that it should be lawful for the trustees, if they should think it desirable, to purchase with such share for the benefit of A. an irredeemable annuity. No annuity was purchased, but the acting trustee paid to A. various sums exceeding the income of the share, & amounting together to three-fourths of the capital:—*Held*: the discretionary power was *pro tanto* well exercised, & the remaindermen on the death of C. were only entitled to so much of the share as was undisposed of.—*MESSEENA v. CARE* (1870), L. R. 9 Eq. 260; 39 L. J. Ch. 210; 22 L. T. 3; *sub nom. MASSEENA v. CARE*, 18 W. R. 415.

#### SECT. 5.—OTHER CASES.

**843.** Power to appoint rentcharge for life—Appointment during widowhood.]—*PROCTOR v. BULSTRODE* (1742), 2 Coop. temp. Cott. 534; 47 E. R. 1291, L. C.

**844.** Power to appoint mixed fund—Appointment of realty & personalty to different objects.]—If a mixed fund, consisting of real & personal property, be made subject to appointment, it is not necessary that each of the objects of the appointment should have a part of each kind. Devise to testator's wife, remainder to her children, subject to appointment. A child born after making the will, in testator's lifetime, is an object of the appointment. If one, having only an estate for life, with a power to appoint in fee, devise the property as her own, it shall be held a good exercise of the power. *Secus*, if she had an interest in the reversion as well as a power.—*MORGAN d. SURMAN v. SURMAN* (1808), 1 Taunt. 280; 127 E. R. 844.

*Annotations*:—*Reid. Halfhead v. Sheppard* (1859), 1 E. & E. 918. *Mentd. Ackers v. Phipps* (1835), 9 Bl. N. S. 430; *Jones v. Skinner* (1835), 5 L. J. Ch. 87; *Doe d. Howell v. Thomas* (1840), 1 Man. & G. 335.

**845.** Power to appoint land purchased with proceeds of sale of land—Appointment of original lands.]—Effect of a private Act of Parliament

**Sect. 5.—Other cases. Part VI. Sect. 1: Sub-sects. 1 & 2, A. & B.]**

declaring an estate vested in trustees & their heirs in trust to sell, discharged from the trusts of a settlement; devesting the legal fee, outstanding under a prior settlement. Power to appoint estates, to be purchased with money, produced by

the sale of other estates, well executed by an appointment, operating directly on the original estates.—**BULLOCK v. FLADGATE** (1813), 1 Ves. & B. 471; 35 E. R. 183.

**Annotations:—***Consd.* **Cooper v. Martin** (1867), 3 Ch. App. 50, n. *Refd.* **Farmer v. Bradford** (1827), 3 Russ. 354; **Clifford v. Clifford** (1852), 9 Hare, 675. *Mentd.* **Shrewsbury v. Scott** (1859), 6 C. B. N. S. 1.

## Part VI.—Excessive, Defective, and Fraudulent Appointments.

### SECT. 1.—EXCESSIVE EXECUTION.

#### SUB-SECT. 1.—EXECUTION TRANSGRESSING RULE AGAINST PERPETUITIES.

*See PERPETUITIES*, pp. 107 *et seq.*, *ante*.

#### SUB-SECT. 2.—EXECUTION EXCEEDING SCOPE OF POWER.

##### A. In General.

**846. Difference between severable & non-severable excess.]—ALEXANDER v. ALEXANDER**, No. 177, *ante*.

**Appointments in fraud of power.]—See Sect. 3, post.**

##### B. Excess by way of Condition.

**847. Condition severable—Condition void.]—**

A father having a power to appoint portions to younger children, to be raised at all events, in such shares as he shall think fit, cannot annex a condition to the appointment of any child's share.—**PAWLET v. PAWLET** (1748), 1 Wils. 224; 95 E. R. 586, L. C.

**Annotation:—***Refd.* **Davies v. Huguenin** (1863), 2 New Rep. 101.

**848. ———.]—ALEXANDER v. ALEXANDER**, No. 177, *ante*.

**849. ———.]—**A lady having four children by her first husband, & three by her second, & having power to appoint a fund amongst the former only, appointed it amongst all her children equally, & declared that, if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband:—*Held*: the appointment was not wholly void, but the first class of children took, each, one-seventh of the fund under it, & the other shares went to them, as in default of appointment.—**SADLER v. PRATT** (1833), 5 Sim. 632; 53 E. R. 476.

**Annotations:—***Expld.* **Stroud v. Norman** (1854), Kay, 313. *Consd.* **Watt v. Croyke** (1856), 3 Sm. & G. 362; **Topham v. Portland** (1863), 1 De G. J. & Sm. 517. *Apld.* *Re* **Farncombes' Trusts** (1878), 9 Ch. D. 652. *Distd.* *Re* **Perkins, Perkins v. Bagot**, [1893] 1 Ch. 283. *Apld.* *Re* **Witty, Wright v. Robinson**, [1913] 2 Ch. 666. *Refd.* **Harvey v. Stracey** (1852), 1 Drew. 73; **Vatcher v. Paull**, [1915] A. C. 372.

### PART VI. SECT. 1, SUB-SECT. 2.—A.

**k. General rule.]—**Where there is an excessive execution of a power & the boundaries between the excess & the execution are not distinguishable, the whole appointment fails.—**A. G. v. TEECE, BOWDEN v. TEECE** (1904), 4 S. R. N. S. W. 347; 21 N. S. W. W. N. 105.—**AUS.**

**l. ———.]—**When a power is executed in the execution, in order to reject the excess, & let the appointment stand, the ct. must see distinctly what the person executing the power had in view, & be satisfied that if he had rightly understood the extent of his power, he would so have executed

it.—**HAMILTON v. ROYSE** (1804), 2 Sch. & Lef. 315.—**IR.**

### PART VI. SECT. 1, SUB-SECT. 2.—B.

**m. General rule.]—**A power must not be exceeded, nor its directions evaded; but where there is no prohibition, everything, which is legal & within the limits of the authority, should be supported.—**CROZIER v. CROZIER** (1843), 3 Dr. & War. 353.—**IR.**

**n. ———.]—**If in terms absolute & unqualified an initial gift, self-contained & complete, is given under a power of appointment or appointment to an object or objects of the power, any adjoined conditions or

**850. ———.]—**Conditions annexed to appointments made in pursuance of a power, though in themselves void, held not to invalidate the appointments.—**PALSGRAVE v. ATKINSON** (1844), 1 Coll. 190; 63 E. R. 378.

**851. ———.]—**Under a power of appointment & selection among children, if an appointment be made upon a condition to be performed by the appointee, the appointment is good, but the condition is void.

But an appointment to child A. upon a certain contingency, & if that contingency should not happen, then the same share to go to child B., is a good conditional limitation under the power. So it is, if the event on which the shifting limitation is to take effect be some act to be done by A., if such act be consistent with the scope of the power; as of the limitation over be to take effect if A. do not, upon the request in writing of the appointor, make over another fund derived from a different source to the other objects of the power; for this is consistent with the intention of the power, which was that the donee should, according to his view of the exigencies of the objects of the power, appoint the whole fund to all of them, or to some only in exclusion of the others.

If the condition be in form that A. should do this upon the request not only of the appointor, but of his exors. or administrators, it will be construed as if the limitation were inserted in the instrument creating the power; & where that provides that the appointment must be made so as to take effect within twenty-one years after the death of the appointor the condition will be valid.—**STROUD v. NORMAN** (1854), Kay, 313; 2 Eq. Rep. 308; 23 L. J. Ch. 443; 18 Jur. 264; 69 E. R. 132.

**Annotations:—***Distd.* **Vatcher v. Paull**, [1915] A. C. 372; *Re* **Staveley, Dyke v. Staveley** (1920), 90 L. J. Ch. 111. *Refd.* *Re* **Holland, Holland v. Clapton**, [1914] 2 Ch. 595.

**852. ———.]—**Testator, having a power of appointment over a trust fund among his children, appointed parts thereof to certain of his children, & the residue thereof to one child, & he directed that every child or grandchild to become entitled to such residue should effectually settle the same upon the same trusts as he had declared of his own

restrictions which are in excess of the power have no effect, & are to be treated simply *pro non scriptis*.—**MIDDLETON'S TRUSTEES v. MIDDLETON** (1906), 8 F. (Ct. of Sess.) 1037; 43 Sc. L. R. 718.—**SCOT.**

**847 l. Condition severable—Condition void.]—****ROGERSON v. CAMPBELL** (1805), 10 O. L. R. 748; 6 O. W. R. 617.—**CAN.**

**847 ii. ———.]—**When an appointment has a condition annexed, if there appears to be a clear intention to benefit the appointee, the ct. will hold the appointment good, discharged of the condition.—**HAY v. WATKINS** (1843), 2 Con. & Law. 157; 3 Dr. & War. 339; 6 I. Eq. R. 273.—**IR.**

residuary estate, being trusts to invest in freehold estates to be settled to uses in strict settlement :—*Held*: the appointment was valid, but the condition was void.—*WATT v. CREYKE* (1856), 3 Sm. & G. 362; 26 L. J. Ch. 211; 28 L. T. O. S. 245; 3 Jur. N. S. 56; 65 E. R. 695.

*Annotation*:—*Consd. Re Perkins, Perkins v. Bagot*, [1893] 1 Ch. 283.

853. ———.—*ROOKE v. ROOKE*, No. 570, ante.

854. ———.—*Where a gift made under a power is accompanied by directions & conditions ultra vires, the gift will be valid & the directions void (LORD CAIRNS, C.).—MCDONALD v. MCDONALD* (1875), L. R. 2 Sc. & Div. 482.

*Annotation*:—*Reid. Re Holland, Holland v. Clapton*, [1914] 2 Ch. 595.

855. ———.—*Under a marriage settlement made in 1820, a father had a power of appointment among his children. He afterwards borrowed the funds subject to the power, amounting to £6,000, from the trustees of the settlement, on the security of a freehold estate which was his own property. On the marriage of his only daughter in 1853, the father settled a sum of £3,000 upon her out of his own property. In 1863, the father executed three deeds of even date. By the first, he made a voluntary settlement of the freehold estate with some other property on his eldest son, E., for his life, with remainder for the benefit of E.'s children or remoter issue, as E. should appoint, & in default of appointment, to E.'s children equally, & in default of children, to himself in fee. By a second deed, the father appointed the whole of the £6,000 under his marriage settlement to E. absolutely; & the same deed contained a release by the father & his wife, & also by E. & the surviving trustee of the settlement, of the mtge. debt of £6,000, & a conveyance by the same parties of the freehold estate discharged from the mtge. to the uses of the voluntary settlement of even date. By a third deed, the father gave the residue of his property to his only other son, R. The father made his will, bearing the same date, & thereby confirmed the three deeds of even date, & charged his ultimate remainder under the first deed with £3,000, in favour of his only daughter, M., & subject thereto, gave the same to R. The father died in 1864. E., although made a party to the two first-mentioned deeds of even date, was not consulted on their preparation, & he at first refused to execute them, but he did in fact execute them in the year 1871:—*Held*: (1) in the opinion of the Ct. the arrangement by which the mtge. debt of £6,000 had been released & the ultimate remainder reserved to the father had not been made for the purpose of benefiting the appointor; & the appointment was not fraudulent or invalid; (2) the condition annexed to the appointment, that E. should release the estate from the mtge. debt, was not binding upon E. until he assented to the arrangement; & he might have claimed the benefit of the absolute appointment in his favour discharged from the condition, but that, having executed the deeds, he had by his voluntary act assented to be bound by the conditions.*

(3) The fact that the donee of the power may derive a benefit under the appointment does not necessarily render the appointment invalid (*BAGGALLAY, J.A.*).—*ROACH v. TROOD* (1876), 3 Ch. D. 429; 34 L. T. 105; 24 W. R. 803, C. A.

*Annotations*:—*As to* (1) *Reid, Re Turner's S. E.* (1884), 28 Ch. D. 205. *Generally, Reid. Re Crawshaw, Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615.

856. ———.—*By a settlement made on the marriage of J. V. with his first wife, the funds were*

*settled after the husband's & wife's life interests, in default of joint appointment which happened, as the survivor should appoint among the children of the marriage, of whom there were three. The wife died & J. V. married again.*

*By an agreement the children, none of whom were emancipated, agreed to assign on the death of J. V. a portion of the fund for the benefit of the wife & children of the second marriage. By his will & codicil J. V. gave the funds to one child only, subject to annuities to the others, & to a request to settle £100 a year on the wife & children of the second marriage:—*Held*: (1) the above-mentioned agreement was not enforceable; (2) the exclusion of the two children from sharing in the corpus was not, but the request to settle the £100 a year, was done with a view to divert the funds, & accordingly, the appointment was bad only to the extent of the request to settle the £100 a year.—*VIAIT v. COOPER* (1897), 76 L. T. 768.*

857. ———.—*In cases where a power of appointment is exercised in favour of an object of the power, but conditions in favour of persons who are not objects of the power are imposed on the appointee, the difficulty in deciding the question whether the conditions are to be disregarded or render the appointment itself void is one of fact or of inference rather than of law; the law being that if there is a genuine appointment to an object of the power, coupled with an attempt to impose on the appointment conditions or trusts in favour of persons who are not objects, the appointment stands good free from the conditions, whereas if there is no genuine appointment to an object of the power, but the appointment to that object is made for purposes foreign to the power, then the whole appointment fails, whether the real purposes of the appointment have or have not been communicated to, & assented to by, the nominal appointee.*

*Under the will of her father a lady had power by will or codicil to appoint that all or any part of the income of certain funds, which was £600 or £700 per annum, should after her death be paid to her husband for life, & upon such conditions & with such restrictions as she should think fit. On her marriage with C. she had settled £3,000 of her own upon trust for herself for life, & then in the events which happened, upon such trusts as she should by will or deed appoint. By her will, in exercise of the power under her father's will, she appointed that after her death the income of the funds thereunder should be paid to C. during his life for his absolute use provided he should acquiesce in the several dispositions contained in her will, & so long as he should pay to each of her nieces W. & F. the sum of £50 annually; & she thereby, in exercise of the power under the settlement, appointed that her trustees should out of the settled funds raise & pay her debts, funeral & testamentary expenses, & pecuniary legacies, & pay the residue thereof to her nephews & nieces; & she gave the residue of her personal estate, being her "separate estate or over which" she had any power of disposition or appointment to C. By a codicil she revoked the appointment under her father's will to C., & instead thereof appointed that the whole of the income of the fund thereunder should be paid to C. during his life for his absolute use, provided that he should acquiesce in her testamentary dispositions & so long as he should pay to each of her nieces W., F., & H. the clear sum of £100 annually. The Ct. found that testatrix had a genuine desire to benefit C. by the appointment & that this desire was the real motive & object of the appointment:—*Held*:*

**Sect. 1.—Excessive execution: Sub-sect. 2, B., C. & D. (a).]**

the appointment to C. was good, & the conditions imposed on him must be disregarded.—*Re HOLLAND, HOLLAND v. CLAPTON*, [1914] 2 Ch. 595; 84 L. J. Ch. 389; 112 L. T. 27.

**858. Condition not severable — Appointment void.]**—*WEBB v. SADLER*, No. 181, *ante*.

**859. ———.]**—Testatrix had power to appoint a fund among her children. She had two sons & two daughters. By her will, which recited the power, & stated that she had appointed the greater part of the fund in favour of her daughters, & that the only part remaining unappointed was a sum of £713 Consols, she, in exercise of the power, appointed the £713 Consols to her sons in equal shares, on condition that they should give up all claim to the proceeds of sale of the furniture in a house formerly occupied by her; but, in the event of their making any claim to the furniture, or to the proceeds of sale thereof, then she appointed the £713 Consols to one of her daughters absolutely. She bequeathed the residue of her estate to a person not an object of the power. The furniture, or the proceeds of sale thereof, had been bequeathed to her for life, with remainder to her sons in equal shares. The furniture had been sold for about £700, & the proceeds of sale received by her:—*Held*: the appointment could not be severed from the condition; it was made for the purpose of increasing the estate for the benefit of the residuary legatee by the amount of the claim which her sons had against her; & consequently, the appointment was void as a fraud on the power.—*Re PERKINS, PERKINS v. BAGOT*, [1893] 1 Ch. 283; 62 L. J. Ch. 531; 67 L. T. 743; 41 W. R. 170; 37 Sol. Jo. 26; 3 R. 40.

*Annotations*:—*Consd.* *Re Wood, Re Wood, Wodehouse v. Wood*, [1913] 1 Ch. 303. *Distd.* *Re Holland, Holland v. Clapton*, [1914] 2 Ch. 595; *Vatcher v. Paull*, [1915] A. C. 372. *Reid.* *Re Bristol, Grey v. Grey*, [1897] 1 Ch. 946; *Re North, Meates v. Bishop* (1897), 76 L. T. 186; *Re Cavendish, Grosvenor v. Butler*, [1912] 1 Ch. 794; *Re Fraser, Ind v. Fraser* [1913] 2 Ch. 224.

**860. ———.]**—The donee of a special power to appoint his share under his father's will to his wife & children, in exercise of the power, appointed an annuity of £1,200 to his wife, & in case his residuary estate should be insufficient to pay his just debts he directed that the trustees of his father's will should pay to his wife an additional annuity of 500 so long as any of his debts should remain unpaid or for a period of ten years from his death, whichever should be the shorter period, on condition that, & so long as, she should expend the sum of £400 in every year in the payment of his debts; & after the debts should have been fully paid by her or after the expiration of ten years from his death, whichever should be the shorter period, to pay her, if she should have fulfilled the condition, instead of the additional annuity of £500, an additional annuity of £100 for the remainder of her life, & subject thereto he appointed the trust funds to his children:—*Held*: the condition could not be fairly separated from the appointment, & the execution of the power was fraudulent & void as having been made for a

purpose wholly foreign to the power. The appointment of the additional annuities was therefore bad.—*Re COHEN, BROOKES v. COHEN*, [1911] 1 Ch. 37; 80 L. J. Ch. 208; 103 L. T. 626; 55 Sol. Jo. 11.

*Annotation*:—*Distd.* *Re Holland, Holland v. Clapton*, [1914] 2 Ch. 595.

**861. Condition inconsistent with power — Condition void.]**—A condition annexed to an appointment, & inconsistent with the power, is void.

Testator, having power to appoint by will a sum of £3,000, made his will, giving his general estate to his children for life, with remainder to their issue; & after referring to the above power, he appointed the fund amongst his children, & requested them not to spend their shares thereof, but to leave the same for the benefit of their children:—*Held*: these words did not constitute a trust for the grandchildren, so as to put the children to their election, but they amounted to a condition annexed to the appointment in favour of children, & such condition was void, as inconsistent with the power.—*BLACKET v. LAMB* (1851), 14 Beav. 482; 21 L. J. Ch. 46; 18 L. T. O. S. 115; 16 Jur. 142; 51 E. R. 371.

*Annotations*:—*Apld.* *Stephens v. Gadsden* (1855), 20 Beav. 463. *Consd.* *Langslow v. Langslow* (1856), 21 Beav. 552. *Reid.* *Tomkyns v. Blane* (1860), 28 Beav. 422; *Churchill v. Churchill* (1867), L. R. 5 Eq. 44. *Mentd.* *Box v. Barrett* (1860), L. R. 3 Eq. 244.

**862. Condition within scope of power.]**—*STROUD v. NORMAN*, No. 851, *ante*.

**863. ———.]**—Under a power of appointment by will among a certain class, a testator appointed to A. & B., objects of the power upon trust for various purposes, some of which were not within the scope of the power, & appointed the ultimate residue, including all such portions the appointment whereof should from whatever cause fail of taking effect, to A. & B. absolutely:—*Held*: it was a valid, legal & equitable appointment, & A. & B. could give a good discharge for the whole fund.

The fact that other trusts are added which are not within the power cannot affect the validity of those which are within it. If you appoint the fund entirely to one or more persons who are objects of the power, that is a good execution of the power, & if you choose to add that they shall be trustees for other objects of the power, that is within the scope of such a power as this (*GIFFARD, V.-C.*).—*WILSON v. WILSON* (1869), 17 W. R. 220.

**864. ———.]**—*Re HARRIS, FITZROY v. HARRIS*, [1891] W. N. 76.

**865. ———.]**—Under a marriage settlement made in England in 1846 a husband & his then intended second wife had a joint power of appointment over a settled fund among the husband's children, whether by his first or his second marriage, & the issue of such children. In 1857 they went to reside permanently in Jersey, & the husband acquired real estate in that island. By a joint deed executed in 1882 the husband & wife appointed the settled fund in favour of their own family, with a proviso that if the issue of the first marriage should abandon their rights in the appointors' real estate the appointment should be

**858 i. Condition not severable—Appointment void.]**—*COLLINS'S TRUSTEES v. COLLINS*, [1913] S. C. 588; 50 Sc. L. R. 421; [1913] 1 S. L. T. 185.—*SCOT*.

*o. Validity of condition—To pay off debt with interest—Whether appointment vitiated.]*—*STUART v. CASTLE-STUART (LORD)* (1858), 8 I. Ch. R. 408.—*IR.*

*p. ——— Of application for pay-*

*ment of fund—Within twelve months.]*—*GRAHAM v. ANGELL* (1869), 17 W. R. 702.—*IR.*

*q. ——— Of good behaviour — Son of reckless & unstable character.]*—*BUTLER v. BUTLER* (1880), 7 L. R. IR. 401.—*IR.*

*r. Jus mariti excluded—Appointment void.]*—*BAIKIE'S TRUSTEES v. OXLEY* (1862), 24 Dunl. (Cl. of Sess.) 589; 34 Sc. Jur. 338.—*SCOT*.

*t. Power to appoint absolute interest to children—Restriction of children's shares to liferents.]*—*WARRANT'S TRUSTEES v. WARRANT* (1901), 3 F. (Cl. of Sess.) 369; 38 Sc. L. R. 273; 8 S. L. T. 367.—*SCOT*.

*s. ———.]*—*MATTHEWS DUNCAN'S TRUSTEES v. MATTHEWS DUNCAN* (1901), 3 F. (Cl. of Sess.) 533; 3 Sc. L. R. 401; 8 S. L. T. 443.—*SCOT*.

void. The husband died in 1886. Under the law of Jersey no person dying before 1891 had any power to alter the devolution of his real estate in accordance with that law :—*Held* : the appointment was a valid exercise of the power.—*VATCHER v. PAULL*, [1915] A. C. 372 ; 84 L. J. P. C. 86 ; 112 L. T. 737, P. C.

*Annotations* :—*Reid. Re Wright, Hegan v. Bloor*, [1920] 1 Ch. 108 ; *Cochrane v. Cochrane*, [1922] 2 Ch. 230.

#### C. Excess by way of Charge.

**866. Charge in favour of object of power—Valid.**—Where testator having a son & daughter in pursuance of a power by which he was authorised to appoint a real estate to the use of his children for such estate, & in such shares & proportions as he should direct, by his will appointed the real estate to his son in fee, upon condition that he should pay to his sister £3,000, wherewith he charged the estate :—*Held* : though the direct terms of the power were not pursued, the intent & design of it were, & such appointment to his daughter was a good execution of his power.—*ROBERTS v. DIXWELL, SANDYS v. DIXWELL, PYOTT v. DIXWELL* (1738), as reported in *West temp. Hard. 536* ; 2 Eq. Cas. Abr. 668 ; *Sugden on Powers*, 8th ed. App. 930 ; 25 E. R. 1072, L. C.

*Annotations* :—*Consd. Kewworthy v. Bale* (1802), 6 Ves. 793. *Reid. Thornton v. Bright* (1836), 2 My. & Cr. 230 ; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276 ; *Re Adams' Trustees & Frost's Contract*, [1907] 1 Ch. 695. *Mentd. Hopkins v. Hopkins* (1739), *West temp. Hard. 606* ; *Bagshaw v. Spencer* (1743), 2 Atk. 570 ; *Read v. Snell* (1743), 2 Atk. 642 ; *Garth v. Baldwin* (1755), 2 Ves. Sen. 646 ; *Morgan v. Morgan* (1820), 5 Madd. 408 ; *Trash v. Wood* (1839), 4 My. & Cr. 324 ; *Douglas v. Willes* (1849), 7 Hare, 318 ; *Williams v. Lewis* (1859), 6 H. L. Cas. 1013 ; *Appleton v. Rowley* (1869), L. R. 8 Eq. 139 ; *Cooper v. Macdonald* (1877), 7 Ch. D. 288 ; *Re Redgate, Marsh v. Redgate* (1902), 72 L. J. Ch. 204 ; *Re Hudson, Cassels v. Hudson*, [1908] 1 Ch. 558.

**867. Charge in favour of stranger—Charge invalid.**—*Re JEAFFRESON'S TRUSTS*, No. 675, *ante*.

#### D. Excess as to Objects.

##### (a) Appointment to Objects and Strangers.

**868. Gifts severable—Appointment to stranger void.**—*ALEXANDER v. ALEXANDER*, No. 177, *ante*.

**869.** ———.—(1) The question whether a will operates as an execution of a power is, like all questions upon the construction of wills, purely a question of intention.

By a marriage settlement, four different portions of property were limited in the following manner : first, the wife was given a general power of appointment over £3,000 to take effect upon her own death ; secondly, the wife had a special power of appointment over the residue of the stocks & funds, to be exercised in favour of a particular class of relations, & to take effect, not upon her own death, but upon the death of her husband ; thirdly, the wife had a general power of appointment over the plate, furniture, etc., but not to take effect until her husband's death ; fourthly, the wife had a general power to dispose of her jewels, trinkets, etc., to take effect upon her own death. The wife's will, which was dated before Wills Act, 1837 (c. 26), & was properly executed in the form prescribed for the execution of the powers in the settlement, commenced, ' I, S. M., do, by virtue of the power & authority reserved to me by my marriage settlement, hereby make, publish & declare this to be my last will & testament.'

Testatrix then referred specially to her power of appointing the £3,000, & disposed of it. The third & fourth portions of the property she disposed of without referring to her power. Lastly, she gave & bequeathed, directed & appointed all the rest, residue & remainder of her moneys, & other her personal estate, of whatsoever description, amongst the class of relations pointed out by the settlement, but did not refer to the power. As to the first, third & fourth portions, no question was raised ; but as to the second portion, being the residue :—*Held* : the will was a good execution of the power.

(2) By the settlement, the trustees were, after the death of the husband, in case of his surviving his wife, to stand possessed of the residue, above referred to as the second portion of the property, in trust for all & every or such one or more of the wife's relations in blood, at the time of her decease, within the eighth degree of consanguinity to her, in such shares & proportions, & with such future or executory or other trusts, being for the benefit of the said relations in blood of the wife within the degree aforesaid, as the wife should by will direct or appoint :—*Held* : the power to be exercised as to the future or executory trusts for the said relations in blood within the prescribed degree, applied only to those relations living at the death of the wife ; the appointment which was made by the wife was valid, notwithstanding that the persons who were to take as appointees, & the shares & interests which they were to take under the appointment, were made contingent upon a future event.

(3) Although the fund was appointed not entirely to objects of the power, but partly to objects of the power & partly to strangers, the appointment was nevertheless valid *pro tanto*, that is, it was valid *quoad* those who were objects of the power, & invalid as to those persons who were not properly objects of the power.

When an appointment is to a class, some of whom are within & others are not within the proper limits of the power, if the class of persons is ascertained, so that you can point to A., who is within the limits, & say so much is to go to him, though the others are not within the limits, yet the appointment to A. shall take effect ; but if the appointment is to a class, some of whom may, & others may not be objects of the power, & there is nothing to point out what portion is to go to those who are within the power, & what to those who are not, the whole fails (*KINDERLEY, V.-C.*).—*HARVEY v. STRACEY* (1852), 1 Drew. 73 ; 22 L. J. Ch. 23 ; 16 Jur. 771 ; 61 E. R. 379 ; *sub nom. HARVEY v. STRACEY, STRACEY v. HARVEY*, 20 L. T. O. S. 61.

*Annotations* :—*As to* (1) *Consd. Pomret v. Perring* (1854), 18 Beav. 618. *Reid. Minchin v. Minchin* (1871), 19 W. R. 993 ; *Re Thompson, Thompson v. Thompson* (1906), 75 L. J. Ch. 599. *As to* (3) *Consd. Churchill v. Churchill* (1867), L. R. 5, Eq. 44. *Apud. Re Farncombe's Trust* (1878), 9 Ch. D. 652 ; *Re Wittry, Wright v. Robinson*, [1913] 2 Ch. 666. *Reid. Re Beale's Settlement, Barrett v. Beales*, [1905] 1 Ch. 256. *Generally, Mentd. Whitehead v. Rennett* (1853), 22 L. J. Ch. 1020.

**870.** ———.—K. by his will gave a fund upon trust for such of the " children " of his daughter M., who was then married, as she should by will appoint, & in default of appointment for her children equally. The will contained no hotchpot clause. M. had several children, some of

#### PART VI. SECT. 1, SUB-SECT. 2.—C.

b. Charge in favour of object of power—Object takes free of charge.—*DOWGLASS v. WADDELL* (1886), 17 L. R. Ir. 344.—*IR.*

#### PART VI. SECT. 1, SUB-SECT. 2.—D.

a. Condition fettering appointment—To object of special power—Whether valid if operating in favour of another object of same power.—Although a

condition fettering an appointment to an object of a special power is in general invalid, it may be valid if it operates in favour of another object of the power.—*Re LEAHY, LEAHY v. PAYNE*, [1920] 1 L. R. 280.—*IR.*



*Sect. 1.—Excessive execution: Sub-sect. 2, D. (a), (b) & (c).]*

whom were illegitimate, having been born before her marriage. By her will she appointed the fund to her "children E. & C., their exors., administrators, & assigns, for their own use & benefit." E. was one of the illegitimate & C. one of the legitimate children:—*Held*: reading M.'s testamentary appointment as indicating an intention to appoint the fund in moieties, one moiety passed to C. under the appointment, & the other moiety, E. not being an object of the power, was divisible among all the legitimate children, as in default of appointment.—*Re KERR'S TRUSTS* (1877), 4 Ch. D. 600; 46 L. J. Ch. 287; 36 L. T. 356; 25 W. R. 390.

871. ———.]—The donee of a power to appoint a fund in favour of her own issue, "such issue to be born before any such appointment," by deed, after reciting the power & her desire to exercise it, & the state of her family, appointed the fund to her daughter for life, & after the daughter's death to the daughter's children in equal shares on their respectively attaining twenty-one, but if any of such children should die under twenty-one leaving issue, the share of the child so dying was to go to such issue, to vest at twenty-one. At the date of the appointment the daughter had three children living, including one *en ventre sa mère*, & she had three born afterwards. One of the children had attained twenty-one, & the rest were minors:—*Held*: (1) issue in existence at the date of the deed of appointment were the only objects of the power; (2) upon the construction of the deed the intention of the appointor was to include non-objects, i.e. issue born after that date; (3) the appointment was not thereby bad *in toto*; (4) the share of each object would be determined by the total number of objects & non-objects who should fall within the class in whose favour the appointment purported to be made. Under the circumstances, one-sixth of the fund in ct. directed to be at once paid out to the child who had attained twenty-one, & the remainder to remain in ct. & the dividends thereon to be accumulated.—*Re FARNCOMBE'S TRUSTS* (1878), 9 Ch. D. 652; 47 L. J. Ch. 328.

*Annotations*:—*As to* (1) *Apld. Re Witty, Wright v. Robinson*, [1913] 2 Ch. 666. *As to* (3) *Apld. Re Witty, Wright v. Robinson*, [1913] 2 Ch. 666.

872. ———.]—J. by her will gave to her daughter E. a power to appoint funds "in favour of all . . . or any one or more of the child or children or other issue or both of my said daughter E. as may be living at her death." E. by her will appointed that the funds should be held in trust for her children who should attain twenty-one or marry in equal shares. She then directed the trustees to retain the shares of each of her daughters & pay the income to her for life for her separate use without power of anticipation & after the decease of such daughter in trust for her children or remoter issue, such remoter issue being born in her lifetime, in such manner as she should by deed or will appoint; & in default of appointment for the daughter's children who should attain twenty-one or marry. J. died in 1888. E. died in 1911, leaving eight children. One of her daughters, who was born before the death of J. & had four children, all born before the death of E., was *pltf.* & she claimed that the settlement of the share appointed to her was void, inasmuch as it might apply to non-objects of the power; the original appoint-

ment in her favour was therefore not cut down; & that she took the share absolutely:—*Held*: the provisions for a settlement were only void, so far as they might apply to non-objects of the power, & this must be ascertained at the death of *pltf.*—*Re WITTY, WRIGHT v. ROBINSON*, [1913] 2 Ch. 666; 83 L. J. Ch. 73; 109 L. T. 590; 58 Sol. Jo. 30, C. A.

873. Gifts not severable—Whole appointment void.]—*HARVEY v. STRACEY*, No. 869, *ante*.

874. ———.]—By a marriage settlement a fund was limited, after the death of the survivor of husband & wife, to "all & every the children, or child, or more remote issue" of the marriage, & the wife should by deed or will appoint. By will the wife appointed the fund to these new trustees upon trust to pay the income to her son for his life, or until he should become *bkpt.*, or should assign or incur the same, & then to the trustees for his life, "for the benefit of her son his wife & children or any of them, as the trustees should think expedient":—*Held*: although the excessive appointment was discretionary only, that the appointment was void *in toto*, & not merely for the excess.—*Re BROWN'S TRUST* (1865), L. R. 1 Eq. 74.

*Annotation*:—*Distd. Carr v. Atkinson* (1872), 41 L. J. Ch. 785.

875. ———.]—Testatrix who, by her husband's will, had a power to appoint to any one or more of her children certain property which, in default of appointment, was to be divided among her children equally, & who also had, under her marriage settlement, a general power of appointment over certain other property, by her will, which was expressed to be made in pursuance of every power, authority, direction, estate or interest in anywise enabling her in that behalf, made an appointment of part of the first mentioned property in favour of her son J. & his children, & afterwards "appointed devised & bequeathed all her real & personal estate not therein specifically & absolutely appointed or bequeathed unto & to the use of her daughter A. absolutely for her own separate use":—*Held*: the appointment to J. & his children was invalid; & all the property over which testatrix had any power of appointment, whether under the will or the settlement, was absolutely & well appointed to A.—*WALLINGER v. WALLINGER* (1869), L. R. 9 Eq. 301; 22 L. T. 259; 18 W. R. 274.

*Annotation*:—*Reid. Bate v. Willats* (1877), 37 L. T. 221.

876. ———.]—*Re CUNARD, CUNARD v. CUNARD* (1918), 53 L. Jo. 63.

*(b) Appointment to Object for Life with Remainder to Stranger.*

877. Appointment to stranger void.]—*ADAMS v. ADAMS* (1777), 2 Cowp. 651; 98 E. R. 1289.

*Annotations*:—*Consd. Robinson v. Harcastle* (1786), 2 Bro. C. C. 22. *Reid. Robinson v. Harcastle* (1788), 2 Term Rep. 241; *Piper v. Piper* (1834), 3 My. & K. 158; *Tomkyns v. Biano* (1860), 28 Bear. 422. *Mentd. Haydon v. Willshire* (1789), 3 Term Rep. 372; *Waller & Smyth v. Heseltine v. Burgh* (1789), 1 Phillim. 170.

878. ———.]—Under a power to appoint to children, an appointment to a child for life, with remainder to her children, is not valid, but the excess is void.—*PITT v. JACKSON* (1786), 2 Bro. C. C. 51; 29 E. R. 27; *subsequent proceedings, sub nom. SMITH v. CAMELFORD (LORD), CAMELFORD (LORD) v. SMITH* (1795), 2 Ves. 698, L. C.

*Annotations*:—*Consd. Routledge v. Dorril* (1794), 2 Ves. 357. *Apld. Crompe v. Barrow* (1799), 4 Ves. 681. *Consd. Thornton v. Bright* (1836), 2 My. & Cr. 230; *Moaypenny*

PART VI. SECT. 1, SUB-SECT. 2.—D. (b).

877 i. Appointment to stranger void.]—*INVERCLYDE'S (LORD) TRUSTEES v. INVERCLYDE (LORD)*, [1910] S. C. 420.—SCOT.



*v. Dering* (1852), 2 De G. M. & G. 145. *Refd.* *Robinson v. Hardcastle* (1788), 2 Term Rep. 241; *Bristow v. Warde* (1794), 2 Ves. 336; *Brudenell v. Elwes* (1802), 7 Ves. 382; *Vanderplank v. King* (1843), 3 Hare, 1; *Monypenny v. Dering* (1847), 16 M. & W. 418; *Fry v. Capper* (1853), Kay, 163; *Lee v. Head* (1855), 1 K. & J. 620. *Mentd.* *Thellusson v. Woodford* (1798), 4 Ves. 227; *Morgan v. Morgan* (1820), 5 Madd. 408; *Douglas v. Willes* (1849), 7 Hare, 318; *Re Mortimer, Gray v. Gray*, [1905] 2 Ch. 502.

879. —. —.]—*BRISTOW v. WARDE*, No. 146, *ante*.

880. —. —.]—Under marriage arts. £15,000 was vested in trustees on trust, together with £5,000 covenanted by the husband to be paid, to be laid out in land to be settled upon the husband for life; remainder to the wife for life, remainder to the children, subject to such powers, limitations, & provisoes, as the husband & wife, or the survivor should appoint; in default of appointment, to the children in tail; in default of issue, to the husband in fee. The husband & wife joined in a direction to the trustees, reciting their resolution to invest the trust fund in an estate lately purchased by the husband for £16,300 & directing them to deliver the said stock, etc., to him at the price they were at on the day of the purchase; which was done. The wife died. There were two daughters. The father by will reciting the purchase, & that he had not conveyed it to the uses of the settlement, & that it was not his intention that the said purchase should be an investment of the trust fund, but that the said fund, with its increase, should be taken out of his personal estate, gave £10,000 part of the trust fund, in trust to be laid out in land, to be conveyed to one daughter for life for her separate use; remainder to her children in tail; remainder to the other daughter in fee; for whom he also appointed the residue of the fund, but revoked that by codicil, reciting a portion given on her marriage:—*Held*: grandchildren are not objects of the power, but the excess only would be void, the fund with its increase was invested in the purchase; there was no appointment of the estate or money due on the covenant; the remainders, in default of appointment, are vested, subject to be divested by appointment, & will take effect as to what is ill appointed or unappointed; the share of the daughter, to whom the portion was advanced on marriage, was thereby satisfied.—*SMITH v. CAMELFORD* (LORD), *CAMELFORD* (LORD) *v. SMITH* (1795), 2 Ves. 698; 30 E. R. 848, L. C.; *previous proceedings*, sub nom. *PITT v. JACKSON* (1786), 2 Bro. C. C. 51.

*Annotations*:—*Consd.* *Lee v. Head* (1855), 1 K. & J. 620. *Refd.* *Bristow v. Warde* (1794), 2 Ves. 336; *Thornton v. Bright* (1836), 2 My. & Cr. 230; *Monypenny v. Dering* (1847), 16 M. & W. 418. *Mentd.* *Thellusson v. Woodford* (1798), 4 Ves. 227; *Bartlett v. Gillard* (1827), 3 Russ. 149; *Higby v. Howard* (1831), 4 Shin. 588.

881. —. —.]—Under a power of appointment to any one or more of the appointor's children, an appointment to E., his daughter, with limitation over to her daughter, is good as to E., though void as to the grandchild. Estates were limited to C. for his life; remainder to such one or more of his children as he should appoint; remainder, in default of appointment, to D., the first son of C., & the heirs of D.'s body. C. appointed to D. for D.'s life, remainder to a daughter of C. for her life. It being admitted that all the limitations were to be read as one conveyance, *Qu.*: whether the life estate, when vested in D., united with the estate limited to D. & the heirs of his body, under the rule in *Shelley's Case*, (1581), 1 Co. Rep. 93 b. *Semble*: the rule does not apply to such a limitation:—*Held*: if the rule were applicable, the limitations did not so unite as to displace the intervening estates; & therefore D. could not bar

these by a recovery.—*DOE d. NICHOLSON v. WELFORD* (1840), 12 Ad. & El. 61; 4 Per & Dav. 77; 9 L. J. Q. B. 334; 5 Jur. 38; 113 E. R. 734. *Annotation*:—*Refd.* *Doe d. Blomfield v. Eyre* (1846), 3 C. B. 557.

882. —. —.]—*DE LA HOOKE v. HILL*, No. 284, *ante*.

883. —. —.]—A power to appoint among such of testator's nephews & nieces grandnephews & nieces, as the donee may think fit, cannot be exercised in favour of any other than the class pointed out, unless there be some indication of the words describing the class having a more extended meaning. Accordingly, an appointment by will to a grandniece for life, & after her decease to her children is void as to the children.

Where the power is limited, in its exercise to a class, it must not be extended beyond the members of the class. Where the terms used by the donor of the power are not well defined, the ct. gladly lays hold of any indication of intention to extend its meaning (LORD LANGDALE, M.R.).—*WARING v. LEE* (1845), 8 Beav. 247; 4 L. T. O. S. 392; 9 Jur. 170; 50 E. R. 97.

884. —. —.]—*WACE v. MAILLARD*, No. 1141, *post*.

885. —. —.]—*KENNERLEY v. KENNERLEY*, No. 753, *ante*.

886. —. —.]—An appointment was made to a person not an object of a power, with remainder to an object. The first appointment being void:—*Held*: the second was not accelerated, but failed with the first.—*REID v. REID* (1858), 25 Beav. 469; 53 E. R. 716.

*Annotations*:—*Refd.* *Freeland v. Pearson* (1867), L. R. 3 Eq. 658; *Swete v. Tindal* (1874), 31 L. T. 223; *Humble v. Bowman* (1877), 47 L. J. Ch. 62; *Re Goulding's Settlement*, *Dobell v. Dutton* (1899), 48 W. R. 183.

887. —. —.]—Under an exclusive power to appoint a trust fund of stock to children & their issue born during the lives of the donees of the power, with a hotchpot clause, an appointment was made to five daughters out of nine children, whereby the trustees were directed, after the death of the parents, tenants for life, to stand possessed of the fund upon the trusts following: that is to say, upon trust thereout to appropriate one-fifth part to & for the benefit of each daughter, & to pay & apply the income of the share of each daughter for her separate use; & after the decease of each daughter upon trusts for the benefit of her children:—*Held*: the limitations over being void, the daughters took life interests only, subject to account for the value under the hotchpot clause.—*RUCKER v. SCHOLEFIELD* (1862), 1 Hem. & M. 36; 1 New Rep. 48; 32 L. J. Ch. 46; 9 Jur. N. S. 17; 11 W. R. 137; 71 E. R. 16.

*Annotations*:—*Consd.* *McDonald v. McDonald* (1875), L. R. 2 Sc. & Div. 482; *Re Oliphant's Trusts*, *Re Dixon's Will*, *Phillips v. Phelps* (1917), 86 L. J. Ch. 452; *Re West*, *Denton v. West*, [1921] 1 Ch. 533. *Refd.* *Re Harrison*, *Hunter v. Bush* (1918), 87 L. J. Ch. 433.

*See, also*, Sub-sect. 2, D. (d), *post*.

#### (c) *Executory Gift Over to Stranger.*

888. *Original gift falls on occurrence of event.* —Power to husband & wife to charge a term of years in lands with such sum or sums of money, not exceeding £200 for their two daughters, A. & B., as the husband & wife should appoint, & in failure of their joint appointment, as the survivors should appoint, with interest from such time as the term of years should commence in possession, & not before. The term was not to commence in possession until after the death of the survivor. Husband & wife, in execution of the power, direct the £200 to be equally divided between the two daughters six months after the decease of the father & mother; & if either of them died before payment,

*Sect. 1.—Excessive execution: Sub-sect. 2, D. (c), (d), (e) & (f).]*

or the money became due, then the share of her so dying to be laid out for the benefit of her exors. One of the daughters died after the appointment, & before the time of payment. This is a good appointment to the daughters themselves, & the appointment to exors. is void; but as one of the appointees died before time of payment, her share sinks into the estate. The joint appointment having appointed the whole, the share of the daughter who died is not the subject of any further appointment.—*BROWN v. NISBETT* (1750), 1 Cox, Eq. Cas. 13; 29 E. R. 1040, L. C.

*Annotation:—Reid. Webster v. Boddington* (1848), 16 Sim. 177.

**889.** —.]—By the marriage settlement of M., a copyhold of which she was seised in fee was settled on her husband B. for life & after his death to the use of M. for life, & after her death to the use of such child or children of the marriage, & for such estate or interest, & in such parts & proportions as M. by deed might appoint, & for want of such appointment to the use of all the children of the marriage as tenants in common in tail, & in default to M. in fee. M., in the lifetime of her husband, & then having two sons, made a will, by which she appointed the estate to her elder son J. & his heirs & assigns for ever, on condition that he should pay £200 to W. her second son, within a year of her husband's decease, or on W.'s attaining the age of twenty-one; but in case neither of the sons should be living at the decease of B. her husband, then she gave the estate to her father-in-law, in trust to sell & pay legacies. After the date of the will, four other children were born of the marriage. M. died in the lifetime of her husband; J. the eldest son died in his father's lifetime leaving the lessor of pltf. his youngest son & customary heir; & W. the second son died before his father.—*Held*: the lessor of pltf. was not entitled to recover. There was an implied dispensation of coverture in the power given to M. Although the appointment was not altogether void, but gave a vested defeasible estate in fee to J. the eldest son, & the appointment over to the father-in-law alone was void, yet that the event which happened defeated & put an end to the estate of J. the son.—*DOE d. BLOMFIELD v. EYRE* (1848), 5 C. B. 713; 18 L. J. C. P. 284; 10 L. T. O. S. 525; 136 E. R. 1058, Ex. Ch.

*Annotations:—Mentl. Robinson v. Wood* (1858), 27 L. J. Ch. 726; *Jones v. Davies* (1880), 28 W. R. 455; *Hurst v. Hurst* (1882), 21 Ch. D. 278; *Re Deacon's Trusts, Deacon v. Deacon, Hagger v. Heath* (1906), 95 L. T. 701; *Re Bold, Banks v. Hartland* (1926), 95 L. J. Ch. 201.

**890.** —.—.]—Testator being, under a will, tenant for life of a freehold estate, with power to appoint the same amongst his children, by his will, in execution of the power, appointed it to trustees in trust for his son A. absolutely; but, "in the event of his son dying without issue," the estate was to go over to certain persons, not the objects of the power. A. survived testator, was married, & had one child. Other benefits, out of testator's own property, were given by the will to A. :—*Held*: no case of election was raised, in favour of the persons not objects of the power, against A.—*BATE v. WILLATS* (1877), 37 L. T. 221.

*(d) Appointment to Stranger with Executory Gift Over to Object.*

**891 Appointment over takes effect if event happens.]—**Every execution of a power must have a reference to the original instrument creating that power; & whoever claims under the execu-

tion must make title under the power itself. So that where a power was given to A. on his marriage with B. to appoint to & amongst the children of the marriage in such proportions etc. & A. by will appointed to C. for life, remainder to trustees to preserve contingent remainders, remainder to the first & other sons, etc. of C., & in default of such issue to D. another child of A., it was held that C. took an estate tail.—*ROBINSON v. HARDCASTLE* (1788), 2 Term Rep. 241; 100 E. R. 131.

*Annotations:—Apld. Compe v. Barron* (1799), 4 Ves. 681. *Consd. Bray v. Bree* (1834), 8 Bli. N. S. 568. *Reid. Routledge v. Dorr* (1794), 2 Ves. 357; *Brudenell v. Elwes* (1801), 1 East, 442; *Williamson v. Farwell* (1887), 35 Ch. D. 128; *Re Abbott, Peacock v. Frigout*, [1893] 1 Ch. 54. *Mentl. Re Hewett's Settlement, Hewett v. Eldridge*, [1915] 1 Ch. 810.

**892.** —.]—An appointment exceeding the power by a limitation to objects not within the power is void as to the excess; as where the power is to appoint to children, & the appointment is to a child for life, & after his decease to his wife & children: but that void limitation shall not defeat a limitation over to an object of the power, in case such child dies without leaving a wife or child surviving.—*CROMPTE v. BARROW* (1799), 4 Ves. 681; 31 E. R. 351.

*Annotations:—Consd. Williamson v. Farwell* (1887), 35 Ch. D. 128. *Reid. Thornton v. Bright* (1836), 2 My. & Cr. 230.

**893.** —.]—A., widow, having a power of appointing a fund amongst her children, by her will appointed shares to certain of her children for life with remainder to their children; &, in case any of her children died in her lifetime, she gave the share to his or her issue; &, in case there should be no issue, the survivors of A.'s children were to take.—*Held*: the appointment to the grandchildren was void, but that the alternative gift over to the surviving children, in case any died in testatrix's lifetime without issue, was valid.—*HEWITT v. DACRE (LORD)* (1838), 2 Keen, 622; 7 L. J. Ch. 295; 2 Jur. 836; 48 E. R. 768.

*Annotation:—Distd. Ratcliffe v. Hampson* (1855), 26 L. T. O. S. 102.

**894.** —.]—Where testator, having a power of appointment over personalty, appoints a share of the fund to an object of the power upon the happening of a certain event, the appointment carries with it all the intermediate accretions to that share, whether in the shape of income or otherwise. Under a settlement made on the second marriage of M., a widow, a trust fund belonging to her was vested in a trustee upon trust for her three children, *nominalim*, in such shares as she should by deed or will appoint, & in default of appointment for such three children equally.—By her will M. appointed that the trustee of the settlement should stand possessed of the trust fund, as to one-third part thereof, upon trust to pay the income thereof to her son C., an object of the power, during his life, or until anticipation; & from & after his death or the determination of his estate, upon trust to pay the said one-third part to her grandson, not an object of the power, when he should attain twenty-one; & in case he should die before he should attain twenty-one, upon trust to pay the said one-third part to her daughter S., an object of the power. C. survived testatrix & died, the grandson being then an infant.—*Held*: although the appointment to the grandson was void, the appointment over to S. was good, & the income from C.'s death of the one-third so appointed would pass with the capital to S., if the grandson died under twenty-one; but, if that event did not happen, both income & capital would pass under the settlement as in default of appointment.—*LONG v. OVENDEN* (1881), 16 Ch.

D. 091; 50 L. J. Ch. 314; 44 L. T. 462; 20 W. R. 709.

*Annotations*:—**Consd.** *Williamson v. Farwell* (1887), 35 Ch. D. 128. **Mentd.** *Re Clements, Clements v. Pearsall*, [1894] 1 Ch. 665; *Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309.

895. —.]—*Re COULMAN, MUNBY v. ROSS*, No. 316, *ante*.

896. —.]—*WILLIAMSON v. FARWELL*, No. 182, *ante*.

(e) *Appointment of Interest in Land to Stranger with Remainder to Object.*

*See, now*, Law of Property Act, 1925 (c. 20), ss. 1, 2, 3.

897. **Appointment by will—Particular estate void—Appointment in remainder valid.**—B. by will devised certain estates to trustees, to the use of C. for life; remainder to trustees to preserve, etc.; remainder to the use of one or more of such child or children of C. for such estate & estates, & in such shares & proportions, & under & subject to such powers, provisoes, restrictions, etc., as C. should by any deed, etc., or by his last will, etc., direct, limit or appoint. C. by his will, devised the premises to trustees, to the use of his son R. for life; remainder to trustees to preserve, remainder to trustees for a term, for providing jointures & portions for the wife & children of R.; remainder to the first & every other son of R., in tail male; with remainder to testator's son G. for life, & the sons of that son, in tail male; remainder to his son W. in fee. The will contained considerable bequests of personalty to all the children:—*Held*: this was a good execution of the power, & if not good as to the children of R., the limitation to G. took effect.—*DOE d. DEVONSHIRE (DUKE) v. CAVENDISH (LORD)* (1782), 3 Doug. K. B. 48; 4 Term Rep. 741, n.; 99 E. R. 532.

*Annotations*:—**Distd.** *Robinson v. Hardcastle* (1788), 2 Term Rep. 241. **Consd.** *Griffith v. Harrison* (1792), 4 Term Rep. 737. **Expld.** *Crompte v. Barrow* (1799), 4 Ves. 681. **Held.** *Doe d. Smith v. Webber* (1818), 1 B. & Ald. 713; *Halford v. Dillon* (1820), 2 Brod. & Bing. 12; *Goldsmid v. Goldsmid* (1842), 2 Hare, 187.

898. —.]—**Whether remainder accelerated.**—Testator appointed, under a general power, real estate, & devised other real estate to his wife & her assigns during her life, & after her death to his son, with a proviso that if his wife should "do, make, or execute any deed, matter, or thing whereby she should be deprived of the rents & profits, or the power or right to receive, or the control over the same, so that her receipt alone should be sufficient discharge for the same, her life estate should cease & determine as fully & effectually as it would by her actual decease." By a codicil he gave his personal estate to his wife for life for her separate use, independently of any future husband. The wife married again without making any settlement:—*Held*: notwithstanding the limitation to her & "her assigns," & the allusion to a future husband in the codicil, the wife's life estate was forfeited by her second marriage; & the remainder both in the appointed & devised estates was accelerated.—*CHAVEN v. BRADY* (1869), 4 Ch. App. 296; 38 L. J. Ch. 345; 23 L. T. 57; 17 W. R. 505, L. C.

*Annotations*:—**Distd.** *Carr v. Atkinson* (1872), L. R. 14 Eq. 397. **Held.** *Re Kelly's Settlement*, *West v. Turner* (1888), 59 L. T. 494.

899. —.]—**Testator having power to appoint an estate to any one or more of his children by will gave it with other property of**

which he was owner in fee, to trustees for a term of one thousand years, to raise portions for grandchildren, not objects of the power, with the usual proviso for cesser in case the term should be incapable of taking effect, with remainder after the expiration of the term & in the meantime subject thereto, to G., one of his sons, an object of the power, for life, remainder to his issue in tail. The objects of the term were not satisfied:—*Held*: the will operated as an execution of the power, & G. took under the *cy-pres* doctrine an estate tail.—*LINE v. HALL* (1873), 43 L. J. Ch. 107; 29 L. T. 568; 22 W. R. 124.

*Annotation*:—**Apld.** *Re Finch & Chew's Contract*, [1903] 2 Ch. 486.

900. —.]—**Where under a special power of appointment testator appoints to the uses or trusts of an antecedent instrument or such of them as are "capable of taking effect," the phrase "capable of taking effect" may be construed as meaning what the law allows to take effect, & need not be confined to a reference to the uses or trusts which, by reason of the deaths of parties & other intervening circumstances, are still in fact existing, or capable of coming into existence; & if therefore some of the uses or trusts fail by reason of the *cestuis que trust* not being objects of the power, or by reason of the rule against perpetuities being infringed, those uses or trusts may be treated as excluded from the appointment.**—*Re FINCH & CHEW'S CONTRACT*, [1903] 2 Ch. 486; 72 L. J. Ch. 690; 89 L. T. 102.

901. **Appointment by deed—Whole appointment void.**—*BRUDENELL v. ELWES*, No. 804, *ante*.

(f) *Absolute Appointment followed by Modification.*

**Application of rule against perpetuities to powers.**—*See PERPETUITIES*, pp. 110–114, Nos. 428–492, *ante*.

902. **Absolute gift becomes indefeasible.**—(1) Power to appoint amongst children, or some or one of them, with limitations over for benefit of one or more of such children, or his or their issue. The donee of the power appointed equal shares to his daughters respectively for life, for their separate use; & then to their issue, as they, the daughters respectively, should appoint; in default, amongst the issue equally:—*Held*: subject to the life interest of the wives for their separate use, the shares appointed to the daughters belonged to them & to their husbands in their right.

(2) A. had a power of appointment over £7,150 stock: certain bonuses accrued thereon, which were laid out upon stock, upon the trusts & subject to the appointment; & after the accretion of these, A. exercised his power, but only noticed the original stock & the first bonus, thus—" & also the said sum of £715 5 per cent., etc., together with all such further additions, in the nature of profit, to be made to the said bank stock in my lifetime ":—*Held*: all the bonuses passed under the appointment.—*CARVER v. BOWLES* (1831), 2 Russ. & M. 301; 9 L. J. O. S. Ch. 91; 39 E. R. 409.

*Annotations*:—**As to** (1) **Apld.** *Kampf v. Jones* (1837), 2 Keen, 756; *Blacket v. Lamb* (1851), 14 Beav. 482; *Harvey v. Stracey* (1852), 1 Drew. 73. **Foll.** *Re Sondes' Will* (1854), 2 Sm. & G. 416. **Apld.** *Gerrard v. Butler* (1855), 20 Beav. 541. **Foll.** *Stephens v. Gadsden* (1855), 20 Beav. 463; *Woolridge v. Woolridge* (1859), John. 63. **Consd.** *Tomkyns v. Blane* (1860), 28 Beav. 422. **Distd.** *Rucker v. Scholefield* (1862), 1 Hem. & M. 36. **Consd.** *Churchill v. Churchill* (1867), L. R. 5 Eq. 44; *Re Cunynghame's Trusts* (1871), 40 L. J. Ch. 247. **Apprvd.** *McDonald v. McDonald* (1875), L. R. 2 Sc. & Div. 482.

PART VI. SECT. 1, SUB-SECT. 2.—D. (e).

d. *Appointment to stranger void—Whether limitation in default void.*—*Re ENEVER'S TRUSTS, POWER v. POWER*, [1912] 1 L. R. 511.—*IR.*

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*Sect. 1.—Excessive execution: Sub-sect. 2, D. (f),  
E., F. & G. Sect. 2: Sub-sects. 1 & 2, A.]*

**Consd.** *Bate v. Willats* (1877), 37 L. T. 221; *White v. White* (1882), 22 Ch. D. 555; *Re Holland, Holland v. Clapton*, [1914] 2 Ch. 505. **Refd.** *Kirk v. Eddowes* (1844), 3 Harc. 509; *Lassence v. Tierney* (1849), 2 H. & Tw. 115; *Cooke v. Cooke* (1887), 38 Ch. D. 203; *Re Crawshaw, Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615. **Generally**, **Refd.** *Woolaston v. King* (1869), L. R. 8 Eq. 185. **Mentd.** *Powys v. Mansfield* (1836), 6 Sim. 528; *Pym v. Lockyer* (1841), 5 My. & Cr. 29.

**903.** —.]—Where there is a valid appointment to an object of the power, with additional words of appointment in favour of the appointee's children, by which in excess of the power those children are also made appointees, so as to cut down the previous absolute interest:—**Held**: the words in excess of the power are to be altogether rejected, & the appointee, who is an object of the power, takes absolutely.—*Re SONDES' (LORD) WILL* (1854), 2 Sm. & G. 416; 65 E. R. 461.

**904.** —.]—Testator, by virtue of a power, appointed a fund to trustees for his four children, in four equal portions & subject to the trusts thereafter contained respecting his own residuary estate. Some of those trusts were to the children for life, with remainder to their children, &, as regarded the fund subject to the power, the appointment to grandchildren was void for remoteness:—**Held**: the children took absolutely in the first instance, & the subsequent attempt to limit the absolute gift being void, the children took the fund absolutely.—*STEPHENS v. GADSDEN* (1855), 20 Beav. 463; 52 E. R. 682.

**905.** —.]—Where there is an absolute appointment to A., an object of the power, followed by a qualification limiting the interest of A. to a life interest, with remainder to persons not objects of the power, the latter being void, A. takes absolutely, under the prior appointment.

Testatrix, having a power to appoint a fund to her children, appointed it in this form: Amongst my children A., B., C. & D., the share of A. to be upon the trusts of her marriage settlement, & to be paid to the trustees thereof. A. was the only person in the marriage settlement within the power:—**Held**: she took her share absolutely.—*GERRARD v. BUTLER* (1855), 20 Beav. 541; 52 E. R. 712.

**Annotation**:—**Consd.** *Re Oliphant's Trusts, Re Dixon's Will, Phillips v. Phelps* (1917), 86 L. J. Ch. 452.

**906.** —.]—Where there is an absolute appointment by will in favour of a proper object of the power, & that appointment is followed by attempts to modify the interest so appointed, in a manner which the law will not allow, the ct. reads the will as if all the passages in which such attempts are made were swept out of it, for all intents & purposes, *i.e.*, not only so far as they attempt to regulate the *quantum* of interest to be enjoyed by the appointee in the settled property, but also, so far as they might otherwise have been relied upon as raising a case of election.—*WOOLRIDGE v. WOOLRIDGE* (1859), John. 63; 28 L. J. Ch. 689; 33 L. T. O. S. 254; 5 Jur. N. S. 566; 70 E. R. 340.

**Annotations**:—**Foll.** *Churchill v. Churchill* (1867), L. R. 5 Eq. 44. **Consd.** *Bate v. Willats* (1877), 37 L. T. 221. **Dist.** *White v. White* (1882), 22 Ch. D. 555.

**907.** —.]—Testator, in exercise of a special power, appointed a fund to his three daughters, who were objects of the power, their exors., administrators, & assigns, in equal shares, & he gave his residuary personal estate to the same daughters in equal shares, & he directed the share to which each daughter should become entitled under his will & the appointment to be held in trust for the daughter for life, with remainder for

her children, who were not objects of the power:—**Held**: the daughters took absolute interests in the appointed fund, & no case of election was raised against them in favour of their children.—*CHURCHILL v. CHURCHILL* (1867), L. R. 5 Eq. 44; 37 L. J. Ch. 92; 16 W. R. 182.

**Annotations**:—**Dist.** *Cooper v. Cooper* (1874), L. R. 7 H. L. 53. **Consd.** *Roach v. Trood* (1876), 3 Ch. D. 420; *Pitman v. Crum Ewing*, [1911] A. C. 217.

**908.** —.]—A gift absolute & completed in terms under a power of appointment to an object of the power is not cut down by a superadded direction or condition which is void as being an excessive execution unless such direction or condition is not severable from the absolute gift.—*Re OLIPHANT'S TRUSTS, Re DIXON'S WILL, PHILLIPS v. PHELPS* (1916), 86 L. J. Ch. 452; 116 L. T. 115.

*E. Excess as to Interest.*

**909.** **Appointment valid pro tanto.**—**PETERS v. MOREHEAD** (1731), Fortes. Rep. 339; Fitz-G. 156; 92 E. R. 880.

**910.** —.]—*Re HINDLE'S TRUST*, No. 559, *ante*.

*F. Maintenance and Advancement.*

**Maintenance & advancement generally.**—**See** *INFANTS*, Vol. XXVIII., pp. 216 *et seq.*

**911.** **Power of maintenance—Appointment to parent not authorised.**—**CHESTER v. CHADWICK**, No. 184, *ante*.

**912.** —.]—Power to appoint to children, "with such directions or regulations for maintenance, education & advancement as their mother should appoint." The mother appointed the income to the children's father until the youngest attained twenty-one "in or towards the maintenance & education" of all her children:—**Held**: the appointment was invalid.—*LLOYD v. LLOYD* (1858), 26 Beav. 96; 53 E. R. 833.

**Annotations**:—**Consd.** *Re Greenslade, Greenslade v. McCowen*, [1915] 1 Ch. 155. **Refd.** *Re Jolcoy, Jolcoy v. Elliott* (1915), 113 L. T. 437.

**913.** — **Express power to appoint to husband—Husband entitled in absence of children.**—A wife had under a settlement a power to appoint the income of a fund to her husband so long as he should continue a widower, with a proviso that he was to apply it to the maintenance of her children:—**Held**: the husband took a beneficial interest under an appointment by the wife, & was entitled to the income of the fund till he married again, though there were no children of the wife.—*Re MAIN'S SETTLEMENT* (1866), 15 W. R. 216.

**914.** **Power of advancement—Settlement on marriage of child.**—A power of advancement for putting or placing the issue of the marriage "to any profession, trade or business, or for their advancement in life":—**Held**: to authorise the payment of part of the trust funds to a daughter on her marriage.—*LLOYD v. COCKER* (1860), 27 Beav. 645; 29 L. J. Ch. 513; 2 L. T. 9; 6 Jur. N. S. 336; 8 W. R. 252; 54 E. R. 256.

**Annotation**:—**Dist.** *Roper-Curzon v. Roper-Curzon* (1871), 24 L. T. 406.

**915.** —.]—A power in a marriage settlement to advance to a son of the marriage part of the trust funds for placing or establishing him in any business, profession, or employment, or otherwise for his advancement or preferment in the world:—**Held**: to authorise the payment of part of the trust fund to the trustees of a post-nuptial settlement made by a son in favour of himself & his wife & the issue of their marriage, neither the son nor his wife being entitled to any property producing an immediate income, & the son being

engaged in study, preparatory to entering the legal profession.—*ROPER-CURZON v. ROPER-CURZON* (1871), L. R. 11 Eq. 452; 24 L. T. 406; 19 W. R. 519.

**916.** — Advance to husband of child to set up in trade.]—A power in a will for trustees to apply a certain proportion of a fund, settled for the separate use of a married woman for life, with remainder for her children, at any period of her life for her advancement or benefit:—*Held*: under special circumstances, to authorise an advance to her husband, on his personal security, for the purpose of setting him up in trade.—*Re KERSHAW'S TRUSTS* (1868), L. R. 6 Eq. 322; 37 L. J. Ch. 751; 18 L. T. 899; 16 W. R. 963.

*Annotation*:—*Consd. Molyneux v. Fletcher*, [1898] 1 Q. B. 648.

**917.** — Advance to pay debts of child's husband.]—A power of advancement for setting up the children of testator in business will not justify trustees in advancing the share of a married daughter for the purpose of paying her husband's debts.—*TALBOT v. MARSHFIELD* (1868), 3 Ch. App. 622; 37 L. J. Ch. 52; 19 L. T. 223; 32 J. P. 725, L. J. J.

*Annotation*:—*Folld. Molyneux v. Fletcher*, [1898] 1 Q. B. 648.

**918.** — —.]—Testator bequeathed his estate to trustees on trust to pay the income to his children in equal shares, & gave power to the trustees to apply "in or towards the advancement in life of each child a sum not exceeding £500 of his or her presumptive share." The trustees were to be the sole judges of the advisability of such payment & of the signification of the term "advancement in life." After the share of a married daughter had become vested, the trustees at her request advanced £250 to her under this power with knowledge that the sum so advanced would be used to pay a debt due from her husband to one of the trustees:—*Held*: this was not a *bonâ fide* exercise of the power, & was therefore a breach of trust. *Semle*: there was no power to make any advance after the share had become vested.—*MOLYNEUX v. FLETCHER*, [1898] 1 Q. B. 648; 67 L. J. Q. B. 392; 78 L. T. 111; 46 W. R. 576; 14 T. L. R. 211; 42 Sol. Jo. 254.

**919.** — Advance to pay debts of child.]—Testator, bequeathed a fund upon trust for L. during his life, & after his decease for his children as he should by will appoint, & in default of appointment for his children, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares. Testator empowered the trustees, at any time or times during the life of L., to apply any part of the fund not exceeding one moiety in or towards the preferment or advancement of L. or otherwise for his benefit as the trustees should in their discretion think fit. At the date of the will L. was thirty years of age, & had been married for nearly three years:—*Held*: the trustees might apply one moiety of the trust fund in payment of debts incurred by L., the interest on which absorbed nearly the whole of L.'s income, & the principal of which he was unable to pay out of his own resources.—*LOWTHER v. BENTINCK* (1874), L. R. 19 Eq. 166; 44 L. J. Ch. 197; 31 L. T. 719; 23 W. R. 156.

*Annotations*:—*Consd. Molyneux v. Fletcher*, [1898] 1 Q. B. 648. *Reid. Re Breed's Will* (1875), 1 Ch. D. 226; *Re Brittlebank*, *Coates v. Brittlebank* (1881), 30 W. R. 99; *Re Stanger*, *Moorsom v. Tate* (1891), 60 L. J. Ch. 326. *Mentd. Re Price* (1887), 34 Ch. D. 603.

**920.** — After vesting of share.]—*MOLYNEUX v. FLETCHER*, No. 918, *ante*.

#### G. Delegation of Powers.

*See* Part IV., Sect. 2, sub-sect. 2, B., *ante*.

### SECT. 2.—DEFECTIVE EXECUTION.

#### SUB-SECT. 1.—IN GENERAL.

*See* EQUITY, Vol. XX., pp. 251 *et seq.*

**921.** Principle on which court acts.]—*CHAPMAN v. GIBSON*, No. 947, *post*.

**922.** — Prejudice of same appointee taking under later appointment.]—Husband & wife having, by virtue of their marriage settlement a joint power of appointment amongst their children over £6,000, to be paid in such manner & at such times, made a defective appointment, the attestation omitting the word "signed," of it to their daughter, in such manner that the interest should be for life, & the principal should be subject to her disposal by will. The husband died & the wife, who by the settlement had a similar power if she survived, & there had been no joint appointment, subsequently appointed the said sum unto her daughter absolutely:—*Held*: the trustees should convey the £6,000 to the daughter absolutely, for the ct. would not aid a defective appointment, which would be to the prejudice of the same appointee who took under both appointments.—*HARE v. LEACH* (1843), 7 Jur. 120.

#### SUB-SECT. 2.—POWERS INVALIDLY EXERCISED AT LAW.

##### A. Essential Conditions.

**923.** Intention to appoint must be established.]

—Where testator refers to a power, but does not legally execute it, but has other estates, to which the will can apply, the defect of the execution cannot be supplied: though where he could not make the gift but by virtue of the power, he shall be supposed to have intended to execute it, & therefore the defect shall be supplied.—*LOWSON v. LOWSON* (1791), 3 Bro. C. C. 272; 20 E. R. 532, L. C.

**924.** —.]—By a marriage settlement, moneys in the funds, moneys lent on mtge. & other property, were assigned to trustees upon trust to pay & transfer the same unto such persons, for such estates or interests, either absolutely or conditionally, & in such parts, shares & proportions, manner & form, & under & subject to such powers, provisos, etc., either for the benefit of the issue of the intended marriage, or of any other persons whomsoever, as the wife, notwithstanding her coverture, at any time or times, & from time to time during the joint lives of herself & her husband, should, by & with the consent & approbation of her husband, testified in writing under his hand & seal, or as the wife alone, after the decease of the husband, in case she should survive him, should by any deed or writing, to be sealed & delivered by her in the presence of & attested by two or more witnesses, direct or appoint; & in default of such direction or appointment, & in the meantime & until such direction or appointment should be made & executed, & subject thereto, & as to so much of the said trust moneys,

#### PART VI. SECT. 2, SUB-SECT. 1.

a. What is defective execution.]—  
Defective execution is where there

has been an intention to execute, & that intention sufficiently declared.—  
*SHANNON v. BRADWYRE* (1803), 1 Sch. & Lef. 52.—*IR.*

1. Equity will not aid volunteers.]—  
*COOKE v. NUNN* (1830), 4 Ir. L. Rec. N. S. 136.—*IR.*

*Sect. 2.—Defective execution: Sub-sect. 2, A., B. & C. (a) & (b).]*

etc., whereof no such direction or appointment should be made, upon trust, to receive the annual proceeds due, & to grow due, for or in respect of the same, & pay the same to such persons as the wife, during her life, notwithstanding her coverture, & whether sole or covert, should from time to time, by any writing or writings under her hand, direct or appoint to receive the same, & in default of such direction or appointment into the proper hands of the wife for her separate use. The moneys in the funds were transferred to the husband by virtue of powers of attorney, under the hand & seal of the wife, with the consent of the husband under his hand & seal, & attested by two witnesses; & the mtge. money was received & a receipt given by the husband & wife, & the premises reconveyed, & the receipt & reconveyance also so attested:—*Held*: (1) the powers of attorney were not directions, but were merely authorities to the bankers by the wife to assign the stock to her husband, & only enabled the bankers to do for her what she might have done for herself, without their intervention. As the directions must follow on the authorities before the authorities could be acted on, it still remained to make the appointment after the execution of the powers of attorney, & the transfers made subsequently to such execution, being unaccompanied by any of the formalities required by the settlement, could not have the effect of converting instruments of substitution into instruments of alienation, & could not operate as executions of the power of appointment; (2) the wife had no power to dispose of the trust funds otherwise than by a perfect appointment; (3) in order to constitute a purchaser in whose favour a defective execution of a power will be aided in equity, there must be a consideration & an intention to purchase, either proved or to be presumed; & the maintenance of his household & establishment by the husband does not furnish such consideration to the wife.—*HUGHES v. WELLS* (1852), 9 Hare, 749; 20 L. T. O. S. 136; 16 Jur. 927; 68 E. R. 717.

*Annotations*:—*As to* (1) *Reid*. *Vaughan v. Vanderstegen* (1853), 2 Drew. 165; *Johnson v. Gallagher* (1861), 3 De G. F. & J. 494; *Shattock v. Shattock* (1866), 14 L. T. 452; *London Chartered Bank of Australia v. Lemprero* (1873), L. R. 4 P. C. 572; *Re Harvey's Estate*, *Godfrey v. Harben* (1879), 13 Ch. D. 216; *Re Armstrong, Ex p. Gilchrist* (1886), 17 Q. B. D. 521; *Re Whitaker, Ainley v. Ainley* (1897), 41 Sol. Jo. 209. *Generally*, *Mentd.* *Campbell v. Ingilby* (1857), 29 L. T. O. S. 287.

*925.* ———.]—*GARTH v. TOWNSEND*, No. 517, *ante*.

*926.* ———.]—A lady, having power to appoint a fund by deed to be sealed & delivered & attested by one witness, in Jan. 1870, signed an unattested memorandum, stating her wish that if she died suddenly her eldest son should have the fund, & that her intention was to make it over to him legally if her life was spared. She died in Mar. 1870, after two days' illness:—*Held*: her intention to appoint the property by this memorandum was sufficiently clear, & the ct. would give effect to the memorandum as an execution of the power.—*KENNARD v. KENNARD* (1872); 8 Ch. App. 227; 42 L. J. Ch. 280; 28 L. T. 83; 21 W. R. 206, L. J.

*Annotation*:—*Consd.* *Re Kirwan's Trusts* (1883), 25 Ch. D. 373.

*927.* ———.]—A lady being, under four several instruments, the donee of powers of appointment amongst her three daughters, by four several deeds poll appointed one-third of the several properties, subject to the powers, to one daughter, & died

without otherwise having exercised any of the powers. One only of the instruments creating the powers contained a hotchpot clause:—*Held*: upon the evidence, there was shown on the part of the appointor a clear & manifest intention to produce an equality between the three daughters, & the three deeds poll must be rectified by the insertion of clauses in the nature of hotchpot clauses.—*KILLICK v. GRAY* (1882), 46 L. T. 583.

*928. Necessity for good consideration.*—[Equity aids a defective execution of a power, if for a valuable consideration, & this against a remainderman, or one not claiming under the power.—*COTTER v. LAYER* (1731), 2 P. Wms. 623; 24 E. R. 887, L. C.

*Annotations*:—*Reid*. *Re Walker, MacColl v. Bruce*, [1908] 1 Ch. 560. *Mentd.* *Godwin v. Kilshe* (1769), Amb. 684; *Mayer v. Gowland* (1779), 2 Dick. 563; *Brydgos v. Chandos* (1794), 2 Ves. 417; *Vawser v. Jeffery* (1810), 16 Ves. 519; *Vawser v. Jeffery* (1828), 3 Russ. 479.

*929.* ———.]—I am of opinion this ct. ought to aid the defects in the execution of a power, where it is for a valuable consideration, as for the payment of debts, or younger children's portions (*LORD HARDWICKE, C.*)—*WILKIE v. HOLME* (1752), 1 Dick. 165; 9 Mod. Rep. 485; 21 E. R. 232, L. C.

*Annotations*:—*Reid*. *Tatnall v. Hankey* (1838), 2 Moo P. C. C. 342; *Re Kirwan's Trusts* (1883), 25 Ch. D. 373.

*930.* ———.]—*HUGHES v. WELLS*, No. 924, *ante*.

*B. In respect of What Matters Equity will Relieve.*

*931. Defects in manner of execution.*—[*THIN v. THIN* (1650), 1 Rep. Ch. 162; 21 E. R. 538.

*932.* ———.]—Where a power is reserved to be executed by deed, in the presence of three witnesses. It is by marriage settlement executed, but the deed is attested by only two, this shall be supplied.—*WADE v. PAGET* (1784), 1 Bro. C. C. 363; 1 Cox, Eq. Cas. 74; 28 E. R. 1180, L. C.

*Annotations*:—*Reid*. *Carver v. Richards* (1859), 27 Beav. 488; *Minchin v. Minchin* (1871), 19 W. R. 993. *Mentd.* *Solby v. Alston* (1797), 3 Ves. 339.

*933.* ———.]—A ct. of equity relieves against a defective execution of a power, only when the defect consists in the want of some circumstance in the manner of execution; & it will reform a deed where the intention of the parties is mistaken by the drawer, but will not correct an error in an instrument occasioned by the ignorance of the parties in matter of law.—*COCKERELL v. CHOLMELEY* (1830), 1 Russ. & M. 418; *Taml.* 435; 39 E. R. 161; *affd.* (1832), 6 Bli. N. S. 120, H. L.

*Annotations*:—*Mentd.* *Doe d. Blewitt v. Phillips* (1841), 1 Q. B. 84; *Doe d. Strickland v. Woodward* (1847), 21 Exch. 273; *Kekewich v. Marker* (1851), 3 Mac. & G. 311; *Buckley v. Howell* (1861), 29 Beav. 546.

*934.* ———.]—*Formality a substantial condition of exercise.*—[*MARTIN v. MITCHELL. MARTIN v. PELLE*, No. 265, *ante*.

*935.* ———.]—*HOPKINS v. MYALL*, No. 295, *ante*.

*936.* ———.]—A. was indebted to B. on a bond for £1,500. Upon the marriage of B. to C. this bond was assigned to a trustee for B. for life, for her separate use, without restraint, on anticipation, & after her decease for the children of the marriage; & in default of children, for such persons as B. should by deed, attested by two witnesses, appoint, & in default of appointment, for her next of kin. B. & C. afterwards, in 1832 & 1836, received a part of the debt. C. having opened a banking account with E., F., G. & H. became indebted to them for advances, & they, being anxious to have B.'s guarantee, prepared a letter to which C. obtained B.'s signature. The letter was dated in Apr. 1843, & stated that in considera-



tion of the bankers having advanced money to her husband, B. guaranteed the repayment thereof upon demand to the extent of £900 & deposited the bond as a collateral security, which bond she undertook to assign to them, at her expense, when called upon to do so. The bond was accordingly deposited with the bankers. In Nov. 1842, K. had been appointed trustee of the settlement. In 1844, B. took out administration to A. who was then dead. In 1846 the banking partnership was changed, E. & F., remaining in the firm, & having two new partners, L. & M. C. became bkpt. E., F., L. & M. instituted a suit for the purpose of enforcing their claim against the bond debt, claiming a right to have a legal appointment by B. in their favour, there being no children of the marriage, & charging K. with wilful default in not recovering the moneys already paid on the bond to C.:—*Held*: the life interest of B. was charged by the letter of Apr. 1843, with the balance due in 1846, when the banking firm was changed; but the bill, so far as it sought to charge K. with wilful default, was dismissed with costs.

The ct. will aid the defective execution of a power in favour of a creditor, or a purchaser, & it will do so, although the donee of the power be a married woman. But the ct. in such cases must be satisfied that the formalities which have not been observed, are no more than matters of form, & that the donee of the power has not by their non-observance been deprived of any of the protection which a due exercise of the power would have afforded her; & the ct. looks with especial jealousy on a transaction in which the wife may have acted under the influence of her husband (PARKER, V.-C.).—THACKWELL v. GARDINER (1851), 5 De G. & Sm. 58; 21 L. J. Ch. 777; 19 L. T. O. S. 101; 16 Jur. 588; 64 E. R. 1017.

**937. Power to appoint by deed exercised by will.**—SNEED v. SNEED, No. 263, *ante*.

**938.** —.—]—BUCKELL v. BLENKHORN, No. 287, *ante*.

**939.** —.—]—COOPER v. MARTIN, No. 341, *ante*.

**940. Power to appoint by will exercised by deed.**—REID v. SHERGOLD, No. 269, *ante*.

**941. Creation of estate tail by will.**—MARLBOROUGH (DUKE) v. GODOLPHIN (LORD), No. 22, *ante*.

### C. Who May Claim Relief.

#### (a) Purchasers for Value.

**942. Right to relief.**—COTTER v. LAYER, No. 928, *ante*.

**943.** —.—]—A ct. of equity will dispense with the form of the instrument by which an appointment in pursuance of a power is made.

As this is a covenant for valuable consideration for a thing to be done, this ct. ought to take it as done (LORD HARDWICKE, C.).—SERGISON v. SEALEY (1742), 9 Mod. Rep. 390; 2 Atk. 412; 88 E. R. 526.

*Annotations*:—*Distd.* Moodle v. Reid (1816), 1 Madd. 516. *Mentd.* Amesbury v. Brown (1750), 1 Ves. Sen. 477; Oxenden v. Compton (1793), 4 Bro. C. C. 231; Burgess v. Mawbey (1823), Turn. & R. 167; *Re* Walden, *Ex p.* Bradbury (1839), 4 Deac. 202; Cole v. Stutely (1842), 6 Jur. 314; Price v. Borington (1851), 3 Mac. & G. 486; Jacobs v. Richards (1854), 23 L. J. Ch. 557; Elliot v. Ince (1857), 7 De G. M. & G. 475; Hill v. Clifford, Clifford v. Timms, Clifford v. Phillips, [1907] 2 Ch. 236; Bird v. Koop, [1918] 2 K. B. 692; York Glass Co. v. Jubb (1925), 134 L. T. 36.

**944.** —.—]—THACKWELL v. GARDINER, No. 930, *ante*.

**944a.** —.—]—HUGHES v. WELLS, No. 924, *ante*.

**945. — Contract for sale.**—Under a settlement certain lands stood limited to such uses as D. should by deed appoint, & subject thereto to the use of D. & the heirs of his body, with remainders over. D. was also absolutely entitled in fee to certain other lands. A railway co. required part both of the settled estate & of the lands to which D. was absolutely entitled. By an agreement not under seal, made between D. & two of the directors of the co., after reciting that D. was owner of certain lands, part of which, being those specified in the schedule thereto, were required by the co., & that the purchase-money & compensation to be paid to D. in respect of the taking of such lands had not been ascertained, & that it had been agreed to refer those matters to arbitrators & an umpire therein named, the parties thereto bound themselves to abide by the determination of the arbitrators & umpire. The schedule comprised the lands required by the co., without any distinction as to the titles under which they were respectively held; & a single sum was awarded to D. as the purchase-money for the whole thereof. Before any conveyance was executed, D. died:—*Held*: the agreement operated in equity as an execution of the power of appointment in the settlement; & the purchase-money was payable to the legal personal representative of D. as part of his personal estate.

The question which arises on this petition is, whether in the events I am about to mention, a ct. of equity will treat a contract entered into by testator as an execution of a general power of appointment by deed. . . . He contracted to sell at a price to be found by arbn.; the price has been found: & that constitutes a good contract (ROMILLY, M.R.).—*Re* DYKES' ESTATE (1869), L. R. 7 Eq. 337; 20 L. T. 292; 17 W. R. 658.

**946. — Mortgage.**—By a deed, disentail & resettlement of certain real estates, power was given to the father & son, & for the son if he should survive, to mortgage the estate to raise such sums as might be requisite to redeem several prior mtges. The father & son exercised their joint power of appointment, creating various charges. The son was the survivor, & he mortgaged the estates to plfts. to secure a sum of £600 advanced at various times to the grandfather, father, & son, during the lifetime of the two former, on the faith of an agreement that those sums should be secured to them by a mtge.:—*Held*: this mtge. was a valid execution of the power, & compound interest allowed as provided for by the prior charges.—GEPP v. MAJENDIE (1800), 21 L. T. 168.

#### (b) Creditors.

**947. Right to relief.**—Surrender supplied for a wife against a distant heir not provided for by testator, though provided for *abunde*.

Whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the ct. will operate upon the conscience of the heir, to make him perfect this intention. . . . Very early, where testator showed an intention to provide for debts, this ct. would supply the defect against the heir (LORD ALVANLEY, M.R.).—CHAPMAN v. GIBSON (1791), 3 Bro. C. C. 229; 29 E. R. 505.

*Annotations*:—*Consd.* Innes v. Sayer (1849), 18 L. J. Ch. 274. *Mentd.* Fielding v. Winwood (1809), 16 Ves. 90; Crabb v. Crabb (1831), 1 My. & K. 511.

### PART VI. SECT. 2, SUB-SECT. 2.—B.

**937 i. Power to appoint by deed exercised by will.**—SHORE v. SHORE

(1891), 21 O. R. 54.—CAN.

**940 i. Power to appoint by will exercised by deed.**—BROWN v. CHAMBERS (1832), Hayes, 597.—IR.

**940 ii.** —.—]—WATSON v. MAJORIBANKS (1837), 15 Sh. (Cl. of Sess.) 586; 12 Fac. Coll. 553.—SCOT.



*Sect. 2.—Defective execution: Sub-sect. 2, C. (b), (c) & (d). Sect. 3: Sub-sect. 1.]*

948. —.]—THACKWELL v. GARDINER, No. 936, *ante*.

(c) *Charities.*

Charities generally, see CHARITIES, Vol. VIII., pp. 241 *et seq.*

949. *Right to relief.*—An appointment by a tenant in tail to a charity, shall bind the reversioner. Statute of Charitable Uses supplies all defects of assurance, which the donor was capable of making. —A.-G. v. BURDET (1717), 2 Vern. 755; 23 E. R. 1093.

*Annotation:—Mentd.* A.-G. v. Hickman (1731), Kel. W. 34.

950. —.]—INNES v. SAYER, No. 599, *ante*.

(d) *Persons to Whom Appointor under Moral Obligation.*

951. *Children.*—FOTHERGILL v. FOTHERGILL (1702), Freem. Ch. 256; 1 Eq. Cas. Abr. 222; 22 E. R. 1194.

952. —.]—A ct. will never supply such defective executions of a power, unless when executed for a valuable consideration, or in support of, or as maintenance for, wife & children (LORD HARDWICKE, C.).—BLAND v. BLAND (1745), 2 Cox, Eq. Cas. 349; 9 Mod. Rep. 478; 30 E. R. 161, L. C.

*Annotations:—Mentd.* Gibson v. Rogers (1750), Amb. 93; Cunliffe v. Cunliffe (1770), Amb. 686; Pierson v. Garnet (1786), 3 Bro. C. C. 38; Sprango v. Barnard (1789), 2 Bro. C. C. 585; Mallin v. Kelghley (1795) 2 Ves. 529.

953. —.]—JONES v. CLOUGH, No. 258, *ante*.

954. —.]—The defective execution of a power aided in favour of an eldest against younger children, also provided for; probate held not to be conclusive proof that instruments, so far as they affect real estates, are of a testamentary character.—HUME v. RUNDALL (1822), 6 Madd. 331; 56 E. R. 1117.

*Annotation:—Follid.* Morse v. Martin (1865), 34 Beav. 500.

955. —.]—Testator gave his widow a power of appointment amongst his children over a fund, which, in default of appointment, was given between them, but the shares of daughters to be for their separate use for life, with remainder to their children. The widow, by a will not executed with the formalities required by the power, gave the fund to the children equally. The ct. supplied the formalities.—LUCENA v. LUCENA (1842), 5 Beav. 249; 49 E. R. 573.

*Annotations:—Follid.* Morse v. Martin (1865), 34 Beav. 500. *Refd.* Re Kirwan's Trusts (1883), 25 Ch. D. 373.

956. —.]—A father, under a power to appoint to his children, appointed a share to a daughter for life, for her separate use, with remainder as she should by will appoint:—*Held*: this was a good execution of the power.

The ct. aided the defective execution of a power in favour of a daughter, as against her brothers, who, in default of appointment, would participate in the property.—MORSE v. MARTIN (1865), 34 Beav. 500; 55 E. R. 728.

*Annotation:—Refd.* Re Walker, MacColl v. Bruce, [1908] 1 Ch. 560.

957. —.]—A will made by the donee of a special power to appoint by deed, though it shows that the donee supposed the power to have been extinguished, & purports to be an execution of

an invalid power, & of all other powers enabling in that behalf, & though it appoints to persons, some of whom are strangers to the power, is a defective execution which equity will aid in favour of a child otherwise provided for, & to the prejudice of other children entitled in default of appointment.

The donee of a power to appoint by deed among the children of her first marriage, who were entitled to the estate in equal shares in default of appointment, executed deeds which she erroneously supposed to have extinguished that power & conferred upon her an unlimited testamentary power. By her will made during her second coverture, expressly in pursuance of the testamentary power, & of every other power enabling her in that behalf, she appointed the estate to her eldest son, charged with a sum for the benefit, in equal shares, of all her other children of both marriages:—*Held*: the will operated as an exercise of the power to appoint by deed among the children of the first marriage.—BRUCE v. BRUCE (1871), L. R. 11 Eq. 371; 40 L. J. Ch. 141; 24 L. T. 212.

*Annotation:—Refd.* Re Kerr's Trusts (1877), 25 W. R. 390.

958. —.]—The defective execution of a power of appointment will be aided by the ct. even though there has been a prior valid appointment by will.

A domiciled Scotswoman, having a power to appoint among children by will or codicil attested by two witnesses, appointed the whole fund by will to her three daughters. Subsequently, by codicil, which was unattested but which was valid according to the law of Scotland, she appointed part of the fund to her sons:—*Held*: the ct. would aid the defective execution of the codicil in favour of the sons, & so as to revoke the will to the extent to which the codicil effectively interfered with the dispositions of the will.—*Re* WALKER, MACCOLL v. BRUCE, [1908] 1 Ch. 560; 77 L. J. Ch. 370; 98 L. T. 524; 52 Sol. Jo. 280.

959. *Not natural child.*—Defective execution of a power refused to be supplied in favour of a natural son against persons claiming under a subsequent valid execution of it.—BRAMHALL v. HALL (1764), 2 Eden, 220; Amb. 467; 28 E. R. 882.

*Annotation:—Refd.* Wright v. Englefield (1764), Amb. 468.

960. *Not husband.*—MOODIE v. REID (1810), 1 Madd. 516; 56 E. R. 189.

*Annotations:—Refd.* Stanhope v. Keir (1824), 2 L. J. O. S. Ch. 166; Lempiere v. Valpy (1832), 6 Sim. 108; Allen v. Breshaw (1835), 1 Curt. 110; Butler v. Burt (1836), 6 Nev. & M. E. R. 281; Burdett v. Spilsbury, Skynner v. Spilsbury (1843), 10 Cl. & Fin. 340; Vincent v. Sodor & Man (Bp.) (1849), 8 C. B. 905; Hughes v. Wells (1852), 9 Hare, 749.

960a. —.]—HUGHES v. WELLS, No. 924, *ante*.

960b. *Wife.*—BLAND v. BLAND, No. 952, *ante*.

### SECT. 3.—FRAUDULENT APPOINTMENTS.

#### SUB-SECT. 1.—IN GENERAL.

961. *Power must be exercised bonâ fide.*—Estate settled on marriage upon the husband & wife for their lives, remainder to such child or children as the husband, with the consent of the trustees, should appoint; & in default of appointment, to the first & other sons in tail. The father,

#### PART VI. SECT. 3, SUB-SECT. 1.

961i. *Power must be exercised bonâ fide.*—Notwithstanding the rule that the appointor under a power must at the time of the exercise of that power, & for any purpose for which it is used, act with good faith, & with an entire & single view to the real purpose &

object of the power, & not for the purpose of accomplishing or carrying into effect any object beyond the purpose & interest of the power, when an arrangement in pursuance of which the appointment of a reversionary estate is made, is such that in substance the appointee gets the full value of the

reversion, & the fact that the appointor derives a benefit corresponding to the value of his life estate is not sufficient to invalidate the appointment.—GIBBERT v. STANTON (1905), 2 C. L. R. 447.—*AUS.*

961ii. —.]—REDMAN v. PERMANENT TRUSTEE CO. OF NEW SOUTH

with the consent of the surviving trustee, appointed to his youngest son. Bill by the eldest son to set aside the appointment, for misrepresentation & imposition on the trustee. The trustee's evidence was read to prove the imposition; but the father's evidence, to prove no misrepresentation or imposition, was rejected. The appointment was set aside.

The power is to be considered as a trust to be executed with discretion (LORD HARDWICKE, C.).—SCROGGS v. SCROGGS (1755), Amb. 272; 27 E. R. 182, L. C.

*Annotations*.—*Reid*. Topham v. Portland (1863), 1 De G. J. & Sm. 517; Viant v. Cooper (1897), 76 L. T. 768.

962. —[No point is better established than that a person having a power must execute it *bonâ fide* for the end designed, otherwise it is corrupt & void (LORD NORTHINGTON, LORD KEEPER).—ALFYN v. BELCHIER (1758), 1 Eden, 132; 28 E. R. 634.

*Annotations*.—*Apd.* Topham v. Portland (1863), 31 Beav. 525. *Reid*. Daubeny v. Cockburn (1816), 1 Mer. 620; Rowley v. Rowley (1854), 2 Eq. Rep. 241; Saunders v. Shatto, (1905) 1 Ch. 126.

963. —[The donee . . . shall at the time of the exercise of that power & for any purpose for which it is used, act with great faith & sincerity. & with an entire & single view to the real purpose & object of the power & not for the purpose of accomplishing or carrying into effect any bye or sinister object, I mean sinister in the sense of its being beyond the purpose & intent of the power, which he may desire to effect in the exercise of the power (LORD WESTBURY, C.).—PORTLAND (DUKE) v. TOPHAM (LADY) (1864), 11 H. L. Cas. 32; 10 Jur. N. S. 501; 12 W. R. 697; 11 E. R. 1242; *sub nom.* PORTLAND (DUKE) v. TOPHAM (LADY), BENTINCK (LADY) v. TOPHAM (LADY), BENTINCK (LORD) v. TOPHAM (LADY), 34 L. J. Ch. 113; 10 L. T. 355, H. L.; *reversing*. S. C. *sub nom.* TOPHAM (LADY) v. PORTLAND (DUKE) (1862), 31 Beav. 525.

*Annotations*.—*Consd.* *Re* Holland, Holland v. Clapton, [1914] 2 Ch. 595. *Reid*. Ranking v. Barnes (1864), 3 New Rep. 660; Cooper v. Cooper (1869), 5 Ch. App. 203; Thacker v. Key (1869), L. R. 8 Eq. 408; *Re* Hulsh's Charity (1870), L. R. 10 Eq. 5; Palmer v. Locke (1880), 15 Ch. D. 294; Whelan v. Palmer (1888), 39 Ch. D. 648; Viant v. Cooper (1897), 76 L. T. 768; Molyneux v. Mitcher, [1898] 1 Q. B. 648; Saunders v. Shatto (1904), 91 L. T. 282; A. G. v. Richmond (No. 1), [1908] 2 K. B. 729; Cloutte v. Storey, [1911] Ch. 18. *Mentd.* Extington v. Lamb (1867), 15 L. T. 657; Preston v. Preston (1869), 21 L. T. 346; *Re* Somers, Cocks v. Somerset (1895), 39 Sol. Jo. 705.

964. Exercise must be strictly in accordance with power.—PORTLAND (DUKE) v. TOPHAM (LADY), No. 963, *ante*.

965. —[Whatever might be the intention of the donor, a power can be exercised only in accordance with, & within the limits expressed by, the deed. Where a power did not authorise a suspension of the enjoyment of the income of a fund, an appointment by which a part of such income was to be accumulated was held void.

In considering the validity of an appointment, the ct. cannot inquire into the motive of the donee, but it can & will inquire into his intention or purpose. If an appointment, however capricious, were made under an absolute power, it would be upheld, while if an ulterior object existed, conducing to the appointment, it would be set aside.

By virtue of an indenture, dated June 24, 1843, a sum of £52,000 stock was vested in trustees for Lady H. & Lady M., as the settlor, or the then Duke of P. should appoint; & in default of appointment the trustees were to pay the income of the fund to the two ladies equally during their joint lives, & to the survivor during her life; & on the death of the survivor the capital to be for the benefit of the then duke. Under another deed dated the 24th Nov. 1848, an annuity of £2,720 charged by the late duke upon his real estate, was to be paid by Lady H. & Lady M., as the duke during his life & after his decease Lord H., & after the decease of both the first representative of the survivor should appoint, in default of appointment to the two ladies equally during their joint lives; in case only one should survive the late duke, or in case both survived him, to pay to the survivor of the two ladies, or to each of them, an annuity of £1,360 during her life. The object of these provisions was to prevent a marriage between Lady M., *pltf.*, & her present husband; but the late duke dying in Mar. 1854, that marriage took place in Oct. of the same year. In contemplation of this marriage two appointments were made, Sept. 21, 1854, by the donees of the power in the above-mentioned instruments, by which the then next payments of the dividends & annuity was appointed to Lady II., & subject thereto such dividends & annuity were to be paid to a certain account at a banker's, whence they were transferred to Lady II.'s account, & in pursuance of an order from her one moiety was to be invested & the other to be at her disposal. On Dec. 19, the duke appointed all the dividends on the £52,000 to Lady II., reserving to himself a power of revocation; & on the same day the whole of the annuity was by another deed appointed to Lady II. with like power of revocation.

In July, 1860, present *pltf.* instituted a suit to set those appointments aside, on the ground that they were frauds upon the power, having resulted from a bargain between the duke & Lady H. that she should accumulate one moiety, & hold the fund to be dealt with as the duke, for the time being, might direct. The Master of the Rolls upheld them, but the Lords Justices set them aside. This last decree was affirmed by the House of Lords. Very soon after this last decision the duke executed two further irrevocable appointments of the income & annuity in favour of Lady H. during the joint lives of herself & Lady M. The present suit was then instituted to set these appointments aside, the bill charging that this was only a fresh attempt to effect the object of the former appointments:—*Held*: although Lady H. was not aware of the new appointments until after they were made, & no understanding had been previously come to between her & the duke, the ct. will require clearest evidence that the appointee is entirely freed from all actual & moral obligation to apply the fund according to the earlier appointment, & in the absence of such evidence will set aside the later instrument.

Where an appointment has been set aside by reason of what has taken place between the donee of a power & an appointee, a second appointment by the same donee to the same appointee cannot be sustained otherwise than by clear proof on the

WALLES, LTD. (1916), 22 C. L. R. 84. —*AUS.*

961 *iii.* —[WEIR v. CHAMLEY (1850), 1 I. Ch. R. 295.—*IR.*

961 *iv.* —[Where a father was, by his marriage settlement, empowered to divide at discretion the funds in

which the children had an expectant interest:—*Held*: he could not deal or negotiate with them in executing the power.—CUNNINGHAME v. ANSTRUTHER (1872), L. R. 2 Sc. & Div. 223.—*SCOT.*

*g. Effect of undue influence.*—Property stood limited in trust for

such purposes or persons as the wife should appoint; & in default of appointment, in trust for the wife & her heirs. The wife appointed part of her estate to her husband in fee, & the other part in trust for herself & children:—*Held*: these appointments were authorised by the power, but it

**Sect. 3.—Fraudulent appointments: Sub-sects. 1 & 2, A. (a).]**

part of the appointee—that the second appointment is perfectly free from the original taint which attached to the first (GIFFARD, L.J.).—**TOPHAM v. PORTLAND (DUKE)** (1869), 5 Ch. App. 40; 39 L. J. Ch. 259; 22 L. T. 847; 18 W. R. 235, C. A.

**Annotations:—***Apld.* Mackenzie v. Marjoribanks (1870), 39 L. J. Ch. 604. *Consd.* Roach v. Trood (1876), 3 Ch. D. 429; *Cloutte v. Storey*, [1911] 1 Ch. 18. *Re* Hulsh's Charity (1870), L. R. 10 Eq. 6; *Henderson v. Astwood*, *Astwood v. Cobbold*, *Cobbold v. Astwood*, [1894] A. C. 150.

**966. Intention not motive of donee considered.]**—**PORTLAND (DUKE) v. TOPHAM (LADY)**, No. 963, *ante*.

**967. Whether fraudulent appointment void or voidable.]**—*Mr. & Mrs. P.*, who had under their marriage settlement a power of appointment over a certain fund in favour of such one or more exclusively of the others or other of the children of the marriage as they should jointly by deed, etc., appoint, made certain appointments nominally in favour of objects of the power, but in reality for their own benefit. By a deed, to which all the children of the marriage were parties, & which they all executed, these appointments were subsequently ratified & confirmed. On a bill by C. P., a child of the marriage who had not attained his majority at the date of the deed of confirmation, but had executed the deed some months after he came of age, to set aside the appointments & the deed of confirmation:—*Held*: the appointments were not *ipso facto* void, but only voidable, & C. P. having deliberately executed the deed of confirmation could not now after the lapse of nearly seven years re-open the transaction.—**PRESTON v. PRESTON** (1869), 21 L. T. 346.

**Annotation:—***Consd.* *Cloutte v. Storey*, [1911] 1 Ch. 18.

**968. —.]**—**Cloutte v. Storey**, No. 3, *ante*.

**969. Effect of fraudulent appointment—On fresh exercise of power to same appointee—Necessity for removal of effects of fraud.]**—**TOPHAM v. PORTLAND (DUKE)**, No. 965, *ante*.

**970. — Liability of estate of donee—To make good loss—Measure of liability.]**—A sum of stock was settled in 1834 upon trust to keep up a policy of assurance on the life of D., & subject thereto upon trust for D. for life, & after his decease the fund & the moneys payable under the policy were to be held in trust for his three children, or such one or more of them, & in such shares & proportions, as D. should by deed or will appoint. In 1849 & 1850, D. & the three children released the trustees from the stock & from all liability to keep up the policy, D. entering into a covenant to keep it up, & the stock was transferred by the trustees. In 1852 D. appointed the policy to B., one of his daughters, to her separate use, without restraint on anticipation, upon a bargain with her that she should surrender the policy & pay the money to him. He promised her to effect & keep on foot a fresh policy, & to settle it upon the same trusts as the old one. The trustees, having no notice of the bargain, transferred the policy to B., who surrendered it to the office & paid the proceeds to D. D. effected the new policy, but failed to devote it effectually to the trusts. The money received on the surrender of the policy

was £897, but the sum which would have been payable under it if it had been kept on foot till D.'s death was more than £5,000. The judge held that the appointment was invalid, & that D.'s estate after his death was liable not merely for the £897 which he had received, but for the sum which would have been received under the policy if it had been kept on foot, for that D. had virtually received the policy; & that the £5,000 must be raised out of his estate & be distributed as in default of appointment:—*Held*: apart from the question of B.'s concurrence, this was the correct measure of liability, for a person making a fraudulent appointment ought to be held liable to make good the whole loss occasioned by it to the trust estate, & moreover, D. was liable under his covenant to make good all loss arising from his not having kept the policy on foot but B. having been an active party to the transaction could not complain of it, & the amount payable by D.'s estate must be diminished by the share which she, if not a party to the transaction, would have taken in default of appointment, & D.'s promise to settle a fresh policy, which promise he failed to keep, was not a misrepresentation entitling her to say that she had been deceived into concurring in the transaction & was to be treated as if she had not concurred.—*Re DEANE*, *BRIDGER v. DEANE* (1889), 42 Ch. D. 9; 61 L. T. 492; 37 W. R. 786, C. A.

**971. Doctrine of fraudulent exercise—Not applicable to release of power not coupled with duty.]**—

(1) The fact that a release of a limited power of appointment will result in a benefit to the donee of the power is not sufficient to make the release fraudulent & void. The doctrines applicable to the fraudulent exercise of a power of appointment do not apply to the release of a power not coupled with a duty.

(2) A father, tenant for life under his marriage settlement, had, in the events which had happened, an exclusive power to appoint for the benefit of a daughter or her issue, & in default of appointment the fund went to the daughter absolutely; the father, being in want of money, released this power, & subsequently he & his daughter mortgaged their interests in the fund for £10,000, the whole of which was paid to the father, & applied by him for his own purposes:—*Held*: the release was valid.—*Re SOMES*, *SMITH v. SOMES*, [1896] 1 Ch. 250; 74 L. T. 49; 44 W. R. 236; 12 T. L. R. 152; 40 Sol. Jo. 219; *sub nom.* *Re SOMES*, *SOMES v. SOMES*, 65 L. J. Ch. 262.

**Annotation:—***As to* (1) *Re* *Jones' Settlement*, *Stunt v. Jones*, [1915] 1 Ch. 373.

**SUB-SECT. 2.—WHAT AMOUNTS TO FRAUD.**

**A. Corrupt Purpose.**

**(a) Intention to benefit Appointor.**

**972. Whether exercise fraudulent.]**—**HINCHINBROKE (LORD) v. SEYMOUR** (1789), 1 Bro. C. C. 395; 28 E. R. 1200; *sub nom.* *SANDWICH'S (LORD) CASE*, cited in 11 Ves. at p. 479, L. C.

**Annotations:—***Consd.* *M'Queen v. Farquhar* (1805), 11 Ves. 467; *Domville v. Lamb* (1853), 1 W. R. 246; *Wellesley v. Mornington* (1855), 2 K. & J. 143. *Expld.* *Henty v. Wrey* (1882), 21 Ch. D. 332. *Re* *Topham v. Portland* (1863), 1 New Rep. 496. *Mentd.* *Queensberry Leases Case* (1819), 1 Bl. 339.

being suggested on affidavit that they were made under the exercise of undue influence on the part of the husband further inquiry was directed.—**FENTON v. CROSS** (1858), 7 Gr. 20.—**CAN.**

**h. Untrue representations inducing execution of power—Effect of.]**—**SWEET**

**v. PLATT** (1886), 12 O. R. 229.—**CAN.**

**PART VI. SECT. 3, SUB-SECT. 2.—A. (a).**

**972.1. Whether exercise fraudulent.]**—The donee of a special power of appointment cannot stipulate for any

benefit to himself with reference to the exercise of the power, & if he does so the whole appointment is vitiated, except where the ct. can clearly distinguish between the *quantum* of the benefit *bona fide* intended to be conferred on the appointee & the *quantum* of the benefit intended to be derived

973. —J.—*NEWMAN v. ROGERS* (1811), Turn. & R. 14, n.; 37 E. R. 997.  
*Annotation* :—*Consd.* Tweddell v. Tweddell (1822), Turn. & R. 1.

974. —J.—*M'QUEEN v. FARQUHAR*, No. 1057, *post*.

975. —J.—*CONOLLY v. McDERMOTT* (1825), Suggen's Law of Property, 513, H. L.

976. —J.—J. being entitled to the dividends of £4,300 for life, with a power to appoint by any deed or writing the principal after his death, & in default of appointment, to his next of kin, & being in prison for debt & in great distress, is prevailed upon by H. to enter into an agreement for sale of the principal after his death, in consideration of £1,000 & other sums therein stated to have been previously lent & advanced to him by H. By a subsequent deed, in consideration of £1,854 therein stated to be due from J. to H., & of £1,000 paid by L. & others, J. by the direction of H. appointed that the principal should on his death be transferred to L. & others, with a proviso that they should assign the same to H. on payment of £1,000 & interest, & all further advances.

The £1,854, or any part of it, had not in fact been advanced by H. :—*Held* : this was a clear fraud.—*MELLER v. MINET* (1830), Tamil. 481; 48 E. R. 191.

977. —J.—*JACKSON v. JACKSON* (1836), Donnelly, 1; 47 E. R. 186.

978. —J.—*UTTERMERE v. WILLIAMS*, No. 1053, *post*.

979. —J.—A married woman, having a power to appoint a fund to her children, appointed it to an only child of tender years, who died four months afterwards. Her husband attested the deed of appointment as a witness. Twenty-four years afterwards the wife died in the lifetime of her husband, who then claimed the fund as administrator of the child. The ct. directed issues to try whether the power had been executed without fraud on the part of the husband & wife.—*GEE v. GURNEY* (1846), 2 Coll. 486; 7 L. T. O. S. 135; 10 Jur. 367; 63 E. R. 826.  
*Annotation* :—*Refd.* Donville v. Lamb (1853), 1 W. R. 246.

980. —J.—A father had a power of appointing to any of his children. Having, in breach of trust, obtained possession of part of the trust funds, he, in 1834, appointed that part to his daughters, in exclusion of his son, under an agreement, that that part should afterwards be conveyed to him, in exchange for an estate of less value. In 1844, he executed a second appointment, reciting the previous dealing with the fund, & he thereby appointed the remaining portion of the trust property " & all other " the property comprised in the settlement, to his daughters :—*Held* : the first appointment was void; & the portion of the property comprised therein was not appointed by the second deed.—*ASKHAM v. BARKER* (1850), 12 Beav. 499; 50 E. R. 1152; *subsequent proceedings* (1853), 17 Beav. 37.

*Annotations* :—*Consd.* Carver v. Richards (1859), 27 Beav. 488. *Refd.* Rowley v. Rowley (1854), Kay, 242.

981. —J.—*HARRISON v. RANDALL*, No. 1076, *post*.

982. —J.—*ROWLEY v. ROWLEY*, No. 1078, *post*.

983. —J.—Appointment by a father to a son, then in a state of mental & bodily disease, of which he died within a year, set aside, the ct. inferring from the evidence as to the father's knowledge of his son's state of health & pecuniary

circumstances, as to the circumstances attending the preparation & execution of the appointment, & as to its not having been communicated to the persons to whom it ought to have been communicated, that the appointment was made by the father, not for the benefit of his son, but for his own benefit, & was a fraud upon the power.—*WELLESLEY (LADY) v. MORNINGTON (EARL)* (1855), 2 K. & J. 143; 1 Jur. N. S. 1202; 69 E. R. 728.

*Annotations* :—*Consd.* Re Marsden's Trust (1859), 4 Drow. 594. *Refd.* Topham v. Portland (1862), 31 Beav. 525; Roach v. Trood (1876), 3 Ch. D. 429; Henty v. Wrey (1882), 21 Ch. D. 332. *Mentd.* Re Agar-Ellis, Agar-Ellis v. Lascelles (1878), 48 L. J. Ch. 1.

984. —J.—A father, in exercise of a power, appointed part of a fund to one of his daughters, then not twenty-two years of age. She immediately mortgaged her interest so appointed, & part of the purchase-money was applied to the use of the father & his daughters :—*Held* : the transaction was so doubtful that a purchaser under the mtge. was not compelled to accept the purchase.—*WARDE v. DIXON* (1858), 28 L. J. Ch. 315; 32 L. T. O. S. 349; 5 Jur. N. S. 698; 7 W. R. 148.

*Annotations* :—*Mentd.* Gray v. Fowler (1873), L. R. 8 Exch. 249; *Imbrey v. Towell*, [1898] 2 Ch. 285; *Simpson v. Gilley* (1922), 92 L. J. Ch. 194.

985. —J.—*BEDDOES v. PUGH*, No. 1079, *post*.

986. —J.—A marriage settlement gave to the parents a power, with the consent of the trustees, to make void the trusts, & of appointing the estate to new uses. This power was exercised for the purpose of mortgaging the estate to one of the trustees for a sum advanced to the father. The estate was afterwards sold under a power of sale contained in the mtge. deed :—*Held* : a good title could not be made under it.—*ELAND v. BAKER* (1861), 29 Beav. 137; 7 Jur. N. S. 956; 9 W. R. 444; 54 E. R. 579.

987. —J.—Testator gave all his property to his wife absolutely " & to be by her willed to any or either of my children in any manner suitable to her wishes." The wife devised the real estate to one of the sons in liquidation of a debt due to him from testator, & afterwards entered into an agreement with him & another son to the same effect, stipulating that they should contribute a certain sum towards her maintenance :—*Held* : there was a trust engrafted on the estate given to the wife in favour of those children who should survive her, with power to her, if she chose, to bequeath it to any of them; the will & agreement were not an exercise of the power, they being in consideration of benefits to be derived by herself.—*EVANS v. EVANS* (1865), 33 L. J. Ch. 602; 10 L. T. 59; 12 W. R. 508.

988. —J.—A bill by the reversioner stated that testator by his will gave property to his wife for life with power to give to his child or children such portion as she might think proper; but if his children should die before attaining twenty-one, he gave the property to his brother; that the widow expecting the instant death of one of the children, which shortly afterwards happened, affected to exercise by deed poll a power of appointment in favour of this child, reserving to herself a life interest; & that the widow claimed as next of kin of the child; the bill prayed that the deed poll might be declared void, & also for accounts. Demurrer on the ground that it did not appear that the deed was a fraudulent or ineffectual exercise of the power, & also on the ground that

by appointor.—*Re MAHONEY, LESSER v. MAHONEY*, [1918] V. L. R. 580.—*AUS.*

972 II. —J.—*Re MATTHEWS* (1924),

56 O. L. R. 406.—*CAN.*

972 III. —J.—*BARRON v. BARRON* (1838), 2 Jo. Ex. 17. 798.—*IR.*

972 IV. —J.—*BROWNLOW v. MEATH*

(EARL) (1840), 2 Dr. & Wal. 674.—*IR.*

972 v. —J.—*Re JOHNSTON'S ESTATE* (1922), 56 I. L. T. 153.—*IR.*

**Sect. 3.—Fraudulent appointments: Sub-sect. 2, A. (a).]**

no case had been stated to entitle pltf. to discovery or relief during the life of the tenant for life: *Demurrer overruled.*—*CARROLL v. GRAHAM* (1865), 13 L. T. 301; 11 Jur. N. S. 1012.

**989.** —.]—The donee of a power must execute it so as to vest the thing absolutely for the benefit of the objects of the power; & if there is any indirect benefit to the donee intended to be effected by means of the appointment, it will not stand. The donee of a power executed a deed by which she released her life interest in the subject-matter of the power, & appointed the fund absolutely to one of her daughters, who was one of the objects of the power, & twenty-seven years of age & about to be married. The deed of appointment was sent to the sole trustee, together with a letter from the appointee, in which she requested him to pay the fund to her mother's account at her bank. The trustee paid the money as requested. With the exception of £600 paid to the husband of the appointee, the fund was all used by the donee for her own private purposes. Both the donee & the trustee had since died. On bill filed by one of the parties entitled in default of appointment:—*Held*: the appointment was a fraud on the power, & as between the parties entitled in default, the exors. of the donee & trustee were jointly & severally liable to make good the fund out of their respective testators' effects. The estate of the donor to be primarily liable as between the donee & trustee.—*MACKECHNIE v. MARJORIBANKS* (1870), 39 L. J. Ch. 604; 22 L. T. 841; 18 W. R. 993.

**990.** —.]—*CUNINGHAME v. ANSTRUTHER*, No. 303, *ante*.

**991.** — **Possible benefit to donee — Appointment otherwise unimpeachable.**—*WICHERLEY v. WICHERLEY* (1731), 2 Eq. Cas. Abr. 391; cited in 2 P. Wms. at p. 618; 22 E. R. 334; *sub nom.* *WICHERLEY'S CASE*, cited in Amb. at p. 234.

*Annotations*:—*Reid*, North v. Ansell (1731), 2 P. Wms. 618; Lane v. Pago (1754), Amb. 233.

**992.** —.]—A residue was bequeathed in trust for A. for life, & after his death, for his children, as he should appoint; & in default of appointment, for the children equally, with remainder over. Before A. was married or had exercised the power, some of the parties entitled in remainder filed a bill to have the accounts of testator's estate taken, & the residue ascertained & secured. Before decree, A. married & had a child; & four days after the child was born, he exercised the power; & then filed a bill against pltf. in the former suit, stating his marriage, the birth of his child, & the appointment, & insisting that, thereby, the interests of pltf. in the former suit had been wholly determined & put an end to. Pltf., however, contended that the appointment was fraudulent & void *in toto*, inasmuch as, though it was made in favour of A.'s children, he would, in the probable event of their dying, become entitled to the property as their next of kin:—*Held*: under existing circumstances, the appointment was good, & therefore, no decree ought to be made in the original suit until the happening of the events which would entitle A. to the property.—*BUTCHER v. JACKSON* (1845), 14 Sim. 444; 60 E. R. 430.

*Annotations*:—*Consd.* *Domville v. Lamb* (1853), 1 W. R. 246; *Henty v. Wrey* (1882), 21 Ch. D. 332. *Reid*. *Beere v. Hoffmeister* (1856), 3 Jur. N. S. 78.

**993.** —.]—Appointment by a father to his infant child under a will is not fraudulent, provided he does not exceed his

power, notwithstanding he makes the appointment in such a way as may ultimately put him into the absolute possession of the whole fund, for his own benefit, & thus defeat the contingent interests of others interested therein. Testator, being possessed of considerable property, by his will gave certain legacies to his three nieces, & their children, as therein mentioned. He then devised all the residue of his freehold, copyhold, & leasehold estates, except a certain leasehold house at B., & personal property to trustees, upon trust for his nephew E. for life, & on his decease, subject to a power of jointuring his wife, upon trust for the children & grandchildren of E. as he should appoint, & in default of appointment, to his children generally, they taking vested interests at twenty-one; & in default of their taking such vested interests, upon trust for his nieces, & their several families, to take in the same manner as before declared respecting the several legacies. After testator's death, E. married, & had one child, a son, born June 2, 1839, & four days after this event, viz. June 6, he, by a deed poll, reciting the will, appointed to his children generally, with a power of revocation, as he should by deed or will appoint; & in default of such appointment, subject as therein mentioned, in trust for his said son then born, & all his after-born children, as joint tenants, for their absolute use & benefit. This appointment was objected to by the children of one of testator's nieces, who were thus excluded from the contingent interest in their favour pointed out by testator, on the ground that it operated as a fraud against those interests, & contrary to testator's intention:—*Held*: as testator had intrusted E. with such a power of appointment, the ct. could not restrain the exercise of that power, however it might frustrate his ultimate intention.

Looking at testator's will & the deed poll, . . . I think that E. has exercised his power of appointment in a very reasonable manner, & perfectly within the limits given him by the will. If it was competent for testator to entrust such an authority to the appointor, it is not within the jurisdiction of the ct. to restrain such an exercise of authority. . . . Equality [is] the highest equity known to the ct.; & as the father has appointed among his children in equal shares, this ct. cannot determine the appointment to be improper, upon the bare suggestion that a contingency might arise, in which the appointment would ultimately turn out for the benefit of the appointor. At any rate the ct. cannot declare the appointment to have been improperly made before that contingency happens (*SHADWELL, V.-C.*).—*PEMBERTON v. JACKSON* (1845), 5 L. T. O. S. 17.

**994.** —.]—Funds were settled on A. for life, with remainder to his children, at such ages, etc., as he should appoint, & in default to them equally, to vest at twenty-one, & there was a power of maintenance until the vesting. There was a gift over, in case there should be no child absolutely entitled. A., having a child eight months old, & another *en ventre sa mère*, appointed the fund to all his children to vest immediately. One of the children survived A. & died an infant, & his share was claimed by his mother as his administrator:—*Held*: the appointment was not a fraud on the power, & she was entitled.—*FEARON v. DESBRISAY* (1851), 14 Beav. 635; 21 L. J. Ch. 505; 51 E. R. 428.

*Annotations*:—*Consd.* *Domville v. Lamb* (1853), 1 W. R. 246. *Reid*. *Beere v. Hoffmeister* (1856), 23 Beav. 101.

**995.** —.]—Power of appointment in favour of children in such shares & to be vested

at such times as husband & wife shall during their joint lives & after the death of either as the survivor shall appoint, with the usual provision in default of appointment:—*Held*: there was nothing unreasonable in husband & wife making a joint appointment between the only two children, the shares to be vested immediately, though one was an infant, & there were no circumstances requiring the exercise of the power; & in the absence of any appearance of fraud the appointment was valid.—*DOMVILLE v. LAMB* (1853), 1 W. R. 246.

996. — — —.—]—A. & his wife had a power of appointing a fund to her children which, in default, was settled on the children who attained twenty one, & in default thereof on the next of kin of the wife. There were powers of maintenance & advancement. There being but one child, of the age of three, of robust health, & the wife being seriously ill, A. & his wife appointed the whole fund to the child, reserving a joint power of revocation. The child died three years after, an infant, & her father became entitled to her property. The appointment was held valid.—*BEERE v. HOFFMISTER* (1856), 23 Beav. 101; 26 L. J. Ch. 177; 28 L. T. O. S. 155; 3 Jur. N. S. 78; 53 E. R. 40.

*Annotations*:—*Consd.* *Roach v. Trood* (1876), 3 Ch. D. 429; *Henty v. Wrey* (1882), 21 Ch. D. 332.

997. — — —.—]—A., having an exclusive power of appointment among his children, five in number, who were entitled equally in default of appointment, in 1832, in pursuance of arts., on the marriage of a daughter, C., who was of age, appointed a share to her, to be held upon the trusts to be declared by her marriage settlement. He also gave a bond for payment of an equal sum to the trustees. By the settlement, which followed the trusts of the arts., the funds were limited for the benefit of the husband & wife during their respective lives, & then for the benefit of their children, but the ultimate trust, in default of issue, was for A., his exors., administrators & assigns. There were no children of the marriage, & C. having survived her husband, who died in 1832 afterwards, in 1841, married pltf. In 1834 A. appointed another share to another of his daughters, E., who was an infant, on her marriage, & gave a bond for payment of an equal sum to her trustees. The trusts of the settlement were similar to those of C.'s settlement, the trust in default of issue being for A., his exors., administrators & assigns. In 1835 A. became bkpt., & proofs were made by the trustees on the bonds, in respect of which considerable dividends were received. In 1866 A. died, & in 1867 C.'s & E.'s shares were paid to their respective trustees, & the other shares to the other children, & a release was taken from the parties interested. C.'s share was afterwards paid into ct. under the Trustee Relief Act.

C.'s husband filed a bill praying that the appointments to C. & E. might be declared frauds upon the power, & that the fund might be divided as in default of appointment:—*Held*: with regard to the appointment to E., who was an infant at the time of her marriage, the bargain under which A. reserved to himself an ultimate interest in the appointed fund, was a bargain between A. & the intended husband, & was not corrupt or improper, so as to render the appointment invalid.—*COOPER v. COOPER* (1869), 5 Ch. App. 203; 39 L. J. Ch. 240; 22 L. T. 1; 18 W. R. 299, L. C.

*Annotations*:—*Consd.* *Re Turner's S. E.* (1884), 23 Ch. D. 205. *Held.* *Re Pocock's Policy* (1871), 19 W. R. 801; *Roach v. Trood* (1876), 3 Ch. D. 429.

998. — — —.—]—**Appointees equally benefiting.**—*COCKCROFT v. SUTCLIFFE*, No. 1055, *post*.

999. — — —.—]—An appointment made with the object that the appointor may obtain an exclusive advantage to himself is bad; but if the object of the appointment be to secure a benefit for all the objects of the power, the appointment is not bad, although the appointor may to some extent participate in such benefit. The tenant for life of real estate under a marriage settlement had a power of appointing the estate among the children of the marriage, of whom there were four. The settlement contained no power of granting building leases. An appointment was made to one of the children of the marriage; & subsequently, the appointor & appointee joined in conveying the estate to trustees upon trust to grant building leases, & subject thereto as to one-fourth thereof upon trust for the appointee, & as to the remaining three-fourths upon trusts corresponding with those of the original settlement:—*Held*: although the object of the appointment was to enable building leases to be granted, & the tenant for life thereby gained an advantage to himself, yet the transaction, being for the benefit of all the objects of the power, was valid.—*Re HUIST'S CHARITY* (1870), L. R. 10 Bq. 5; 39 L. J. Ch. 499; 22 L. T. 565; 18 W. R. 817.

*Annotation*:—*Held.* *Re Turner's Settlement*, (1881), 52 L. T. 70.

1000. — — —.—]—*ROACH v. TROOD*, No. 855, *ante*.

1001. — — —.—]—By a marriage settlement a power of appointment over a trust fund was given to the husband, the pltf., in favour of the children of the marriage to be exercised by deed or will. In default of appointment the property was to be divided equally among the children. There were four children of the marriage, of whom one died in 1869, a bachelor & intestate. Pltf. was his personal representative. In 1876 pltf., appointed by deed in favour of his three surviving children, but reserved a power of revocation. In 1880 he revoked by deed the appointment made in 1876, so that the property might stand limited as theretofore. Pltf. proposed to execute an absolute release of the power of appointment, & submitted that he would thereby become entitled to a share of the trust fund. Defts. contended that pltf. executed the deed of revocation in 1880 in order that he might claim the share for his own benefit, & that his intention was to commit a fraud on the power:—*Held*: the donee of a power might deal with it in any lawful way he pleased. He might exercise the power & reserve to himself a power of revocation. Although in this case by an accident, namely, the death of one of the objects of the power, the donee had derived benefit from the doing, he could not be regarded as having committed a fraud on the power, & upon executing a proper release he would be entitled to the share he claimed.—*SHIRLEY v. FISHER* (1882), 47 L. T. 100.

*Annotations*:—*Expld.* *Re Radcliffe, Radcliffe v. Bowes*, [1891] 2 Ch. 662. *Distd.* *Re Jones's Settlement*, *Stunt v. Jones*, [1915] 1 Ch. 373.

1002. — — —.—]—**Appointee receiving other benefit.**—In addition to benefit under power.]—Execution of a power of appointment to children, held good, though it extended to the issue of one of them, under the special circumstances of the case.

I agree that the father cannot take any benefit to himself, but must appoint to a child or children, & cannot give any part or interest to a stranger. But if a further advantage is given to the child than he could have had under the power, & the father sells to the child part of his own interest



*Sect. 3.—Fraudulent appointments: Sub-sect. 2, A. (a) & (b), & B. (a).]*

in the estate; this ct. will not weigh the *quantum* of the consideration paid for it, whether it was adequate to the advantage (LORD HARDWICKE, C.).—*LANGSTON v. BLACKMORE* (1755), Amb. 289; 27 E. R. 194, L. C.

*Annotations:—Apld.* *White v. St. Barbe* (1813), 1 Ves. & B. 399; *Tucker v. Tucker*, *Tucker v. Sanger* (1824), 13 Price, 607. *Consd.* *Cutten v. Sanger* (1828), 2 Y. & J. 459. *Distd.* *Morgan v. Gronow* (1873), L. R. 16 Eq. 1. *Consd.* *Re Turner's S. E.* (1884), 28 Ch. D. 205.

**1003. — Donee both appointee & object of power.]**—The trustees of a deed had a discretionary power of distribution over a fund amongst a class of children, who in default took equally. There were originally five trustees, one of whom was a member of the class. After the death of the surviving trustee, three new trustees were appointed under a power, one of whom, A., was a member of the class. These three apportioned the fund, except a minute portion, amongst the three survivors of the children equally, including A.:—*Held*: the appointment of three trustees, instead of five, was not void, & the appointment of the fund was good.

I have great difficulty with regard to the trustees. Is it not a fraud on a discretionary power to appoint the fund to yourself? (ROMILLY, M.R.).—*REID v. REID* (1802), 30 Beav. 388; 8 Jur. N. S. 499; 10 W. R. 225; 54 E. R. 939.

*Annotation:—Reid.* *Tempest v. Camoys* (1888), 58 L. T. 221.

**1004. — —.]**—Under a settlement the trust funds in a certain event were to be held in trust for such persons & purposes and in such manner as the settlor should by deed or will appoint, so only that every such appointment should be made to or in favour of one or more of a specified class of persons, & in default of appointment in trust for the members of the class equally. The settlor was herself a member of the class:—*Held*: it was competent to the settlor under the power to appoint the trust funds to herself.—*TAYLOR v. ALLHUSEN*, [1905] 1 Ch. 529; 74 L. J. Ch. 350; 92 L. T. 382; 53 W. R. 523.

**1005. — —.]**—By the will & five codicils of testator real estates were settled to the use of his wife during widowhood, remainder to the use of A. for life, remainder to the use of the first & every other son of A. successively in tail male, remainder to the use of such person or persons of a special class as A. should by deed or will appoint, remainder in default of such appointment to B. for life, remainder to the first & every other son of B. successively in tail male, with remainders over.

A. was married but had no children. He was a member of the class, B. was not. Testator's wife desiring that B. should not be excluded from succeeding to the estates, induced testator to make a sixth codicil by which he revoked the power of appointment given to A. by the fifth codicil. On hearing of this A. had an interview with testator's wife at which he gave her his written promise to leave the estates to B. on acquiring the power to do so if she would get testator to revoke the sixth codicil. Testator's wife communicated this promise to the testator, who thereupon destroyed the sixth codicil. After testator's death A. by deed appointed the estates to himself in fee on failure of his issue male. In an action by B. to enforce the promise:—*Held*: the appointment was fraudulent & void, for that A. could not exercise the power so as to interfere with B.'s right of succeeding to the estates. *Qu.*: whether the donee of an absolute & exclusive power of appointment in favour of a

special class can *bond fide* exercise the power by appointing to himself, he being a member of the class.—*THARP v. THARP*, [1916] 1 Ch. 142; 85 L. J. Ch. 162; 114 L. T. 495; 60 Sol. Jo. 176; *on appeal*, [1916] 2 Ch. 205, C. A.

**1006. — Revocation of appointment under limited power.]**—Although the doctrine of fraud on a power does not apply to the release of a limited power, it applies to the revocation of an appointment thereunder. The donee cannot therefore revoke a previous appointment with the avowed object of obtaining a benefit by that revocation.—*Re JONES' SETTLEMENT*, *STUNT v. JONES*, [1915] 1 Ch. 373; 84 L. J. Ch. 406; 112 L. T. 1067; 59 Sol. Jo. 364.

**Antecedent agreement by appointee to benefit appointor.]**—*See* Sub-sect. 2, B. (a), *post*.

(b) *Covenants to exercise Powers in Particular Way.*

**1007. Limited power exercisable by will—Validity of appointment in pursuance of covenant.]**—*COFFIN v. COOPER*, No. 1145, *post*.

**1008. — —.]**—A father, who had a limited power of appointment over a fund by will only, among his children, made a will by which he appointed a sum of £5,000 to his son J., & the remainder among his other sons. A few weeks afterwards he executed a bond binding himself that his son J. should receive, either out of his own property or out of the fund subject to the power, the sum of £5,000 at the least. The father died without revoking his will:—*Held*: (1) the appointment was valid; (2) a bond or covenant by the donee of a limited testamentary power that he will exercise it in a particular way is entirely void.

It had been decided in various cases that such a power as this could be released, because, although in some sense it is fiduciary, it is fiduciary only to this extent, that the donee of the power cannot use it for any purpose of benefiting himself or oppressing anybody else (JAMES, L.J.).—*PALMER v. LOCKE* (1880), 15 Ch. D. 294; 50 L. J. Ch. 113; 43 L. T. 454; 28 W. R. 926, C. A.

*Annotations:—As to* (1) *Apld.* *Re Evered*, *Molinueux v. Evered*, [1910] 2 Ch. 147. *Follid.* *Re Cooke*, *Winckley v. Winterton*, [1922] 1 Ch. 292. *As to* (2) *Follid.* *Re Bradshaw*, *Bradshaw v. Bradshaw*, [1902] 1 Ch. 436. *Apld.* *Re Evered*, *Molinueux v. Evered*, [1910] 2 Ch. 147. *Follid.* *Re Cooke*, *Winckley v. Winterton*, [1922] 1 Ch. 292. *Reid.* *Robinson v. Ominanney* (1883), 31 W. R. 525. *Generally.* *Reid.* *Re A.*, [1904] 2 Ch. 328.

**1009. — Validity of covenant.]**—Testatrix bequeathed a sum of £5,000 upon trusts for her nephew for life, & then for his wife for life. She then gave to her nephew a power of appointment by will over the £5,000 amongst his children; & in default of appointment, or subject to any such as should not be a complete & entire disposition of the whole sum, she gave the same to all her nephew's children absolutely, to become vested at twenty-one or marriage. The nephew had five children, one of whom, a son, after attaining twenty-one, died unmarried & intestate. Afterwards a daughter, who had also attained twenty-one, married, & on this occasion the father covenanted that he would, in exercise of the power, appoint by will to the trustees of her settlement one-fifth of the £5,000. The daughter also assigned to the trustees all that her fifth part or share in default of any testamentary appointment of & in the said sum of £5,000. The father died without having exercised the power in any way. Upon the death of the widow, the trustees of the settlement claimed not only the sum of



£1,000, but also one-fifth of the remaining £4,000, as being a part of the fund which was not completely & entirely disposed of by the covenant of the appointor:—*Held*: (1) the covenant, though not actually performed, had been substantially satisfied; & p<sup>l</sup>ts. were entitled to no more than £1,000.

(2) *Semble*, a covenant by a fiduciary donee of a testamentary power, to exercise the power to a certain extent in favour of one of the objects of a power, is illegal & void.—*THACKER v. KEY* (1869), L. R. 8 Eq. 408.

*Annotations*:—*As to* (2) *Folld.* *Palmer v. Locke* (1880), 15 Ch. D. 294; *Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436. *Apld.* *Re Cooke, Winckley v. Winterton*, [1922] 1 Ch. 292.

**1010.** ———.]—*Testatrix*, having power to appoint by will a certain fund amongst all & every of her children, & their children, covenanted to appoint a certain sum to one child. She then, by her will, appointed that sum & appointed other parts of the fund to certain objects of the power, & bequeathed & appointed all the estate over which she had a disposing power to one object of the power. There were other objects of the power:—*Held*: all the appointments were bad, as being exclusive. *Qu.*: whether damages could be recovered for breach of such a covenant.—*BULTEEL v. PLUMMER* (1870), 6 Ch. App. 160; 39 L. J. Ch. 805; 23 L. T. 753; 18 W. R. 1091, L. C. & L.JJ.

*Annotations*:—*Consd.* *Palmer v. Locke* (1880), 15 Ch. D. 294; *Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436.

**1011.** ———.]—*PALMER v. LOCKE*, No. 1008, *ante*.

**1012.** ———.]—(1) The donee of a special power to appoint by will among children, which is a fiduciary power, is intended to & should keep the ordinary exercise of it under his control until the moment of his death; & he cannot, in anticipation of his last will, validly covenant that it shall be exercised in a particular way. Such a covenant is bad, as calculated to defeat the object of the creation of the power.

(2) Such a covenant being bad cannot be sued upon even if made in a deed or deeds of family arrangement. It is not analogous to the release of a power of this kind, which depends upon a foundation of its own.—*Re BRADSHAW, BRADSHAW v. BRADSHAW*, [1902] 1 Ch. 436; 71 L. J. Ch. 230; 86 L. T. 253.

*Annotations*:—*As to* (1) *Folld.* *Re Cooke, Winckley v. Winterton*, [1922] 1 Ch. 292. *As to* (2) *Reid.* *Re Evered, Mollneux v. Evered* (1910), 79 L. J. Ch. 465. *Generally, Reid.* *Re Beales' Settlement, Barrett v. Beales*, [1905] 1 Ch. 256; *Re Oliver's Settlement, Evered v. Leigh*, [1905] 1 Ch. 191; *Re Wright, Whitworth v. Wright*, [1906] 2 Ch. 288; *Re Nash, Cook v. Froderick*, [1910] 1 Ch. 1; *Re Ogilvie, Ogilvie v. Ogilvie*, [1918] 1 Ch. 492.

**1013.** ———.]—The donee of a special testamentary power of appointment covenanted by deed to appoint to her son out of a trust fund not less than £4,000, & not to revoke that appointment. There was no covenant to leave unappointed such part of the trust fund as would, together with any sum actually appointed, make up the covenanted sum. The donee of the power executed a will by which she appointed to her son not less than £4,000, but afterwards executed another will, revoking the first, by which she appointed a sum of less than £4,000:—*Held*: the covenant to appoint not less than £4,000 was not a fetter on the power of appointment which prevented the donee of the power afterwards

exercising it so as to defeat the covenant; the covenant to appoint in a particular way was void, & the covenant not to revoke the appointment, though negative in form, was in substance & in fact a covenant to exercise a testamentary power in a particular way & was also void.—*Re COOKE, WINCKLEY v. WINTERTON*, [1922] 1 Ch. 292; 91 L. J. Ch. 273; 126 L. T. 598; 66 Sol. Jo. 351.

**1014.** ———.]—*Covenant not to revoke executed will.*—An unmarried woman, having a power of appointing a sum of money, by will, made a will appointing it to a mtgee., & covenanted not to revoke the will. She afterwards became bkpt. & obtained her discharge. After her discharge she revoked her will & made another appointing the sum of money to another person:—*Held*: the covenant not to revoke the will was divisible, & was not wholly void, although in one alternative it was in restraint of marriage.—*ROBINSON v. OMMANNEY* (1883), 23 Ch. D. 285; 52 L. J. Ch. 440; 49 L. T. 19; 31 W. R. 525, C. A.

*Annotations*:—*Reid.* *Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 799. *Mentd.* *Morgan v. Hardy* (1886), 17 Q. B. D. 770; *In the Estate of Heys, Walker v. Gaskill*, [1914] P. 192; *Re Lind, Industrials Finance Syndicate v. Lind*, [1915] 2 Ch. 345.

**1015.** ———.]—*Action for breach of covenant.*—*BULTEEL v. PLUMMER*, No. 1010, *ante*.

**1016.** ———.]—*Re BRADSHAW, BRADSHAW v. BRADSHAW*, No. 1012, *ante*.

**1017.** ———.]—*Enforcement of covenant—Specific performance.*—The ct. will not decree specific performance of a contract to leave property by will entered into by a mere donee of a testamentary power of appointment.

By a marriage settlement, executed in 1867, the husband & wife severally covenanted that all property whatsoever which the wife or the husband in her right should at any time during the coverture become possessed of or entitled to in any manner whatsoever should be settled, & that any power of appointment of which she might then or at any time thereafter during such coverture be the donee, should, if executed by her, be executed only in favour of the trustees of the settlement. During the coverture she became the donee of a general testamentary power of appointment over a sum of stock which, by her will, she exercised in favour of persons other than the trustees:—*Held*: the covenant could not be specifically enforced, but the trustees were entitled to recover by way of damages from the wife's exors. to the extent of her assets the value of the property which would have come to the hands of the trustees if the appointment actually made had been in their favour; & the appointed fund was assets for the payment of her debts.

*Qu.*: whether the husband was liable under his personal covenant.—*Re PARKIN, LILL v. SCHWARZ*, [1892] 3 Ch. 510; 62 L. J. Ch. 55; 67 L. T. 77; 41 W. R. 120; 36 Sol. Jo. 647; 3 lt. 9.

*Annotations*:—*Apld.* *Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 799. *Reid.* *Re Evered, Mollneux v. Evered* (1910), 79 L. J. Ch. 465; *Re Cavendish Browne's Settlement, Trusts, Horner v. Hawle* (1916), 61 Sol. Jo. 27. *Mentd.* *In the Estate of Heys, Walker v. Gaskill*, [1914] P. 192.

#### B. Antecedent Agreement by Appointee.

##### (a) To benefit Appointor.

**1018.** Appointment void.]—*FARMER v. MARTIN*, No. 630, *ante*.

**1019.** ———.]—If the donee of a power appoints the fund to one of the objects of the power, under

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*(a) & (b).]*

an understanding that the latter is to lend the fund to the former, although on good security, the appointment is bad.—*ARNOLD v. HARDWICK* (1835), 7 Sim. 343; 4 L. J. Ch. 152; 58 E. R. 869.

*Annotation:—Refd. Askham v. Barker* (1853), 17 Beav. 37.

**1020.** —.]—A person being by his marriage settlement tenant for life of an estate in Ireland, held on lease for lives renewable for ever, with power of appointment to one or more of the children of the marriage,—the estate in default of appointment to go to the first and other sons successively in tail male,—by deed poll, dated Jan. 14, 1804, appointed to his eldest son an estate in tail male; & by indenture of lease, executed four days after, the father & son, in consideration of £1,600, to be applied in paying debts on the estate, & renewal fines then due, demised part of it for lives. By a deed dated Dec. 1807, the son, in consideration of debts paid for him by the father, & in discharge of the trust & confidence reposed in him, conveyed the estate & all his interest therein to the father & his heirs. The father, by his will made after the death of the eldest son without issue, devised the estate—charged thereby with certain legacies—to the use of his two surviving sons & their respective issue, in equal portions, as tenants in common:—*Held*: the execution of the lease for £1,600 by the father & son so soon after the deed of appointment, & the circumstances appearing on those deeds & on the deed of reconveyance of 1807, raised such suspicions of the validity of the appointment, as required the ct., before it could adjudicate on the father's title to dispose of the estate, to direct an inquiry whether that appointment was a *bond fide* execution of the power.—*JACKSON v. JACKSON* (1840), 7 Cl. & Fin. 977; West, 575; 7 E. R. 1338, H. L.

**1021.** —.]—(1) The donee of a power of selection cannot lawfully exercise his power in such a manner, as to secure an advantage, to himself, by any stipulation or arrangement with the appointees in whose favour the power is exercised.

(2) The burden of proving the invalidity of an appointment lies on the person who seeks to set it aside, & not only the deed, but the whole matter, & all the accompanying facts, must be examined, in order to ascertain the real nature & character of the transaction.—*ASKHAM v. BARKER* (1853), 17 Beav. 37; 22 L. J. Ch. 769; 21 L. T. O. S. 204; 1 W. R. 279; 51 E. R. 945; *previous proceedings* (1850), 12 Beav. 499.

*Annotation:—Generally, Refd. Roach v. Trood* (1876), 3 Ch. D. 429.

**1022.** —.]—P. had a power of appointment in favour of his children of an estate of which he was tenant for life, & was proved to have expressed an intention of exercising it in favour of his daughter. Although he had no power of leasing, he had executed a lease which had become vested in G., to whom P. then agreed to execute a new lease. A joint bond to indemnify G. against the consequences of the determination of the lease by P.'s death was executed by P. & by his daughter, & on the same day a will, prepared by the solr. who had prepared the bond, was executed by P., whereby he appointed the estate to his daughter exclusively, & at the same time G. surrendered the old lease, & a new one was executed to him for the remainder of the former term. P. afterwards died, & one of his sons filed a bill to have the appointment declared void, as

being the result of a corrupt bargain between P. & his daughter:—*Held*: the will formed no part of the arrangement with reference to the lease & the bond, & the bill was accordingly dismissed.—*PICKLES v. PICKLES* (1861), 31 L. J. Ch. 146; 4 L. T. 755; 7 Jur. N. S. 1065; 9 W. R. 763, L. JJ.

**1023.** —.]—*CUNINGHAM v. ANSTRUTHER*, No. 303, *ante*.

**1024.** —.]—A wife obtained against her husband, who was the donee of a special power to appoint a fund of £50,000 amongst his children or remoter issue, a *decree nisi* for the dissolution of their marriage. Negotiations ensued for the compromise of the wife's claim to permanent alimony, & ultimately terms of settlement were signed by which (*inter alia*) the husband agreed to appoint more than half the £50,000 fund to the only child of the marriage. It was in evidence that the husband was at the time desperately anxious to have the *decree nisi* made absolute at the earliest possible moment so that he might be free to remarry, that the wife's legal adviser was aware of this, & that it formed an important element in the negotiations, during which the husband was pressed to make a far larger appointment than he had originally proposed. The terms of settlement were confirmed by the Divorce Ct. & the *decree nisi* made absolute. Afterwards the husband only executed the appointment on advice that the Divorce Ct. would, if necessary, order him to do so, & that, if he then still refused to make the appointment, he might be committed for contempt of ct.:—*Held*: in the absence of evidence that the wife had accepted a smaller annuity by way of alimony in consideration of the increased appointment to her child, the appointment was not rendered invalid by reason of its execution in pursuance of an agreement entered into as part of the negotiations as to alimony, but the appointment was a fraud on the power as having been made by the donee in pursuance of an agreement entered into by him to obtain a personal benefit for himself—namely, freedom to remarry.—*COCHRANE v. COCHRANE*, [1922] 2 Ch. 230; 91 L. J. Ch. 605; 127 L. T. 737; 38 T. L. R. 607; 66 Sol. Jo. 522.

*(b) To benefit Stranger.*

**1025. Appointment void.**—A man makes his son by the first wife agree to a provision for a second wife, & the issue of that marriage. This provision being in the son's own wrong, & he being at this time ignorant of his right, the agreement is a fraud upon him, & he shall not be held to a performance of it.—*SCROPE v. OFFLEY* (1736), 1 Bro. Parl. Cas. 276; 2 Eq. Cas. Abr. 54; 1 E. R. 565, H. L.

*Annotations:—Consd. Hervey v. Hervey* (1739), 1 Atk. 561; *Zouch v. Woolston v. Woolston* (1761), 2 Burr. 1136; *Notridge v. Dering, Raban v. Dering*, [1910] 1 Ch. 297.

**1026.** —.]—Voluntary settlement of personal property, in trust for such one or more of his children as the settlor shall appoint. Appointment to one child, exclusively, upon a secret understanding that that child shall reassign a part of the fund to, or in favour of, a stranger. This appointment is a fraud upon the settlement; & void, not only to the extent of the sum assigned back, but *in toto*. Bill, by purchaser for valuable consideration, without notice under this appointment, dismissed as against the person entitled under the settlement in default of appointment, such person having also the legal estate in the fund which was the subject of the appointment.

—**DAUBENY v. COCKBURN** (1816), 1 Mer. 626; 35 E. R. 801.

**Annotations:—***Distd.* Rowley v. Rowley (1854), Kay, 242. *Consd.* Beddoes v. Pugh (1859), 26 Beav. 407. *Distd.* Topham v. Portland (1863), 1 De G. J. & Sm. 517. *Consd.* Whelan v. Palmer (1888), 39 Ch. D. 648; Cloutte v. Storey, [1911] 1 Ch. 18. *Reid.* Wade v. Cox (1835), 4 L. J. Ch. 105; Askham v. Barker (1853), 17 Beav. 37; Viant v. Cooper (1897), 76 L. T. 768; *Re* Lawley, Zaiser v. Lawley, [1902] 2 Ch. 673; Saunders v. Shafto, [1905] 1 Ch. 126; O'Grady v. Wilmot, [1916] 2 A. C. 231. *Mentd.* Wild v. Hobson (1819), 4 Madd. 49; Payne v. Mortimer (1859), 4 De G. & J. 447; Halifax Joint Stock Banking Co. v. Gledhill, [1891] 1 Ch. 31.

**1027.** —[A., being tenant for life, with remainder to his children as he might appoint, & being indebted to one of the trustees of the fund, soon after his eldest son came of age, he executed the power in his eldest son's favour, & the whole fund was retained by the trustee in satisfaction of the debt. The son, who was twenty-three years of age, executed to the trustees a release of all claims in respect thereof, & eighteen years afterwards, he, in conjunction with a younger brother & sister, filed a bill against the trustees, to set aside the transaction. The ct. declared the whole transaction fraudulent & void. The trustees were ordered to restore the fund, & the father was also held responsible.—**WADE v. COX** (1835), 4 L. J. Ch. 105.

**1028.** —[A., being desirous of voluntarily settling property on the female descendants then in existence of C., by deed reciting this desire & that certain persons therein named were the only descendants then in life of C., settled a part of the property on the persons so named, & reserved to himself a power of appointing the remaining part of the property amongst such several persons before named, which, in default of appointment, was given to those several persons named; he afterwards discovered that there were other descendants in existence of C., who had been omitted, & to remedy the omission, he appointed a part of the fund to an object of the power, upon his executing bonds for the payment to the persons newly discovered, of the amount when received:—**Held:** the appointment was void, & the ct. would not, in a suit to have the rights of the parties to the appointed fund declared, determine whether the case was such as to entitle the parties to have the settlement reformed according to the intention of the settlor.—**LEE v. FERNIE** (1839), 1 Beav. 483; 48 E. R. 1027.

**1029.** —[The donee of a power of appointment of a fund among her children, to whom the fund was limited in default of appointment, had only two daughters, & apportioned nearly the whole of the fund to one of them who was unmarried, on an understanding, but without any positive agreement, that the appointee would resettle one moiety of it on trusts for the separate use of the other daughter who was married, exclusively of her husband, & after her death, on trusts for her children. A resettlement was accordingly made without the privity of the married daughter, who did not hear of the transaction until several years afterwards:—**Held:** on the suit of her husband, the appointment was invalid, & a settlement was directed to be made of the married daughter's share.—**SALMON v. GIBBS** (1849), 3 De G. & Sm. 343; 18 L. J. Ch. 177; 12 L. T. O. S. 470; 13 Jur. 355; 64 E. R. 508.

**Annotation:—***Reid.* Topham v. Portland (1863), 1 De G. J. & Sm. 517.

**1030.** —[—(1) An absolute appointment was made to an object of a power, under a prior "understanding" between the appointor & appointee, to hold in "trust" for persons, some of

whom were objects & some not:—**Held:** the whole was void.

(2) A parent had a power to appoint to children alone. She appointed to two children absolutely. The next year the appointees settled the property on children & grandchildren of the parent, by a deed reciting that, when the appointment was made, it was understood, between the appointor & appointees, that the latter should consider themselves as possessed of the property upon the trusts of the settlement:—**Held:** the transaction was a fraud on the power & wholly void.—**BIRLEY v. BIRLEY** (1858), 25 Beav. 299; 27 L. J. Ch. 569; 31 L. T. O. S. 160; 4 Jur. N. S. 315; 6 W. R. 400; 53 E. R. 651.

**Annotations:—***Consd.* Topham v. Portland (1862), 31 Beav. 525. *Reid.* *Re* Turner's S. E. (1884), 28 Ch. D. 205.

**1031.** —[A father & mother having under their marriage settlement power to appoint real estate to their children appointed it to two of their children upon the understanding that the latter would resettle the property in favour partly of the children & partly of remoter issue not objects of the power:—**Held:** the appointment was a fraud on the power.—**PRYOR v. PRYOR** (1864), 2 De G. J. & Sm. 205; 4 New Rep. 82; 33 L. J. Ch. 441; 10 L. T. 360; 10 Jur. N. S. 603; 12 W. R. 781; 46 E. R. 353, L. JJ.

**Annotations:—***Consd.* *Re* Crawshaw, Crawshaw v. Crawshaw (1890), 43 Ch. D. 615. *Reid.* *Re* Turner's S. E. (1884), 28 Ch. D. 205.

**1032.** —[The donee of a power of appointment amongst his children exercisable by deed or will having one son & one daughter by will in 1862 made a valid appointment to the daughter of the whole fund subject to the power. By a French settlement not under seal, made in 1866 upon the marriage of his daughter, he purported to appoint the whole fund to her, reserving to himself the power of disposing of a life interest in a portion of the fund in favour of his second wife; & by a holograph codicil dated in 1871 made in France, & unattested after reciting an arrangement made when his daughter was married between himself, his daughter, & her intended husband that such second wife should have such provision he in effect appointed that if his daughter & her husband should carry out this arrangement they should have the whole of the fund. This codicil was admitted to probate under 24 & 25 Vict. c. 114:—**Held:** (1) the appointments by the settlements & codicil were frauds upon the power; (2) the arrangements made by the settlement & codicil involved a threat to revoke the will if they were not carried into effect & consequently the will being an ambulatory instrument was vitiated & became a fraud upon the power although at the date of its execution it was not open to objection.—*Re* KIRWAN'S TRUSTS (1883), 25 Ch. D. 373; 52 L. J. Ch. 952; 49 L. T. 292; 32 W. R. 581.

**Annotations:—***As to* (2) *Consd.* Poney v. Hordern, [1900] 1 Ch. 492. *Generally, Reid.* Hummel v. Hummel, [1898] 1 Ch. 642; Barretto v. Young, [1900] 2 Ch. 339; *Re* Price, Tomlin v. Latter, [1900] 1 Ch. 442; *Re* Simpson, Counts v. Church Missionary Soc., [1916] 1 Ch. 602; *Re* Wilkinson's Settlement, Butler v. Wilkinson, [1917] 1 Ch. 620. *Mentd.* *Re* Lyne's Settlement, Trustees, *Re* Gibbs, Lyne v. Gibbs, [1919] 1 Ch. 80.

**1033.** —[—**VIAIT v. COOPER**, No. 856, *ante*.

**1034.** —[—**EVANS v. NEVILL** (1908), *Times*, Feb. 11, C. A.

**1035.** —[A lady had power under her marriage settlement to appoint to one or more of her children exclusively of the other or others of them. She had two children, a son & a daughter, & she appointed the whole property to the daughter on condition that the daughter settled the property

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as to one moiety on herself & her children & as to the other moiety on the son, his wife, & children:—**Held:** the appointment was a fraud upon the power.—**KNOWLES v. MORGAN** (1909), 54 Sol. Jo. 117.

**1036.** —.—**Re BOILEAU'S WILL TRUSTS**, [1921] W. N. 222.

**1037. Independent contemporaneous settlement by appointee of appointed fund.]—**Trustees of a fund, having a power to appoint the same to such one or more of several objects of the power as the trustees should select, appointed the fund to trustees, of whom A., one of the objects of the power, was one, upon trusts to be declared by a subsequent deed; & by that deed, to which A. & all the trustees were parties, the trusts of the fund were declared to be for the benefit of A. for life, with remainder, in equal shares, amongst four other of the objects of the power, subject to such limitations, in respect of the interests in their respective shares, to be taken as between themselves, their wives & issue, respectively, as A. should appoint. A., by will, limited the share of one of the appointees to trustees for the appointee, his wife & children, the wife not being an express object of the original power:—**Held:** the appointment was an effectual execution of the power, being equivalent to an appointment to A., & a subsequent & independent settlement by A. of the fund which A. acquired by such appointment.—**GOLDSMID v. GOLDSMID** (1842), 2 Hare, 187; 12 L. J. Ch. 113; 7 Jur. 11; 67 E. R. 78.

**Annotations:—****Consd.** *Pryor v. Pryor* (1863), 32 L. J. Ch. 731. **Apld.** *Whitting v. Whitting* (1908), 53 Sol. Jo. 100.

**1038.** —.—**Real estate was vested in trustees under a will, upon trust as to one moiety to pay the rents to A. for life, & after his death to convey it to & among his children who should attain twenty-one, & if he had no such child then on the trusts of the other moiety, & as to the other moiety on similar trusts for B. & his children. The will empowered the trustees if they should think fit to convey the shares of A. & B., or either of them, to them in fee. In 1882, A. & B., the younger of whom was the age of sixty-two, & neither of whom had any child, having incurred their interests, & being pressed by their mtgees., applied to the trustees to exercise the power of giving them their shares of the estate in fee. An arrangement was made between A. & B. & the trustees that the trustees should, in exercise of their power, convey the estate to A. & B., as tenants in common in fee, & that, subject to such mtges. as should be approved by the trustees for raising money to pay off the existing mtges., a part of the property should be settled upon trusts which gave A. & B. respectively powers of appointment in favour of their respective children & remoter issue, & powers of jointuring their wives. The trustees accordingly conveyed to A. & B., as tenants in common in fee, & the resettlement which vested the equity of redemption in new trustees, with a power of sale, upon the trusts which had been arranged, was made by a deed which recited that the trustees had exercised the power on condition that the settlement should be made:—**Held:** looking at all the circumstances of the case, it was not shown that the bargain for the resettlement induced the appointment, or if the bargain had not been entered into, the**

appointment would not have been made, & the appointment & settlement were therefore valid.—**Re TURNER'S SETTLED ESTATES** (1884), 28 Ch. D. 205; 54 L. J. Ch. 690; 52 L. T. 70; 33 W. R. 265, C. A.

**1039.** —.—**](1) Under a power to appoint to children an appointment was made by deed poll to trustees upon the trusts of a contemporaneous settlement on the marriage of one of the daughters. This settlement, to which the daughter was a party, declared trusts for the daughter for life, with limitations over to her husband & children:—Held:** the appointment was good, being equivalent to an appointment to the daughter & a settlement by her.

**(2) Another appointment was made in favour of another daughter already married, & in this case the deed of appointment itself declared trusts in favour of the daughter, her husband & children:—Held:** this appointment was bad; but on the evidence of intention the appointment was rectified.—**DANIEL v. ARKWRIGHT, COURTHORPE v. DANIEL, DANIEL v. COURTHORPE** (1864), 2 Hem. & M. 95; 4 New Rep. 418; 11 L. T. 18; 10 Jur. N. S. 764; 71 E. R. 396.

**Annotations:—****As to (2) Re** *Turner's S. E.* (1884), 28 Ch. D. 205. **Generally, Mentd.** *Bonhote v. Henderson*, [1895] 1 Ch. 742; *Rake v. Hooper* (1900), 83 L. T. 669.

**1040.** —.—**PRYOR v. PRYOR**, No. 1031, *ante*.

**1041.** —.—**Appointment & settlement in same instrument.]—**Under a power to appoint among children interests may be given to grandchildren by way of settlement with the concurrence of their mother, an object of the power, & her husband.—**WHITE v. ST. BARBE** (1813), 1 Ves. & B. 399; 35 E. R. 155.

**Annotations:—****Consd.** *Tucker v. Tucker, Tucker v. Sanger* (1824), 13 Price, 607; *Cutten v. Sanger* (1828), 2 Y. & J. 459. **Apld.** *Re Gosset's Settltmt.* (1854), 19 Beav. 529; *Fitzroy v. Richmond* (No. 2) (1859), 27 Beav. 190. **Consd.** *Re Pocock's Policy* (1871), 6 Ch. App. 445. **Apprvd.** *Cuninghame v. Anstruther* (1872), L. R. 2 Sc. & Div. 223. **Distd.** *Morgan v. Gronow* (1873), L. R. 16 Eq. 1. **Re** *Turner's Settltmt.* (1884), 52 L. T. 70. **Mentd.** *Purdew v. Jackson* (1824), 1 Russ. 1; *Honner v. Morton* (1826-28), 3 Russ. 65.

**1042.** —.—**]**—A tenant for life had a power to appoint to children. By a post-nuptial settlement, to which his married daughter & her husband were parties, he appointed the reversionary interest of stocks to the daughter & her husband & children:—**Held:** the appointment to the husband & grandchildren was valid.—**Re GOSSET'S SETTLEMENT** (1854), 19 Beav. 529; 52 E. R. 456.

**Annotation:—****Mentd.** *Re Fox, Wodchouse v. Fox*, [1904] 1 Ch. 480.

**1043.** —.—**]**—A., a tenant for life, had a power of appointing a fund amongst her children. There being only one object of the power, viz., C., who was a married woman, an arrangement was come to between A. & C. & her husband, whereby the whole fund was appointed to C. & then resettled, giving an interest to C.'s children & to E., a stranger. The husband survived:—**Held:** the transaction was binding on him & his representatives.—**WRIGHT v. GOFF** (1856), 22 Beav. 207; 25 L. J. Ch. 803; 27 L. T. O. S. 179; 2 Jur. N. S. 481; 4 W. R. 522; 52 E. R. 1087.

**Annotation:—****Re** *Turner's S. E.* (1884), 28 Ch. D. 205.

**1044.** —.—**]**—Parents had life interests in a sum of money, with power to appoint it to their children. On the marriage of an infant daughter, by a settlement to which she & her intended husband were parties, the parents

**PART VI. SECT. 3, SUB-SECT. 2.—B. (b).**

**1037 I. Independent contemporaneous settlement by appointee of appointed fund.]—****Re FOOTE & PURDON'S ESTATE**, [1910] 1 I. R. 365.—**IR.**

appointed the reversionary fund to trustees, on trust for the daughter, the intended husband & the children of the marriage. The daughter & her husband survived the parents:—*Held*: the appointment to the husband & children, though not objects of the original power, was valid, notwithstanding the infancy of the daughter.—*FITZ ROY v. RICHMOND (DUKE)* (No. 2) (1859), 27 Beav. 190; 28 L. J. Ch. 752; 33 L. T. O. S. 267; 5 Jur. N. S. 971; 54 E. R. 74.

*Annotation*:—*Refd. Re Turner's S. E.* (1884), 28 Ch. D. 205.

**1045.** ———.]—The donees of a power of appointment appointed to their son, an object of the power, for life & then to any wife of such son, the wife not being an object of the power, for her life. The son was a party to the deed of appointment:—*Held*: the appointment to the wife was good, as the deed operated as a settlement by the son of the appointed fund.—*WHITTING v. WHITTING* (1908), 53 Sol. Jo. 100.

*Annotations*:—*Mentd. Re Nash, Cook v. Frederick*, [1909] 2 Ch. 450; *Re Park's Settlt.*, *Foran v. Bruce*, [1914] 1 Ch. 595; *Re Bullock's Will Trusts*, *Bullock v. Bullock*, [1915] 1 Ch. 493; *Re Garnham*, *Taylor v. Baker*, [1916] 2 Ch. 413.

### C. Purpose Foreign to Power.

**1046. Whether appointment void.**—Wherever a power is given giving dominion over property for a specified purpose, the ct. requires that it shall be exercised with a view only to effecting the legitimate purpose of the power. If it be used by the donee for other purposes, from any ill motive, this is a fraud on the power.—*ROBERTSON v. NORRIS* (1857), 1 Giff. 421; 30 L. T. O. S. 253; 4 Jur. N. S. 155; 65 E. R. 983; *on appeal*, 4 Jur. N. S. 443, L. C.

*Annotations*:—*Refd. Pooley's Trustee v. Whetham* (1886), 33 Ch. D. 111. *Mentd. Thurlow v. Mackeson* (1868), 9 B. & S. 975; *Nash v. Rads* (1880), 25 Sol. Jo. 95; *Martinson v. Clowes* (1882), 21 Ch. D. 857; *Warner v. Jacob* (1882), 20 Ch. D. 220; *Farrar v. Farrar* (1888), 40 Ch. D. 395; *White v. City of London Brewery Co.* (1888), 39 Ch. D. 559; *Colson v. Williams* (1889), 58 L. J. Ch. 539; *Belton v. Bass, Ratcliff & Gretton*, [1922] 2 Ch. 449.

**1047.** ———.]—*PORTLAND (DUKE) v. TOPHAM (LADY)*, No. 963, *ante*.

**1048.** ———.]—*Appointee ignorant of fraud.*—Where the donee exercises a power of appointment in favour of one of several objects of the power, with a view to the benefit of a stranger, the appointment is fraudulent & void, even although the appointee is ignorant of the fraud, & the motive of the donee is not morally wrong.

Where a married woman having a power to appoint a fund, of which she received the income for her life, among her children, appointed the whole fund at her death to her eldest daughter, in order that thereout the daughter should benefit her father, but the daughter was not informed of the mother's intention until after her mother's death:—*Held*: such appointment was void.—*Re MARSDEN'S TRUST* (1859), 4 Drew. 594; 28 L. J. Ch. 906; 33 L. T. O. S. 217; 5 Jur. N. S. 590; 7 W. R. 520; 62 E. R. 228.

*Annotations*:—*Fold. Topham v. Portland* (1862), 31 Beav. 525. *Consd. Ranking v. Barnes* (1864), 3 New Rep. 660; *Topham v. Portland* (1869), 5 Ch. App. 40. *Distd. Roach v. Trood* (1876), 3 Ch. D. 429. *Exold. Re Crawshaw, Crawshaw v. Crawshaw* (1890), 43 Ch. D. 615. *Refd. Henty v. Wrey* (1882), 19 Ch. D. 492.

**1049.** ———.]—*TOPHAM v. PORTLAND (DUKE)*, No. 965, *ante*.

**1050.** ———.]—*Appointee not party to execution—Subsequent acquiescence.*—*ROACH v. TROOD*, No. 855, *ante*.

**1051.** ———.]—*Appointment with forfeiture clause*—

*Forfeiture on specified marriage.*—*Testatrix*, by will, dated in 1845, limited to a daughter an exclusive power of appointment by will amongst her children. The daughter, by her will, dated in 1874, in exercise of the power, appointed the fund amongst the objects of the power in certain shares, giving to two of her daughters life interests only, & declared that if either during her life or after her death any son or daughter of hers should marry a person who did not profess the Jewish religion, or was not born a Jew though converted to Judaism, or should forsake the Jewish & adopt the Christian, or any other religion, then such son or daughter should forfeit all share in the fund, & in case of forfeiture the forfeited share was to accrue & go over to the other or others of the children living at the time of the forfeiture. J., a son of the appointor, married a Christian in his mother's lifetime, but without her consent. Pltf., one of the two daughters of the appointor, to whom a life interest only was appointed, became a Christian after the mother's death. Both J. & pltf. were born after the death of the creator of the power:—*Held*: (1) the forfeiture clause was not void as against public policy; (2) it was effectual as to the shares of children marrying Christians or becoming Christians during the lifetime of the appointor, & therefore the share of J. was forfeited; (3) the forfeiture clause must be read in conjunction with the gift over, & therefore, so far as it affected, after the death of the appointor, the share of a child born after the death of the creator of the power, it was void for remoteness, whether such share was appointed for life only or absolutely, & consequently pltf. had not forfeited her share.—*HODGSON v. HALFORD* (1879), 11 Ch. D. 959; 48 L. J. Ch. 548; *sub nom. Re LYON, Re JACOBS, Hodgson v. Halford*, 27 W. R. 545.

*Annotation*:—*Fold. Wainwright v. Miller*, [1897] 2 Ch. 255.

**1052.** ———.]—*Forfeiture on change of religion.*—By a settlement made in 1847 on the marriage of W. property was settled upon trust to pay the income of W. for life, & after her death for such one or more of the children of the marriage in such shares & subject to such conditions & limitations & in such manner as W. should appoint by deed. There were three children of the marriage, T., J., & H., & in 1890 W. by deed appointed that after her death one-third of the property should be held in trust for T., another third in trust for J., & as to the remaining third upon trust to pay the income to H., if not then a member of the Roman Catholic Church or of any sisterhood, or until she should become a member of either, & subject as aforesaid, as to the capital & income, to T. & J. W. died in 1893, & in 1895 H. became a member of a sisterhood:—*Held*: the appointment of H.'s third was not a fraud on the power.—*WAINWRIGHT v. MILLER*, [1897] 2 Ch. 255; 66 L. J. Ch. 616; 76 L. T. 718; 45 W. R. 652; 41 Sol. Jo. 561.

*Annotation*:—*Consd. Re Gage, Hill v. Gage*, [1898] 1 Ch. 498.

### SUB-SECT. 3.—PROOF OF FRAUD.

**1053. Necessity for proof.**—I am willing to admit the general principle, that if a father having a power of appointment among his children, thinks proper to exercise it in a way, which on the face of it appears to be for the benefit of the children, but is in reality more or less exclusively

### PART VI. SECT. 3, SUB-SECT. 2.—C.

**1046 1. Whether appointment void.**—*BELL v. LEE* (1883), 8 A. R. 185.—*CAN.*

*Sect. 3.—Fraudulent appointments: Sub-sects. 3*

for his own, the transaction cannot stand; but, until the ct. has information before it of the value of the copyhold, & the amount of the ultimate surplus, it is not in a situation to say the transaction is unfair or even suspicious. Whatever the transaction may have been, if there is no evidence to impeach it, how is it possible for the ct. to interfere? On the face of the deed everything is stated with the most minute particularity, & as there is nothing to show it is not a fair family arrangement, there is no reason why the ct. should not make the usual decree for a sale (*SHADWELL, V.-C.*).—*UTTERMERE v. WILLIAMS* (1838), 2 Jur. 838.

**1054.** —.]—By a post-nuptial marriage settlement property in the funds belonging to the wife was settled in trust for the husband & wife for their lives & the life of the survivor, & then for such one or more exclusively of the others or other of the children of the marriage, in such parts & shares, etc., as the wife should by deed or will appoint. There were four children of the marriage. The husband died, & the wife appointed the whole fund, & assigned her life interest therein to the eldest child, a daughter, who had attained the age of twenty-one, but who, together with the other children, was living with her mother:—*Held*: the appointment & assignment were valid, & a trustee refusing to join in the transfer of the fund, pursuant to the appointment, was not allowed his costs of a suit brought against him by the daughter to compel the transfer, though, under all the circumstances of the case, he was not decreed to pay the costs of the suit.

If it can ever be shown that this deed was executed from improper motives, those who are interested in doing so can apply to set it aside. There is nothing whatever to justify this ct. in not giving effect to it at present (*KNIGHT BRUCE, V.-C.*).—*CAMPBELL v. HOME* (1842), 1 Y. & C. Ch. Cas. 664; 7 Jur. 365; 62 E. R. 1062.

*Annotations*:—*Consol.* Wellesley v. Mornington (1855), 2 K. & J. 143. *Reid.* Cockcroft v. Sutcliffe (1856), 2 Jur. N. S. 323.

**1055.** —.]—A tenant for life, with a power of appointment among his children, appointed to two, & then joined with them in a mtg., the money being expressed to be advanced to all three:—*Held*: this was no fraud on the power of appointment.

Trustees raising a charge of fraud, & taking no steps to satisfy themselves when they might easily do so, will not be allowed their costs of the discussion in ct. if upon the evidence the ct. considers there was no reasonable ground of suspicion.—*COCKCROFT v. SUTCLIFFE* (1856), 25 L. J. Ch. 313; 27 L. T. O. S. 34; 2 Jur. N. S. 323; 4 W. R. 339.

*Annotations*:—*Apld.* *Re* Hulsh's Charity (1870), L. R. 10 Eq. 5. *Reid.* *Re* Turner's Settlement (1884), 52 L. T. 70.

**1056.** —.]—Under a settlement, made in 1828, testator had power to appoint by will to & among his children a sum of £35,000. By his will, made in 1865, he bequeathed £150,000 to his daughter Jessie, & directed that this legacy should be paid to four trustees named in the will, & should be held by them upon trust for her during her life, with remainder for her issue. The will then recited the power of appointment contained in the settlement, & by virtue of that power the testator appointed £10,000, part of the £35,000, to the same daughter; but his will was that the same should be paid to the trustees thereinbefore named with reference to the legacy of £150,000, & should be held by them upon the trusts therein-

before declared thereof. Testator then appointed two sums of £10,000 & £7,000 respectively in favour of two other daughters, & he appointed the residue of the £35,000 to his son Robert absolutely. In case he had exceeded his power in not appointing the £10,000 to his daughter Jessie unconditionally, but in directing the settlement thereof, & in case his said daughter or her husband, or others having any right or power to object to the settlement thereof as aforesaid, should so object, or should not confirm such settlement, if required so to do, then he appointed that the said sum of £10,000 should go & belong to his son Robert, "but who will I am assured settle the same voluntarily in the manner in which I have attempted to settle the same as aforesaid so as thereby to carry out my wishes." After testator's death the son Robert executed a declaration of trust of the £10,000 to carry out his father's wishes. There was no evidence, other than the will itself, of any bargain between the son & testator that the former would settle the £10,000:—*Held*: the appointment of the £10,000 in favour of the daughter Jessie was invalid; the £10,000 did not pass to the son under the appointment of the residue to him; but under the last appointment to him, there being only an expression of testator's wish, & no evidence of any bargain by the son that the fund should be settled, it passed to him absolutely, free from any obligation to settle it, & was, therefore, validly appointed.—*Re CRAWSHAY, CRAWSHAY v. CRAWSHAY* (1890), 43 Ch. D. 615; 59 L. J. Ch. 395; 62 L. T. 489; 38 W. R. 600.

**1057.** — *Whether suspicion sufficient.*—

(1) Though a party is not permitted to execute a power for his own benefit, & the objection cannot be waived by a party, participating in the benefit, as against other interests, the ct. will not act against the title upon a mere suspicion, that a transaction was of that nature; appearing fair both upon the instruments & the abstract: viz. a purchase under the execution of a power of appointment by a father, subject to estates for life in him & his wife, in favour of their son; all three joining; & receiving the money, the fair value; which is presumed to be received according to their interests in the estate; & the purchaser not bound to see to the application.

(2) This ct. will not permit a party to execute a power for his own benefit (*LORD ELDON, C.*).—*M<sup>QUEEN</sup> v. FARQUHAR* (1805), 11 Ves. 467; 32 E. R. 1168, L. C.

*Annotations*:—*As to* (1) *Distd.* *Hall v. Montague* (1830), 8 L. J. O. S. Ch. 167. *Apld.* *Butcher v. Jackson* (1845), 14 Sim. 444; *Cockcroft v. Sutcliffe* (1856), 25 L. J. Ch. 313. *Reid.* *Green v. Pulsford* (1839), 2 Beav. 70; *Domville v. Lamb* (1853), 1 W. R. 246; *Baker v. Bradley* (1855), 2 Jur. N. S. 98; *Wellesley v. Mornington* (1855), 2 K. & J. 143; *Warde v. Dixon* (1858), 28 L. J. Ch. 315; *Cloutte v. Storey*, [1911] Ch. 18. *As to* (2) *Consol.* *Henty v. Wrey* (1882), 21 Ch. D. 332. *Reid.* *Re Hulsh's Charity* (1870), L. R. 10 Eq. 5. *Generally.* *Reid.* *Wright v. Wakeford* (1811), 17 Ves. 454; *A.-G. v. Hamilton* (1816), 1 Madd. 214; *Moodie v. Reid* (1816), 1 Madd. 516; *Hougham v. Sandys* (1827), 2 Sim. 95; *Allen v. Bradshaw* (1835), 1 Curt. 110; *Campbell v. Home* (1842), 1 Y. & C. Ch. Cas. 664; *Burdett v. Spilsbury, Skynner v. Spilsbury* (1843), 10 Cl. & Fin. 340; *Warren v. Postlethwaite* (1845), 2 Coll. 108; *Doe d. Knight v. Spencer*, *Same v. Sansum* (1848), 2 Exch. 752; *Vincent v. Sodor & Man (Bp.)* (1849), 8 C. B. 905; *Brassey v. Chalmers* (1852), 16 Beav. 223; *Bradshaw v. Fane* (1856), 25 L. J. Ch. 413; *Re Rickett's Trust* (1860), 2 L. T. 320; *Re Frith & Osborne* (1876), 3 Ch. D. 618. *Mentd.* *Ross v. Tyser Line, The Celtic King* (1894), 10 T. L. R. 222.

**1058.** —.]—A father being tenant for life of a certain estate held upon lives, with power of appointment amongst one or more of his children, by deed of Jan. 14, 1804, appoints to his son, in tail male. By deed of Jan. 18, 1804, the



father & son, in consideration of £1,600, to be applied in paying interest of debts upon the estates, & of fines due for the renewal of the lives on the estates, demise part of the estate for the lives therein named, & for lives which might afterwards be added. By lease & release of Dec. 10 & 11, 1807, in consideration of the debts paid by the father for the son, the son reconveys to the father the estate which had been appointed to the son:—*Held*: from the circumstances of the two first deeds being executed nearly at the same time, of the father's debts being provided for out of the estate, & of the son's restoring the estate to the father, there was so much doubt as to the validity of the appointment, notwithstanding a recital in one of the deeds, that the father had paid the debts of the son, as to make it necessary to inquire into the validity of the appointment.

Deft. has merely thrown suspicion upon the title of pltf. (LORD COTTENHAM, C.).—*JACKSON v. JACKSON* (1840), 7 Cl. & Fin. 977; West, 575; 7 E. R. 1338, II. L.

1059. ———.]—M. P. having a power of appointing a fund by deed or will amongst her children, exercised the power by will in favour of two of her children. A month afterwards she exercised her power in almost the same terms by a deed, & on the faith of the latter appointment, M. P. obtained a loan, & the appointees joined in charging the shares appointed to them as security for the repayment of this loan. The appointment by deed was admittedly invalid, as between the children, as a fraud upon the power; & the will, the deed of appointment, & the security, were all drawn by the same solr., who was also the solr. for the persons who advanced the money:—*Held*: these circumstances, though giving rise to strong suspicion that the will was executed with a view to the subsequent fraudulent transaction, were not sufficient to justify the ct. in arriving at that conclusion, & as fraud was not clearly proved the appointment made by will must be treated as valid.—*PARES v. PARES* (1863), 33 L. J. Ch. 215; 10 Jur. N. S. 90; 12 W. R. 231.

1060. ———.]—*Re BOILEAU'S WILL TRUSTS*, [1921] W. N. 222.

1061. Burden of proof.—When on those impeaching appointment.]—*ASKHAM v. BARKER*, No. 1021, *ante*.

1062. ——— When on those supporting appointment.]—(1) A power of appointment given by her marriage settlement to H., was exercised by her in favour of her daughter S., who some time afterwards raised money upon the security of the sum appointed, which money was applied, wholly or in part, in the discharge of debts due from S., but for which H. was liable also as a surety. The appointment was sought to be set aside after the deaths of both appointor & appointee, on the ground of a corrupt bargain between them, & amongst other evidence a letter written by H. was produced, wherein she acknowledged that there had been an agreement between herself & S., that her money should, in part, be applied for her benefit; & complained of the violation of that agreement. The husband of S. positively denied the existence of such motives; & the judge thought that, although the case was involved in

suspicion, yet that the *onus* of proof was on pltf. seeking to set the transaction aside; he therefore dismissed the bill, but without costs:—*Held*: as the circumstances showed that the appointor had intended to devise a benefit to herself, although it was not proved that she had actually derived a benefit, excepting indirectly by the discharge of debts of S., for which she, H. W., was surety, the appointment must be set aside.

(2) The letter referred to was taken as evidence that at one time the appointor, in making the appointment, had intended to derive a benefit from it; & TURNER, L.J., expressed his opinion that the *onus* was upon the parties supporting the appointment to show that, at the time of the execution of the appointment, that intention had been abandoned by her.—*HUMPHREY v. OLVER* (1859), 28 L. J. Ch. 406; 33 L. T. O. S. 83; 5 Jur. N. S. 946; 7 W. R. 334, L. JJ.

*Annotations*:—As to (1) *Consd. Shirley v. Fisher* (1882), 47 L. T. 109. *Reid. Molynaux v. Fletcher*, [1898] 1 Q. B. 648. As to (2) *Apld. Re Wright, Hogan v. Bloor* (1920), 1 Ch. 108.

1063. ———.]—*Re WRIGHT, HEGAN v. BLOOR*, No. 555, *ante*.

1064. Evidence.—All surrounding circumstances.]—*ASKHAM v. BARKER*, No. 1021, *ante*.

1065. ——— Letter showing intention of donee.]—*HUMPHREY v. OLVER*, No. 1062, *ante*.

1066. ———.]—*Re WRIGHT, HEGAN v. BLOOR*, No. 555, *ante*.

#### SUB-SECT. 4.—EFFECT ON PURCHASERS FOR VALUE WITHOUT NOTICE.

*See, now*, Law of Property Act, 1925 (c. 20), s. 157.

1067. Purchaser with legal estate.]—A tenant for life of real estate, with remainder to his children as he should appoint, remainder to them in fee, entered into an agreement with a creditor to which his children were parties, that the estate should be immediately sold, & one half of the produce paid to the father, & the other to the children. The father remained in possession for seven years, & then died, without having taken any step to carry the agreement into effect. A bill by the personal representative of creditor against the children & the representative of the father, to have the agreement carried into effect, was dismissed on the ground that the father, by continuing in possession of the estate, deprived his daughters of the benefit of the agreement.—*RHODES v. COOK* (1826), 2 Sim. & St. 488; 4 L. J. O. S. Ch. 147; 57 E. R. 433.

*Annotation*:—*Reid. Baker v. Bradley* (1854), 2 Sm. & G. 531.

1068. ———.]—An estate was settled to the husband & wife successively for life, with remainder to their children as they should appoint, & in default of appointment between such children. The husband & wife encumbered their life interests, & in Aug. the husband & wife, having seven children, appointed the whole estate to the eldest daughter; in Oct. of the same year the husband, wife & daughter mortgaged the property for £8,000. The mtgee., under the power of sale in the mtge. deed, sold the property to pltf.; & after the title had been approved of, one of the

#### PART VI. SECT. 3, SUB-SECT. 3.

1061. Burden of proof.—When on those impeaching appointment.]—*HUTCHINS v. HUTCHINS* (1876), 10 I. R. Eq. 453.—*IR*.

1. Whether strong suspicion sufficient.]—Strong suspicion that an appointment by a father to his son was

for the benefit of the father, & a fraud upon the power of appointment. Is not sufficient to avoid the transaction.—*HAMILTON v. KIRWAN* (1845), 2 Jo. & Lat. 393.—*IR*.

#### PART VI. SECT. 3, SUB-SECT. 4.

m. Purchaser must be without notice.]

—Equity will relieve against a contract entered into by a child with a parent, for an appointment from him; & a purchaser from the parent, with notice of the fraud, will be affected by it.—*PALMER v. WHEELER* (1811), 2 Ball & B. 27, 29, 30.—*IR*.



**Sect. 3.—Fraudulent appointments: Sub-sects. 4 & 5. Sect. 4. Part VII.]**

younger children gave notice to pltf. not to complete & that the appointment was a fraud on the marriage settlement, & also cautioning the purchaser not to pay the purchase-money; he did not, however, follow up the notice by any proceeding:—*Held*: notwithstanding this a good title was shown, & the purchaser must complete.

The question is, whether the mere circumstance of this notice having been given, without one single fact being brought forward in any way to impeach these deeds, ought to be a reason why the contract should not be specifically performed (LANGDALE, M.R.).—*GREEN v. PULSFORD* (1839), 2 Beav. 70; 48 E. R. 1105.

*Annotations*:—*Reid*, Grove v. Bastard (1848), 2 Ph. 619; Grove v. Bastard (1851), 1 De G. M. & G. 69; Cockcroft v. Sutcliffe (1856), 27 L. T. O. S. 34. *Mentd.* Boyse v. Rossborough (1853), Kay, 71.

**1069.** —.] — *Cloutte v. Storey*, No. 3, *ante*.

**1070. Where appointment in fraud of equitable power.]**—*Daubeny v. Cockburn*, No. 1026, *ante*.

**1071.** —.] — *Warde v. Dixon*, No. 984, *ante*.

**1072.** —.] — *Cloutte v. Storey*, No. 3, *ante*.

**1073. Who are purchasers—Issue of marriage.]**—*Conolly v. McDermott* (1825), Sugden's Law of Property, 513, H. L.

**1074. Purchaser must be without notice.]**—A conveyance to a purchaser for valuable consideration, set aside, on the ground that it proceeded upon an appointment by a father to his eldest son, made in fraud of the power.—*Hall v. Montague* (1830), 8 L. J. O. S. Ch. 107.

**SUB-SECT. 5.—SEVERANCE OF APPOINTMENTS.**

**1075. Whether court will sever valid from invalid.]**—*Daubeny v. Cockburn*, No. 1026, *ante*.

**1076. — Transactions taken as a whole—Impeachment of one of two appointments—Other appointment not before court.]**—(1) The ct. will not entertain a suit to set aside an appointment of a part of certain trust funds as a fraud upon the power, when it appears that another appointment, not impeached by the bill, was made of funds subject to the same power, in which regard was had to the appointment complained of, & the object was to equalise the interests of the several appointees; for the ct. will not undo part of an entire transaction, the other parts of the same transaction not being brought within its jurisdiction.

(2) Where there is an appointment to A. & B. by one instrument, & *a fortiori* by different instruments, the appointment to A. may be good, & the appointment to B. bad, & A. & B. may well agree between themselves that the bad appointment shall not be disturbed.

(3) Certain policies of insurance, effected by a father on his life as a provision for his daughters, were assigned to a trustee, upon trust for such of the daughters as the father should appoint; & certain estates were demised to the same trustee, upon trust, out of the rents & profits to secure the payment of the premiums. The trustee advanced some sums of money in payment of the premiums, & the father appointed the bonuses which had accrued upon the policies to three of his daughters; & the three daughters soon afterwards authorised the trustee to receive the sum paid by the office for the bonuses, & invest part thereof as a fund to keep down the premiums, & a part of the sum

was applied in satisfaction of the arrears of such premiums. A subsequent appointment was made, in favour of the other daughters, of the residue of the sums to be received on the policies, & which was intended to equalise the shares:—*Held*: the first appointment was a fraud upon the power, its immediate object being to relieve the father, & its necessary consequence to relax the diligence of the trustee in enforcing the rights of the daughters against the father; & the application of the trust funds, in pursuance of the appointment by the trustee, who knew that the appointment was fraudulent, was a breach of trust, for which he was responsible to the objects of the power.—*HARRISON v. RANDALL* (1851), 9 Hare, 397; 21 L. J. Ch. 294; 16 Jur. 72; 68 E. R. 562.

*Annotation*:—*As to* (3) *Consd.* Rowley v. Rowley (1854), 23 L. T. O. S. 55.

**1077.** —.] — Distinction between an appointment exceeding the limits of a power & void for the excess only, & one which being a fraud on the power is void altogether.

B. had a power to appoint a rentcharge in favour of her sons, & a power to appoint policy moneys in favour of her children. On Aug. 13, 1838, she appointed the rent charge to her son G., who, on the following day, settled it, not only in favour of himself & other objects of the power, but also of B.'s husband & others not objects of the power. On the same day, B. appointed the policy moneys partly in favour of objects of the power & partly in favour of her husband & other persons not such objects. The deed contained a proviso, that if any of the objects should refuse to accede to the arrangements as to the rent charge & policy moneys, he should forfeit the benefits intended. On the same day, G. gave a bond to A.'s husband for securing him a benefit out of the policy moneys. The ct. being of opinion that the transaction must be taken as a whole, held it altogether void, both as against the objects of the power & the rest, considering it an entangled transaction to effect a fraudulent execution of the power in favour of persons who were not objects.—*AGASSIZ v. SQUIRE* (1854), 18 Beav. 431; 23 L. J. Ch. 985; 1 Jur. N. S. 50; 52 E. R. 170.

**1078. — Transaction not sufficiently connected.]**—A husband & wife lived apart, & the wife had the care of one of their two younger children. The husband being desirous of raising money by mtge. of his settled estates & being unable to do so on account of the existing charges thereon, applied to the wife to postpone her pin money & jointure annuities to his proposed mtges. The wife consented, provided that the husband would exercise a power of appointment which he had over a sum of £30,000 in favour of his younger children, to the extent of appointing £5,000 to the child under her care. He accordingly did so by a revocable deed; & by a similar deed, dated the next day, reciting the former appointment, he appointed the rest of the fund to his only other younger child. The former deed only was communicated to the wife, & she objecting to the power of revocation, it was cancelled, & a new irrevocable deed was prepared & executed of the same date as the former. The husband died before the mtge. which he proposed to make was effected:—*Held*: although the bribe to the husband would affect the validity of the appointment of the £5,000, yet the appointment of the £25,000 was not so connected with the former appointment as to be also invalid; nor indeed was the motive for the latter appointment the same as in the former case, for

instead of being an inducement to the wife to consent to the proposed arrangement, the second appointment, if revealed to her, would probably have prevented her concurring in postponing her pin money & jointure.—*ROWLEY v. ROWLEY* (1854), *Kay*, 242; 2 *Eq. Rep.* 241; 23 *L. J. Ch.* 275; 23 *L. T. O. S.* 55; 18 *Jur.* 306; 69 *E. R.* 103.

*Annotations*:—*Consd.* *Whelan v. Palmer* (1888), 39 *Ch. D.* 648. *Refd.* *Bulteel v. Plummer* (1869), *L. R.* 8 *Eq.* 585; *Saunders v. Shatto*, [1905] 1 *Ch.* 126; *Re Wright, Hegan v. Bloor*, [1920] 1 *Ch.* 108.

1079. ———.]—Tenant for life had power to appoint, to any of his children, an estate, which in default, was limited to his eldest son in fee. The eldest son attained twenty one in Jan. 1841, & in Feb. the father appointed the estate to him absolutely. In May the father & the son mortgaged the estate for the father's debts, & in July the father & eldest son conveyed the estate to a trustee, to indemnify the son against the mtge. debts, & then to sell & divide the surplus between all the children equally:—*Held*: the deed of July must be treated as valid until set aside by an independent proceeding for that purpose in a suit by a younger child, to carry it into execution.

[An] appointment, being partly for a purpose beneficial to the donee of the power, was a fraud

on the power (*ROMILLY, M.R.*).—*BEDDOES v. PUGH* (1859), 26 *Beav.* 407; 53 *E. R.* 955.

1080. ———.]—*CARVER v. RICHARDS*, No. 380, *ante*.

1081. ———.]—*PORTLAND (DUKE) v. TOPHAM (LADY)*, No. 963, *ante*.

1082. ———.]—The husband of an appointee under a power, not being himself an object of the power, was surety for the debt of another object of the power. The appointment having been made with the intention that one-half should be employed in exonerating the husband, was held void as to that half, but valid as to the other.—*RANKING v. BARNES* (1864), 3 *New Rep.* 660; 33 *L. J. Ch.* 539; 10 *L. T.* 124; 10 *Jur. N. S.* 463; 12 *W. R.* 565.

*Annotation*:—*Consd.* *Bulteel v. Plummer* (1869), *L. R.* 7 *Eq.* 585.

1083. ———.]—*VIANT v. COOPER*, No. 856, *ante*.

1084. Agreement to leave invalid appointment undisturbed—Agreement between two appointees.]—*HARRISON v. RANDALL*, No. 1076, *ante*.

#### SECT. 4.—ELECTION.

*See EQUITY*, Vol. XX., pp. 427–432, Nos. 1573–1608.

## Part VII.—Non-Exercise of Power.

1085. Not aided by equity.]—*TOMKIN v. SANDYS* (1718), 2 *P. Wms.* 227, n.; 24 *E. R.* 711.

1086. ———.]—*HOLMES v. COGHILL*, No. 738, *ante*.

1087. ———.]—*LANGSLOW v. LANGSLOW*, No. 516, *ante*.

1088. ———.]—Testator gave his residuary estate to be equally divided amongst his children. He afterwards gave the dividends for the use of each of his children during their respective lives, & if they had children, then the principal to be at the disposal of the parent to such children. One of the daughters, by her will, after expressing her intention to appoint her share to her children, gave a part only to her children, & after directing her debts & legacies to be paid, gave to one of her children the residue of the personal estate which belonged to her, or which she had power to dispose of.—*Held*: the unappointed part of the share was not appointed by the residuary bequest, & was divisible amongst the children equally.

Although the testatrix has expressed the strongest intention to distribute all, yet she has not distributed all & though she may be taken to have been very desirous that the power should be exercised yet if she has not done so then all the ct. can say is, that this portion ought to have been

disposed of by her amongst the children & not having been so disposed of it will be distributed equally amongst them all (*LORD HATHERLEY, C.*).

—*BUTLER v. GRAY* (1869), 5 *Ch. App.* 26; 39 *L. J. Ch.* 291; 25 *L. T.* 227; 18 *W. R.* 193, *L. C.* *Annotation*:—*Refd.* *Re Weekes' Settlement*, [1897] 1 *Ch.* 289.

1089. ———.]—*Re JACK, JACK v. JACK*, No. 518, *ante*.

1090. ——— Unless non-execution caused by fraud.]—*MOUNTAGUE (EARL) v. BATH (EARL)* (1693), 3 *Cas. in Ch.* 55; 2 *Rep. Ch.* 417; 22 *E. R.* 963; *sub nom.* *ALBEMARLE (DUCHESS) v. BATH (EARL)*, *Freem. Ch.* 121, 193.

*Annotations*:—*Consd.* *Griffin v. Nanson* (1798), 4 *Ves.* 344. *Refd.* *Berle v. Faulkland* (1698), 3 *Cas. in Ch.* 129; *Piggott v. Penrice* (1716), 1 *Com.* 250; *Bagot v. Oughton* (1726), *Fortes. Rep.* 332; *Fitzgerald v. Fauconberg* (1731), *Fitz-G.* 207; *Hervey v. Hervey* (1739), 1 *Atk.* 56; *Chapman v. Gibson* (1791), 3 *Bro. C. C.* 229; *Cholmondeley v. Clinton* (1820), 2 *Jac. & W.* 1. *Mentd.* *Bennet v. Vade* (1742), 2 *Atk.* 324; *Middleton v. Prior* (1760), *Amb.* 828; *Haynes v. Haynes* (1861), 1 *Drew. & Sm.* 426.

1091. ———.]—If a person be fraudulently prevented from doing any act, it will in equity be considered as if that act had been done.—*MIDDLETON v. MIDDLETON* (1819), 1 *Jac. & W.* 94; 37 *E. R.* 311, *L. C.*

*Annotations*:—*Mentd.* *Blair v. Bromley* (1847), 2 *Ph.* 354; *Moore v. Knight* (1890), 63 *L. T.* 831.

#### PART VII.

n. Whether donee of power may bind himself not to execute power.]—The donee of a power, although to be

executed by will only, may bind himself not to execute it, or not to execute it except under certain restrictions.—*Re CHAMBERS* (1847), 11 *L. Eq. R.* 518.—*IR.*

o. Non-exercise of power to children—Who takes in default—Whether children of appointor.]—*Re KIERAN, MATTHEWS v. KIERAN*, [1916] 1 *I. R.* 289.—*IR.*

## Part VIII.—Extinguishment and Suspension of Powers.

### SECT. 1.—BY EXPRESS RELEASE OR DISCLAIMER.

#### SUB-SECT. 1.—IN GENERAL.

See Law of Property Act, 1925 (c. 20), ss. 155, 156.

**1092. Right to release—General rule.]**—I think that every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him, which may be released or extinguished. . . . I think that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, & therefore, in gross, may be extinguished (LEACH, V.-C.).—WEST v. BERNEY (1819), 1 Russ. & M. 431; 39 E. R. 167.

*Annotations:*—**Consd.** Smith v. Death (1820), 5 Madd. 371. **Apld.** Shirley v. Fisher (1882), 47 L. T. 109. **Refd.** Bleckley v. Guest (1831), 1 Russ. & M. 440; *Re* Little, Harrison v. Harrison (1889), 37 W. R. 289.

**1093.** ———.]—In *West v. Berney*, No. 1092, *ante*, it appears to me, as the result of the authorities, that every power reserved to a grantee or devisee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, & therefore in gross, may be extinguished. Such a grantee or devisee can deal with the estate in respect of his freehold interest; & his dealing with the estate, so as to create interests inconsistent with the exercise of his power, must extinguish his power, upon the general principle that a person is not permitted to defeat his own grant. It makes no difference that here the power was a particular power in favour of children; such a power could not be called a trust, for the alleged *cestui que trust* could not compel the execution of it, & being at the option of the grantee for life to exercise or not, any dealing with the estate inconsistent with its exercise must determine his option.—SMITH v. DEATH (1820), 5 Madd. 371; 56 E. R. 937.

*Annotations:*—**Apld.** Barton v. Briscoe (1822), Jac. 603. **Refd.** Roddy v. Fitzgerald (1859), 6 H. L. Cas. 823. **Mentd.** Pyke v. Waddingham (1852), 10 Hare, 1.

**1094.** ———.]—COFFIN v. COOPER, No. 1145, *post*.

**1095.** ———.]—PALMER v. LOCKE, No. 1008, *ante*.

**1096.** ——— **Power reserved for own benefit—Though not coupled with interest.]**—A. seised in fee made a feoffment to the use of himself for life, remainder to B. in tail, remainder over, with a power, by deed sealed in the presence of four witnesses, to revoke these uses & to limit new ones, if he overlived J. After this A. by his deed, in the lifetime of J. remised, released, & quit-claimed his said power to the feoffee & the remainderman:—**Held:** this future power was annulled by the defeasance.

Collateral powers & common law authorities, cannot be barred or extinguished by fine, feoffment, or any other conveyance; but powers relating to the land may be extinguished by a fine or feoffment.

A present power may be extinguished by release to any one who has an estate of freehold in the

land, in possession, reversion, or remainder, & the estate defeasible by the power is thereby made absolute.—ALBANY'S CASE (1586), 1 Co. Rep. 110 b; 76 E. R. 246.

*Annotations:*—**Refd.** Digges' Case (1600), 1 Co. Rep. 173 a; Lampet's Case (1612), 10 Co. Rep. 46 b; Grange v. Tiving (1665), O. Bridg. 107; King v. Welling (or Melling) (1672), 3 Keb. 95; Hawkins v. Kemp (1803), 3 East, 410; West v. Berney (1819), 1 Russ. & M. 431; Tyrrell v. Marsh (1825), 10 Moore, C. P. 305. **Mentd.** Sheffield v. Ratcliffe (1615), Hob. 334; Secheverel v. Dale (1627), Poph. 193; Lugg v. Lugg (1695), 2 Salk. 592.

**1097.** ———.]—WEST v. BERNEY, No. 1092, *ante*.

**1098.** ——— **Power to appoint by will.]**—Settlement in trust for the separate use of a married woman for life, but so as not to anticipate, with remainder as she should appoint by will; & in default of appointment to A. On the death of her husband, the restraint on anticipation ceases, & therefore she is entitled, with the concurrence of A., to a transfer of the fund.

Another point . . . is with respect to the power the settlement gives to the mother of disposing of trust funds by will. The question is, whether she can now deprive herself of it & abdicate it. Now the case of *Smith v. Death*, No. 1093, *ante*, & others of that kind have decided that a power of this description may be parted with; & there is, therefore, I apprehend, nothing to prevent her from now releasing it & thereby precluding herself from the exercise of it (PLUMER, M.R.).—BARTON v. BRISCOE (1822), Jac. 603; 37 E. R. 978.

*Annotations:*—**Apld.** Malcolm v. O'Callaghan (1835), 5 L. J. Ch. 137. **Refd.** Davies v. Thornycroft (1836), 6 Sim. 420; Johnson v. Freeth (1836), Donnelly, 16; Brown v. Bamford (1846), 1 Ph. 620; Vaughan v. Vandergeston (1854), 23 L. J. Ch. 793. **Mentd.** Woodmoston v. Walker (1831), 2 Russ. & M. 197; Brown v. Pocock (1833), 2 Russ. & M. 210; Massey v. Parker (1834), 2 My. & K. 174; Tullett v. Armstrong (1839), 4 My. & Cr. 390.

**1099.** ———.]—A tenant for life, with a power of appointing the property by will to all or any of testator's children, may release or extinguish the power.—HORNER v. SWANN (1823), Turn. & R. 430; 37 E. R. 1160.

**1100.** ——— **For own benefit.]**—A father had an exclusive power of appointment in favour of his children over a fund, which, in default, was limited to them equally, & as representative of a deceased son, he was, in default of appointment, beneficially entitled to one-third of the fund. The father released the power to his mtgees:—**Held:** the power had been effectually destroyed, & the ct. declared the rights of the parties consequent on such destruction.—SMITH v. HOUBLON (1859), 26 Beav. 482; 53 E. R. 985.

*Annotations:*—**Fold.** *Re* Radcliffe, Radcliffe v. Rewes, [1892] 1 Ch. 227. **Apld.** *Re* Somes, Smith v. Somes, [1896] 1 Ch. 250. **Refd.** Palmer v. Locke (1880), 15 Ch. D. 294.

**1101.** ——— **Limited power.]**—*Re* SOMES, SMITH v. SOMES, No. 971, *ante*.

**1102.** ——— **Power coupled with duty.]**—When a power, coupled with a duty, is conferred upon trustees, to be executed by them at a fixed period, & after they have come to a judgment as to the conduct of the individual to be affected, they cannot divest themselves of the power, or execute

**PART VIII. SECT. 1, SUB-SECT. 1.**  
**p. Right to release.]**—A married woman married after the passing of Act No. 384 may by deed release a power of appointment given her by settlement without her husband's con-

currence & not acknowledged by her in the terms of Act No. 213, s. 69.—THOMAS v. ORMOND (1889), 15 V. L. R. 365.—AUS.

**q. ———.]**—The release of a power of appointment is not an alienation

or conveyance of property & such a power affecting real estate cannot be effectively extinguished or released by a married woman by deed acknowledged under Conveyancing & Law of Property Act, 1898, s. 26 (2).—*Re*

it until the time appointed; nor can they enter into any anterior compact respecting it. The fact that the individual to be affected by the execution of the power, a youth of twenty-two, married three years before the time appointed for such execution; the fact that the trustees formally approved of the marriage, & were made aware of the settlement thereon, including a provision out of the trust estate for the intended wife; & the fact, moreover, that they gave no caution, or warning, that they might ultimately be obliged to defeat it; all these facts made no difference in the result; for it was held to be the duty of the trustees, the husband having, in their judgment subsequently misconducted himself, to execute the power so as to restrict him to a life interest, although the effect was to defeat the provision for the wife, as well as other claims founded on a confident expectation that the marriage settlement would not be disturbed.—*WELLER v. KERR* (1866), L. R. 1 Sc. & Div. 11, H. L.

*Annotations*.—*Fold*, *Saul v. Pattinson* (1886), 55 L. J. Ch. 831. *Re*, *Radcliffe, Radcliffe v. Bewes*, [1891] 2 Ch. 662. *Mentd.* *Chambers v. Smith* (1878), 3 App. Cas. 795.

1103. ———.]—Testator, by his will, dated in 1880, after giving specific legacies to one of the two defts., A. & B., & to the wife of the other of them, devised & bequeathed his residuary real & personal estate to his trustees, defts. A. & B., upon trust for sale & conversion, & directed that his trustees should hold one moiety "in trust for such persons, in such shares, & generally in such manner" as A. & B. should in their absolute discretion direct, limit, & appoint; & in default of appointment, in trust for all testator's children, living at testator's death equally. Testator stated that his reason for giving such general power of appointment to the trustees was, that he had the fullest confidence in them that they would do what was right & proper, & that they would dispose of the property subject to power justly & fairly & as they thought it ought to be disposed of & divided by testator. By a deed poll dated July 20, 1882, B. absolutely & for ever released the moiety subject to the power, to the intent that, after the execution of that deed, such moiety might go & be held upon the trusts by the will declared concerning the same in default of appointment.

*Pltf.*, a son of testator, brought an action for the administration of testator's property & contended that, by reason of the release by B., the power of appointment, even if simply collateral, was entirely destroyed under Conveyancing Act, 1881 (c. 41), s. 52, & *pltf.* was, therefore, entitled to a share of the moiety.—*Held*: the power which the trustees had was a power coupled with a duty, which neither of them was at liberty to destroy; such power still remained, notwithstanding the deed poll executed by B.; & the fund could not be distributed during the joint lives of the trustees, unless they joined in making an irrevocable appointment.—*Re EYRE, EYRE v. EYRE* (1883), 49 L. T. 259.

*Annotation*.—*Distd.* *Re* *Somes, Smith v. Somes*, [1896] 1 Ch. 250.

1104. ———.]—A marriage settlement executed in 1843 contained a proviso that, if the husband should survive the wife, it should be

lawful for the trustees at their option to withhold the income from him & to appropriate it as they might think most proper for the benefit of him or his children. After the death of the survivor of the husband & wife the property was to go as the wife should by deed or will appoint.—*Held*: the power, being in the nature of a trust could not be released.—*SAUL v. PATTINSON* (1886), 55 L. J. Ch. 831; 54 L. T. 670; 34 W. R. 561.

*Annotation*.—*Distd.* *Re* *Somes, Smith v. Somes*, [1896] 1 Ch. 250.

1105. ———.]—*Re* *SOMES, SMITH v. SOMES*, No. 971, *ante*.

1106. Effect of release—Right to transfer of stock.]—*MILES v. KNIGHT*, No. 77, *ante*.

Rights of trustee in bankruptcy.]—*See* *BANKRUPTCY*, Vol. V., p. 742, No. 6406.

Rights of married woman.]—*See* *HUSBAND & WIFE*, Vol. XXVII., p. 142, Nos. 1159–1162.

Jurisdiction of court—Power vested in lunatic.]—*See* *LUNATICS*, Vol. XXXIII., p. 198, No. 1023.

Power vested in married woman.]—*See* *HUSBAND & WIFE*, Vol. XXVII., pp. 518, 525, 526, Nos. 5584–5590, 5667–5684.

Power under alleged fraudulent conveyance.]—*See* *FRAUDULENT & VOIDABLE CONVEYANCES*, Vol. XXV., p. 221, No. 516.

#### SUB-SECT. 2.—RELEASE BY DEED.

*See* Law of Property Act, 1925 (c. 20), s. 155.

1107. Validity—When executed for benefit of donee.]—*CUNYNGHAME v. THURLOW* (1832), 1 Russ. & M. 436; 39 E. R. 169.

*Annotations*.—*Fold*, *Re* *Little, Harrison v. Harrison* (1889), 40 Ch. D. 418. *N.F.* *Re* *Radcliffe, Radcliffe v. Bewes*, [1892] 1 Ch. 227. *Re*, *Palmer v. Locke* (1880), 15 Ch. D. 294; *Re* *Somes, Smith v. Somes*, [1896] 1 Ch. 250. *Mentd.* *Re* *Scot's Trust*, [1902] 1 Ch. 488.

1108. ———.]—The power which the Conveyancing & Law of Property Act, 1881 (c. 41), s. 39, gives to the ct. of dispensing with a restraint on anticipation is a discretionary power, to be exercised with great caution, & only where a strong case is made for it, & is not necessarily to be exercised because it will be for the benefit of the married woman.

A fund was settled on a married woman for life for her separate use with a restraint on anticipation, remainder to her children & issue as she should appoint, & in default of appointment to the children equally, with cross limitations in the event of any dying under twenty-one without issue. She being in straitened circumstances arranged with her eldest son that his fifth share in a part of the trust funds should be applied in a specified way for her benefit. With a view to this she released her power of appointment over the trust funds, & then applied to the ct. to have the fifth share of the son in the agreed part of the funds together with her life interest therein sold, & the proceeds applied as above.—*Held*: the ct. would not in the exercise of its discretion dispense with the restraint on anticipation in order to give effect to a release executed by the donee of the power for her own benefit.—*Re* *LITTLE, HARRISON v. HARRISON* (1889), 40 Ch. D.

*McBRIEN, WOOD v. McBRIEN* (1909), 98 S. R. N. S. W. 18; 25 N. S. W. W. N. 198.—*AUS.*

*P.*—*POSTLE v. STEPHENS* (1915), 16 S. R. N. S. W. 9; 34 N. S. W. W. N. 187.—*AUS.*

*t.*—*Re* *DUNNE'S TRUSTS*

(1878), 1 L. R. Ir. 516.—*IR.*

*a.* ———.]—*HEATH v. WICKHAM* (1880), 5 L. R. Ir. 285.—*IR.*

*b.* ———.]—*Re* *LYONS & CAROLL'S CONTRACT*, [1896] 1 I. R. 383.—*IR.*

*c.* ———.]—*CHISM v. LIPSETT*, [1905]

1 I. R. 60.—*IR.*

*d.* ———.]—*Qu.*: whether in New Zealand a married woman can, by release or disclaimer, extinguish a power of appointment over personal estate.—*DORZAC v. PUBLIC TRUSTEE* (1894), 13 N. Z. L. R. 538.—*N.Z.*

*Sect. 1.—By express release or disclaimer: Sub-sects. 2 & 3. Sect. 2: Sub-sect. 1.]*

418; 58 L. J. Ch. 233; 60 L. T. 246; 37 W. R. 289; 5 T. L. R. 236, C. A.

*Annotations:—Consd. Re Radcliffe, Radcliffe v. Bewes, [1892] 1 Ch. 227; Re Evered, Molineux v. Evered, [1910] 2 Ch. 147.*

1109. — *Release of power under marriage settlement.*—By a marriage settlement certain real property was settled upon the husband & wife for life, & afterwards to such of the children of the marriage as they should jointly appoint; in default of joint appointment, as the survivor should appoint; & in default of such appointment to the children equally, as tenants in common. The wife died without having joined in any appointment. The husband subsequently executed a deed poll, by which he absolutely released his power of appointment given by the settlement, & afterwards by his will, professed to execute the power of selection, without taking notice of the deed of release, & divided the property in unequal shares among his children:—*Held*: the deed poll releasing the power was valid, the children took as tenants in common, & the will was inoperative as an execution of the power.—*SMITH v. PLUMMER* (1848), 17 L. J. Ch. 145; 10 L. T. O. S. 389.

1110. — *—*.—By a marriage settlement certain property was conveyed to trustees during the joint lives of the husband & wife, in trust to pay the rents & profits to the wife for life, for her separate use, & after her death to the husband for life, & after his decease to the use of such persons as the husband should by will appoint, & in default of such appointment to certain uses for the benefit of the children of the marriage, & in default of any such appointment & issue, there was a limitation to the next of kin of the husband. By a subsequent deed of 1828, which recited that there were no children of the marriage, the husband & wife released & appointed the property to trustees for sale, & covenanted to levy a fine for the purpose of extinguishing all powers & interest of the wife. It was also declared that the release & fine should operate to extinguish the husband's power of appointment by will so far only as any such will made in execution of the power should not operate & enure to the use of the trustees, or in confirmation of the indenture of 1828. A fine was accordingly levied, & subsequently, contrary to the expectation of the parties, a child of the marriage was born. The husband then made a will & executed his power of appointment in favour of the trustees of the deed of 1828, & confirmed that deed in all respects. The trustees contracted to sell the estate; but as the only child of the marriage refused to join in the sale, a bill for specific performance was filed:—*Held*: the power of appointment under the marriage settlement was extinguished by the deed of 1828, except for the special purpose of confirming that deed by will.—*WALMSLEY v. JOWETT* (1854), 23 L. J. Ch. 425; 22 L. T. O. S. 279; 2 W. R. 179.

1111. — *—*.—A father, who was tenant for life under his marriage settlement, had power to appoint among his children, & in default of appointment the fund was to go to all the children equally, the shares to be vested at twenty-one or marriage. There were issue of the marriage three sons; one died an infant; the other two attained twenty-one; but one of them died a bachelor & intestate. The father took out administration to the last-mentioned son, & executed a deed releasing his power of appointment, & then took

out a summons calling on the trustee of the settlement to transfer one moiety to him:—*Held*: the release of the power was valid & the father was entitled to the son's reversionary interest as his administrator.—*Re RADCLIFFE, RADCLIFFE v. BEWES*, [1892] 1 Ch. 227; 61 L. J. Ch. 186; 66 L. T. 363; 40 W. R. 823; 36 Sol. Jo. 151, C. A.

*Annotations:—Consd. Re Some, Smith v. Some, [1896] 1 Ch. 250. Refd. Re Evered, Molineux v. Evered, [1910] 2 Ch. 147. Mentd. A.-G. v. Beech, [1898] 2 Q. B. 147; Blood v. Blood, [1902] P. 190; Re Selot's Trust, [1902] 1 Ch. 488; Evans v. Evans & Blyth, [1904] P. 274; Re French-Brewster's Settlements, Walters v. French-Brewster, [1904] 1 Ch. 713; Re Attkins, Life v. Attkins, [1913] 2 Ch. 619.*

### SUB-SECT. 3.—COVENANT NOT TO EXERCISE POWERS.

*See Law of Property Act, 1925 (c. 20), s. 155.*

1112. *Effect of.*—A tenant for life, having a power to charge the estate with portions for younger children, mortgaged his life estate, & covenanted not to exercise the power:—*Held*: he could not, afterwards, charge the estate with portions, to the prejudice of his mtgees.—*HURST v. HURST* (1852), 16 Beav. 372; 22 L. J. Ch. 538; 1 W. R. 105; 51 E. R. 822.

*Annotation:—Refd. Re Beddingfield & Herring's Contract, [1893] 2 Ch. 332.*

1113. *Validity.—Release of power of appointment by will.*—The settlor of a gross sum of money to be raised out of real estate for portions for younger children, reserving to himself a power of appointment by deed or will, & giving the fund equally in default of appointment, covenanted for a valuable consideration, that he will not, by any exercise of his power, diminish a daughter's share below a certain sum:—*Held*: such a covenant operated *pro tanto* as a release of his power.—*DAVIES v. HUGUENIN* (1863), 1 Hem. & M. 730; 2 New Rep. 101; 32 L. J. Ch. 417; 8 L. T. 443; 11 W. R. 1040; 71 E. R. 320.

*Annotations:—Dtd. Palmer v. Locke* (1880), 15 Ch. D. 294; *Re Evered, Molineux v. Evered*, [1910] 2 Ch. 147. *Refd. Walford v. Gray* (1864), 5 New Rep. 235; *Coffin v. Cooper* (1865), 2 Drew. & Sm. 365; *Henty v. Wrey* (1882), 21 Ch. D. 332; *Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510; *Re Bradshaw, Bradshaw v. Bradshaw* (1902), 71 L. J. Ch. 230.

1114. — *—*.—An equitable power of appointment may be effectually released by means of a voluntary covenant not to exercise it, entered into by the donee of the power, with the trustees of the fund subject to the power.—*ISAAC v. HUGHES, SAME v. SAME* (1870), L. R. 9 Eq. 191; 39 L. J. Ch. 379; 22 L. T. 11.

1115. — *—*.—A release by the appointor, or a covenant by the appointor not to exercise the power, is not open to objection even though the effect of the release is for the benefit of the appointor (*COZENS-HARDY, M.R.*).—*Re EVERED, MOLINEUX v. EVERED*, [1910] 2 Ch. 147; 79 L. J. Ch. 465; 102 L. T. 694; 54 Sol. Jo. 540, C. A.

*Annotation:—Consd. Re Cooke, Winckley v. Winterton, [1922] 1 Ch. 292.*

1116. *Covenant that estate free from incumbrances.*—By marriage settlement J. had a power of appointing portions for daughters to the amount of £16,000 under a term of years created for raising the same: he appointed £13,000 part thereof among four of his daughters, on their respective marriages, & took assignments from them of their interests in the term. On the marriage of the eldest son, J. & the eldest son covenant that the settled estate is free from all

incumbrances. After this J. makes his will, & appoints the remaining £3,000 to his only unmarried daughter. Notwithstanding the clear intention of J. to keep the term alive for his benefit, yet his covenant in the son's marriage settlement will bar his claim of any benefit from it as against the parties interested under that settlement.—*GOWER v. GOWER* (1783), 1 Cox, Eq. Cas. 53; 29 E. R. 1059.

## SECT. 2.—BY IMPLICATION.

### SUB-SECT. 1.—IN GENERAL.

#### 1117. Duration of power—Question of intention.]

—The question of the duration of a power in a settlement is, if the rule against perpetuities is not infringed, one of intention.—*Re JUMP, GALLOWAY v. HOPE*, [1903] 1 Ch. 129; 72 L. J. Ch. 10; 87 L. T. 502; 51 W. R. 268.

1118. Power over particular estate—Whether extinguished by accession of fee.]—*CROSS v. HUDSON*, No. 622, *ante*.

1119. ———.]—A general power of appointment over the whole estate may subsist in the same person, who has the fee simple.—*MAUNDRELL v. MAUNDRELL* (1805), 10 Ves. 246; 32 E. R. 839, L. C.

*Annotations*.—*COMBES v. COMBES* (1833), 1 Ad. & El. 255. *Appl.* *Logan v. Bell* (1845), 1 C. B. 872. *Refd.* *Roach v. Wadham* (1805), 2 Smith, K. B. 376; *Rawlins v. Burgess* (1814), 2 Ves. & B. 382; *Slug v. Leslie* (1864), 2 Hem. & M. 68. *Mentd.* *Ex p. Knott* (1806), 11 Ves. 609; *Mackruth v. Symmons* (1808), 15 Ves. 329; *Doe d. Putland v. Hilder* (1819), 2 B. & Ald. 782; *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1; *Frere v. Moore, etc.* (1820), 8 Price, 475; *Ray v. Pung* (1821), 5 Madd. 310; *Tunstall v. Trappes, Lawson's Case* (1830), 3 Sim. 286; *Peacock v. Burt* (1834), 4 L. J. Ch. 333; *Wilmot v. Pike* (1845), 5 Hare, 14; *Glass v. Richardson* (1852), 9 Hare, 698; *Hughes v. Wells* (1852), 9 Hare, 749; *Rice v. Rice* (1853), 2 Drew. 73; *Carter v. Carter* (1857), 3 K. & J. 617; *Bates v. Johnson* (1859), John. 304; *Prosser v. Hico* (1859), 28 Beav. 68; *Pease v. Jackson* (1868), 3 Ch. App. 576, n.; *Plecher v. Rawlins* (1872), 7 Ch. App. 259; *Spencer v. Clarke* (1878), 9 Ch. D. 137; *Taylor v. Russell*, [1891] 1 Ch. 8; *Taylor v. London & County Banking Co., London & County Banking Co. v. Nixon*, [1901] 2 Ch. 231.

1120. Conditional power—Satisfaction of condition.]—F. having an estate, which came to her *ex p. materna*, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs; by will, she directed the estate to be sold, the money to be laid out in the funds, & the trustees to permit the husband to receive the interest for life; then, after the deduction of £3,500 to uses which vested in *pltf. A.*, & after payment of £1,000 to G., to pay the residue of the purchase-money to the three *defts. H.* By codicil she gave *pltf.*, her husband, a power of appointing the £3,500 in case A. should marry without his consent. G. died, living testatrix, before the codicil made, but F. in the codicil took no notice thereof.—*Held*: the £3,500 was vested in A., & the trustees having paid out a larger sum by £17, with intent to appropriate it, it was well appropriated; & A. having married once, with her father's consent, his power is gone; & he consenting to give up his life-interest, it was directed to be paid to the trustees in her marriage settlement.—*HUTCHESON v. HAMMOND* (1790), 3 Bro. C. C. 128; 29 E. R. 449, L. C.

*Annotations*.—*Mentd.* *Kennell v. Abbott* (1799), 4 Ves. 802; *Cooke v. Stationers' Co.* (1831), 3 My. & K. 262; *Buchanan v. Harrison* (1861), 1 John. & H. 662.

1121. ———.]—Impossibility of satisfaction.]—Real estate was devised to H. & her assigns for life, in case she should continue unmarried, & after her decease unto such persons as she should appoint, & in default of appointment, then over to other

persons; & testator declared that, in case H. should marry in the lifetime of his wife with her consent, or after the death of his wife, with the consent of two persons mentioned in his will, or the survivor of them, H. & her assigns should hold the same real estate in such manner as she should have done if she had continued unmarried. After the death as well of testator's wife, as also of the two persons so mentioned in his will, & above twenty years since, H. married R., who also died in the lifetime of H.—*Held*: the estate for life in H. was become absolute, & she could then execute the power of appointment.—*AISLIE v. RICE* (1818), 8 Taunt. 459; 2 Moore, C. P. 358; 120 E. R. 461; *previous proceedings*, 3 Madd. 256.

*Annotation*.—*Refd.* *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1.

1122. ———.]—(1) A devise of all testator's property in trust for his niece, subject to a discretionary power in the trustees, on her attaining twenty-one or marrying, to settle the whole or such part as they should think fit upon her & her children if she should have any, with remainder, in default of children, to her mother absolutely. The niece attained twenty-one; but before any settlement was made under the power she died, without having been married.—*Held*: the power could not then be exercised, & her heir was entitled to the whole of the real estate.

(2) A trustee of a will who had formally renounced that character by a deed which purported, but ineffectually, to appoint a successor, being applied to eleven years afterwards to join with his original co-trustee in a deed purporting to be an exercise of a discretionary power which could only be exercised by the two trustees of the will for the time being, refused to do so, without an indemnity, but ultimately, on being indemnified, executed the deed.—*Held*: he could not resume his position as trustee for such a purpose, & even if he could, his execution of the deed under the circumstances stated, could be regarded only as a mere formal act, & not as an exercise of that discretion which was essential to a due execution of such a power.—*LANCASHIRE v. LANCASHIRE* (1848), 2 Ph. 657; 17 L. J. Ch. 270; 12 L. T. O. S. 21; 12 Jur. 363; 41 E. R. 1097, L. C.

*Annotations*.—*Generally*, *Mentd.* *Umpleby v. Waveney Valley Ry.* (1860), 1 John. & H. 251; *Taylor v. Dowlen* (1869), 4 Ch. App. 697.

1123. Disentailing deed.]—By a marriage settlement, lands were limited to the use of the husband for life, remainder to the wife for life, remainder to trustees for a term of four hundred years, to commence from the decease of the survivor of the husband & wife, remainder to the heirs of the body of the wife begotten by the husband, remainder to the heirs of the husband. The trust of the term was, in case there should be issue of the marriage a son & one or more younger child or children, who should live to attain his, her, or their age or ages of twenty-one years, to raise such sum, not exceeding £2,000 in the whole, as the husband & wife should by any deed or writing appoint, or in default thereof, as the survivor should by deed or writing, or his or her last will or testament, appoint; & in default of such appointment, or subject thereto, after the moneys so appointed should have been raised, & the costs of the trustees paid, the term was to cease or be assigned in trust to attend the inheritance. There were younger children of the marriage who attained twenty-one. The wife died without having joined in any appointment, & afterwards the husband levied a fine of the premises.—*Held*: the power

**Sect. 2.—By implication: Sub-sects. 1, 2 & 3. Part IX. Sect. 1.]**

was extinguished by the fine.—*BICKLEY v. GUEST* (1831), 1 Russ. & M. 440; 39 E. R. 170.

**1124.** ———.] — *TORBUCK v. HEWITSON*, *Re HEWITSON* (1852), 19 L. T. O. S. 342; 1 W. R. 58, L. C.

**Bankruptcy of donee.]—See BANKRUPTCY**, Vol. V., pp. 740–742, Nos. 6392–6406.

**Marriage of female donee.]—See HUSBAND & WIFE**, Vol. XXVII., pp. 136–138, Nos. 1112–1126.

**Payment of fund into court.]—See TRUSTS & TRUSTEES.**

**SUB-SECT. 2.—EXERCISE OF POWERS.**

**1125. Partial exercise of primary power—Whether secondary power extinguished.]—SIMPSON v. PAUL**, No. 307, *ante*.

**1126.** ———.] — *MAPLETON v. MAPLETON*, No. 309, *ante*.

**1127. Exercise with intent to exhaust.]—By a post-nuptial settlement power was given to a husband by deed or deeds to appoint a fund, after the determination of his own interest therein, amongst his children, subject to a proviso empowering him by deed or will to appoint one-fourth of the income to “his wife” for her life. The husband in exercise of these powers by deed irrevocably appointed one-fourth of the income in favour of his then wife for her life, & “subject & without prejudice to the trust” in her favour “thereinbefore limited, if the same should take effect,” he appointed the fund amongst his two daughters, who were adults, & his one son, who was under age, in equal thirds, reserving, as to his son, a power of revocation which he subsequently exercised by irrevocably appointing one-third of the fund to such son absolutely. The then wife afterwards died; the husband married again; & on his second marriage purported by deed irrevocably to appoint one-fourth of the income of the fund to his second wife during her life:—*Held*: the appointment of income in favour of the second wife was ineffectual.**

What was done in Jan. 1885, was inconsistent with any intention on the part of the appointor & with good faith, to appoint to anybody else other than those for whom he was then providing. . . . He exercised his power & exhausted it, & intended to do so (*LINDLEY, L.J.*).—*Re HANCOCK, MALCOLM v. BURFORD-HANCOCK*, [1896] 2 Ch. 173; 65 L. J. Ch. 690; 74 L. T. 658; 44 W. R. 545; 40 Sol. Jo. 498, C. A.

*Annotations:—Apld. Foakes v. Jackson*, [1900] 1 Ch. 807. *Mentd. Re Ellis's Settltnt., Wasborough v. Boyce*, [1921] 1 Ch. 230.

**1128. Power of re-appointment reserved—Effect of “confirming” appointment.]—Re LEES' TRUSTS, LEES v. LEES**, [1926] W. N. 220.

**Right to appoint by successive instruments.]—See Part IV., Sect. 5, *ante*.**

**SUB-SECT. 3.—ACT INCONSISTENT WITH EXERCISE OF POWER.**

**1129. General rule—Power extinguished.]—SMITH v. DEATH**, No. 1093, *ante*.

**1130.** ———.]—Any dealing with an estate by the donee of a power inconsistent with the exercise of that power releases it.

A husband & wife had a joint power, & subject thereto the survivor had a separate power, to appoint property among certain objects. The husband & wife & the persons entitled in default of appointment executed a deed whereby the wife, with her husband's consent, & those persons according to their several & respective estates & interests as beneficial owners assigned the property to an object. The joint power was not referred to. The wife died, & the husband appointed the property to other objects:—*Held*: whether or not the deed of assignment operated as a joint appointment, & *semble*, it did so operate, it released the husband's separate power, & his subsequent appointment was inoperative.—*FOAKES v. JACKSON*, [1900] 1 Ch. 807; 69 L. J. Ch. 352; 83 L. T. 26; 48 W. R. 616.

**1131. Representation by donee—Of intention not to exercise power.]—A father, during the treaty for the marriage of his daughter, represented that she would become entitled, on the decease of her parents, to one-third share of certain trust funds, subject to the exercise of a certain power of appointment vested in himself, but which power he did not intend to execute. The settlement recited that the intended wife was so entitled, “subject to any exercise” of the power. In truth, if the wife pre-deceased her parents, her share did not vest in her, but went to her issue. The father exercised the power to the prejudice of his daughter, & her issue. The wife pre-deceased her father, leaving issue. The father afterwards died:—*Held*: the father had precluded himself from executing the power; & this equity might be asserted by the issue of the marriage.—*WALFORD v. GRAY* (1865), 5 New Rep. 235; 11 L. T. 620; 11 Jur. N. S. 106; 13 W. R. 335; *affd.*, 6 New Rep. 76, L. C.**

**1132. Prior exercise of power—With intention to exhaust.]—Re HANCOCK, MALCOLM v. BURFORD-HANCOCK**, No. 1127, *ante*.

—.]—*See Sub-sect. 2, ante*.

**1133. Assignment of property by one of two grantees—With concurrence of co-grantee—Husband & wife.]—FOAKES v. JACKSON**, No. 1130, *ante*.

**1134. Mortgage of property.]—NOTTIDGE v. DERING, RABAN v. DERING**, No. 11, *ante*.



## Part IX.—Powers in the Nature of Trusts.

## SECT. 1.—IN GENERAL.

**1135. What constitutes—Discretion to apportion gift.]**—Residuary devise & bequest for such of testator's relations & kindred in such proportions, etc., as his exors. should think proper; recommending & advising his trustees & exors. to give the greatest share to such person & persons who in their opinion & judgment should appear to them to be his nearest relations & the most deserving; declaring his intention not to control their discretion; but that everything relative to that disposition, who were his relations & the proportions, should be entirely in the discretion of the trustees & exors. & the heirs, exors. & administrators, of the survivor of them. A trust & a power. The ground of the power being personal confidence, it is *primâ facie* limited to the original trustees; not without express words passing to others, to whom by legal transmission the same character may happen to belong; & cannot be executed by the devisees & exors., for that specific purpose only of the surviving trustee. A trust therefore, executed by the et. for the next of kin at the death of testator according to Statute of Distributions, 1670 (c. 10).—*COLE v. WADE* (1807), 16 Ves. 27; 33 E. R. 894.

*Annotations:—***Consd.** *Re Smith, Eastick v. Smith*, [1904] 1 Ch. 139. **Refd.** *Piper v. Piper* (1834), 3 My. & K. 159; *Fordyce v. Bridges* (1848), 2 Coop. temp. Cott. 324; *Re Perkins, Brown v. Perkins* (1909), 101 L. T. 345.

**1136. ———.]**—*Re SUSANNI'S TRUSTS*, No. 1199, post.

**1137. ———.]**—Testator appointed H., his exor. & trustee, & gave him all his estate, "upon trust for all my children & their issue in such shares & in such manner as I shall by codicil direct or appoint, or, failing any such direction or appointment by me, then in such shares as . . . H. shall in his discretion think fit & proper." Testator never made a codicil, & left children, grandchildren, & a great-grandchild:—*Held*: (1) the children & their issue living at the death of testator were entitled to the estate, subject to the power of selection given to H.; (2) the power so given to him was not confined to directing in what shares members of the class were to take, but that he could place any share in settlement.—*Re HUGHES, HUGHES v. FOOTNER*, [1921] 2 Ch. 208; 91 L. J. Ch. 10; 127 L. T. 117.

*Annotation:—***Generally, Consd.** *Re Combe, Combe v. Combe*, [1925] Ch. 210.

**1138. ——— Expression of desire.]**—"I give to A. £500, & it is my will & desire that A. may dispose of the same amongst her relations, as she by will may think proper":—*Held*: a trust for the relations of A. & the £500 well bequeathed by the will of A. to her sister, & her sister's children, though made without reference to the will of first testator.—*FORBES v. BALL* (1817), 3 Mer. 437; 36 E. R. 168.

*Annotations:—***Consd.** *Davies v. Thorns* (1849), 3 De G. & Sm. 347; *Re Brierley, Brierley v. Brierley* (1894), 43 W. R. 36; *Re Weekes' Settlement*, [1897] 1 Ch. 289. **Refd.** *Lake v. Currie* (1853), 21 L. T. O. S. 26.

—.]—Testator, by his will, gave personal property to his wife, absolutely, for her

own use & benefit. By a codicil, which was in the form of a letter to his wife, he said: "It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself; but I should be unhappy if I thought it possible that any one not of your family, should be the better for what, I feel, confident, you will so well direct the disposal of":—*Held*: the word "family" was not confined to children, but included descendants in every degree; & the wife was entitled to the property, absolutely, & not merely for her life with a power in the nature of a trust for her children.—*WILLIAMS v. WILLIAMS* (1851), 1 Sim. N. S. 358; 20 L. J. Ch. 280; 15 Jur. 715; 61 E. R. 139.

*Annotations:—***Mentd.** *Bernard v. Minshull* (1859), John. 276; *Burt v. Hellyar* (1872), L. R. 14 Eq. 160; *Pigg v. Clarke* (1876), 45 L. J. Ch. 849.

**1140. ———.]**—Devise of copyholds to a married woman to be her sole & separate property, & with power to her to appoint the same to her children & her husband in such way & in such proportions as she may think fit:—*Held*: she was devisee in fee, & the execution of the power was not made a duty, & therefore no trust in favour of the husband & children.

Where the power is given with particular persons indicated who may be the objects of it, the et. has considered any words importing a direction or desire or recommendation or even a wish in their favour, as imposing a duty on the donee of the power as amounting to a trust in favour of the objects (*STUART, V.-C.*).—*BROOK v. BROOK* (1856), 3 Sm. & G. 280; 65 E. R. 659.

*Annotations:—***Apld.** *Lambe v. Eames* (1870), L. R. 10 Eq. 267. **Refd.** *Howarth v. Dewell* (1860), 6 Jur. N. S. 1360; *Butler v. Gray* (1869), 5 Ch. App. 26.

**1141. ——— Expression of confidence.]**—Testator bequeathed all his property to his widow, her heirs, exors., administrators & assigns, for her sole benefit, in full confidence that she would appropriate & apply the same for the benefit of his children:—*Held*: this amounted to a gift of an estate for life in the property to the widow, with a power of appointment in favour of the children, with a gift in default of appointment to the children as joint tenants.—*WACE v. MALLARD* (1851), 21 L. J. Ch. 355; *sub nom. WARE v. MALLARD*, 18 L. T. O. S. 194; 16 Jur. 492.

*Annotations:—***Apld.** *Curnick v. Tucker* (1874), L. R. 17 Eq. 320. **Refd.** *Howarth v. Dewell* (1860), 6 Jur. N. S. 1360; *Shovelton v. Shovelton* (1863), 32 Beav. 143; *Fordham v. Speight* (1875), 23 W. R. 782.

**1142. ——— Direction to appoint.]**—Testator directed that certain stock should stand in his name, & certain real estates remain unalienated "until the following contingencies are completed"; & after giving life interests in such stock & estates to his two children, with remainder to their issue, he declared that in case his two children should both die without leaving lawful issue, the same should be disposed of as after-mentioned, that was to say, the survivor of his two children should have power to dispose, by will, of his real & personal estate, "Amongst my nephews &

## PART IX. SECT. 1.

**1135 i. What constitutes—Discretion to apportion gift.]**—*Re GRIFFITHS, GRIFFITHS v. GRIFFITHS*, [1926] V. L. R. 212; [1926] Argus, L. R. 197.—**AUS.**

**1135 ii. ———.]**—*HUTCHINSON v.*

*HUTCHINSON* (1850), 13 I. Eq. R. 332.—**IR.**

**1135 iii. ———.]**—*Re HARGROVE'S TRUSTS* (1873), 8 I. R. Eq. 256.—**IR.**

**1135 iv. ———.]**—*CARBERRY v. MCCARTHY* (1881), 7 L. R. Ir. 328.—**IR.**

**1135 v. ———.]**—*AHEARNE v.*

*AHEARNE* (1881), 9 L. R. Ir. 144.—**IR.**

**1135 vi. ———.]**—*Re WALKER & ELEE'S CONTRACT* (1918), 53 I. L. T. 22.—**IR.**

**e. ———.]**—A will gave land to testator's heir-at-law for life, with

**Sect. 1.—In general. Sects. 2 & 3.]**

nieces, or their children, either all to one of them or to as many of them as my surviving child shall think proper":—*Held*: a trust was created in favour of testator's nephews & nieces & their children, subject to a power of selection & distribution in his surviving child.—*BURROUGH v. PHILCOX, LACEY v. PHILCOX* (1840), 5 My. & Cr. 72; 5 Jur. 453; 41 E. R. 299, L. C.

*Annotations*:—*Consd. Wilson v. Duguld* (1883), 24 Ch. D. 244; *Re Weekes' Settlement*, [1897] 1 Ch. 289. *Reid. Faulkner v. Wynford* (1845), 15 L. J. Ch. 8; *Penny v. Turner* (1848), 2 Ph. 493; *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195; *Re White's Trusts* (1860), John. 656; *Pocock v. A.-G.* (1876), 3 Ch. D. 342; *Re Llewellyn's Settlement*, Official Solicitor v. Evans, [1921] 2 Ch. 281; *Re Combe, Combe v. Combe*, [1925] Ch. 210. *Mentd. Cowper v. Mantell* (1856), 22 Beav. 231.

1143. ————]—*BROOK v. BROOK*, No. 1140, *ante*.

 **— Discretionary direction to settle.]—**

*LANCASHIRE v. LANCASHIRE*, No. 1122, *ante*.

1145. ———— **Power to appoint to children.]—**  
A married woman being entitled under a will to a residuary fund in ct., such fund was settled under the direction of the ct., giving her a general power of appointment by will amongst her children, with a limitation over to the children equally. One of the sons becoming indebted, the mother executed two deeds whereby she covenanted with him & his creditors to appoint to him not less than £1,000 & by her will made a short time after, in pursuance of the power, she appointed to her son £1,000:—*Held*: the appointment was valid.

A power to appoint to children by deed or will, is a power in the nature of a trust, it is a power created for the benefit of the objects of the power. . . . The donee of the power, in the exercise of the power, ought to have this object, the benefit of the children, solely in view. . . . Where the donor gives the power to appoint by will alone, he does that designedly, that the donee should exercise it irrevocably, that is, not until the end of his or her life. . . . Where the donee of such a power is clearly shown to be exercising the power with a view to the benefit of some person not an object of the power, & *a fortiori*, with a view of benefitting himself, even in the absence of a positive bargain, such an appointment ought not to stand, being a violation of the principle that no regard shall be had to anything but the objects of the power, & without saying that should be the motive, the intention should be only for the benefit of the objects of the power, not to confer a benefit on the donee himself. . . . The donee may release the power, that is to say, may bind herself not to exercise her discretion, whatever circumstances may arise, notwithstanding that the donor's intention was that she should do so (*KINDERSLEY, V.-C.*).—*COFFIN v. COOPER* (1865), 2 Drew. & Sm. 365; 5 New Rep. 459; 34 L. J. Ch. 629; 12 L. T. 106; 13 W. R. 571; 62 E. R. 660.

*Annotations*:—*Folld. Palmer v. Locke* (1880), 15 Ch. D. 294. *Consd. Re Bradshaw, Bradshaw v. Bradshaw*, [1902] 1 Ch. 436; *Re A.*, [1904] 2 Ch. 328; *Re Rose, Rose's Trustee v. Rose*, [1904] 2 Ch. 348; *Re Evered, Mollieux v. Evered*, [1910] 2 Ch. 147.

1146. ————]—Where there is a gift to A. for life with a power to A. to appoint among a class, but no gift to the class, & no gift over in default of appointment, the ct. is not bound, without more, to imply a gift to the class in default of the power being exercised.

In order to imply a gift there must be a clear

indication in the will that testator intended the power to be regarded in the nature of a trust, so that the class or some of the class should take.

Testatrix bequeathed to her husband a life interest in certain real property, & gave "him power to dispose of all such property by will amongst our children." The will contained no gift over in default of appointment. There were children, but the husband died intestate without having exercised the power of disposition:—*Held*: the power conferred on the husband was a mere power & not one coupled with a trust, & consequently there was no gift to the children by implication, & the heir-at-law of testatrix was entitled.—*Re WEEKES' SETTLEMENT*, [1897] 1 Ch. 289; 66 L. J. Ch. 179; 76 L. T. 112; 45 W. R. 265; 41 Sol. Jo. 225.

*Annotations*:—*Distd. Re Llewellyn's Settlement*, Official Solicitor v. Evans, [1921] 2 Ch. 281. *Apld. Re Combe, Combe v. Combe*, [1925] Ch. 210.

1147. **Distinguished from trust.]—SMITH v. DEATH**, No. 1093, *ante*.

1148. ————]—Widow, by the settlement on her second marriage, settled £2,300 which had belonged to her first husband, in trust for her separate use for life; & declared that, subject thereto, the fund should, as & whenever she should think fit or be advised, be settled upon trust for the benefit of her daughter & only child, by her first husband, & of her daughter's intended husband & her child & children, in such manner & for such rights & interests as should be agreed upon, either previous to or after her daughter's marriage, with her consent, & that she, the mother, should have full power to settle the fund or any part of it, in trust for the immediate benefit of her daughter & her child & children, in manner aforesaid, to take effect either upon such marriage, or upon or immediately after her own death, as she should think fit; but if the daughter should not be married in the mother's lifetime & should survive her, then the fund should be assigned to the daughter at twenty-one or on marriage, but if the daughter should die in her mother's lifetime without having been married, then the fund should be held in trust for the children of the mother's second marriage:—*Held*: a trust, & not a power, was created in favour of the daughter, her husband & children; but the mother, if she thought fit, might modify the interests of the *cestuis que trust*, on the daughter marrying with her consent.—*CROFT v. ADAM* (1842), 12 Sim. 639; 11 L. J. Ch. 386; 6 Jur. 522; 59 E. R. 1278.

1149. **Who may exercise—Original trustees only.]—COLE v. WADE**, No. 1135, *ante*.

1150. **How far court will enforce.]—**Where absolute discretion has been given to trustees as to the exercise of a power the ct. will not compel them to exercise it but if they propose to exercise it, the ct. will see that they do not exercise it improperly or unreasonably. Where the power is coupled with a trust or duty the ct. will enforce the proper & timely exercise of the power but will not interfere with the discretion of the trustees as to the particular time or manner of their *bond fide* exercise of it.—*TEMPEST v. CAMOYS (LORD)* (1882), 21 Ch. D. 571; 51 L. J. Ch. 785; 48 L. T. 13; 31 W. R. 326, C. A.

*Annotations*:—*Consd. Re Gadd, Eastwood v. Clark* (1883), 23 Ch. D. 134. *Apld. Re Hall, Hall v. Hall* (1885), 54 L. J. Ch. 527. *Folld. Re Burrage, Burningham v. Burrage* (1890), 62 L. T. 752. *Consd. Re Bryant, Bryant v. Hickey*, [1894] 1 Ch. 324; *Re Charteris, Charteris v.*

power to appoint the same to one or more of his sons; & declared that the devisee (his heir) was not to alien or

mtge. the lot; & that it was not to be attachable by his creditors:—*Qu.*: whether, this power was a naked

power, or created a trust in favour of the devisee's sons.—*McMASTER v. MORRISON* (1867), 14 Gr. 138.—*CAN.*

Biddulph, [1917] 2 Ch. 377. *Reid. Re Radnor's Will Trusts* (1890), 45 Ch. D. 402; *Re Higginbottom*, [1892] 3 Ch. 132; *Montefiore v. Guedalla*, [1903] 2 Ch. 723. *Mentd. Re Poor's Lands Charity, Bethnal-Green* (1891), 7 T. L. R. 705.

1151. ———.]—Where a power is coupled with a trust or duty, the ct. will enforce the proper & timely exercise of the power, but will not interfere with the discretion of the trustees as to the particular time or manner of their *bond fide* exercise of it.—*Re BURRAGE, BURNINGHAM v. BURRAGE* (1890), 62 L. T. 752.

## SECT. 2.—EXERCISE OF POWER.

See Part IV., *ante*.

## SECT. 3.—VESTING OF INTEREST PENDING EXERCISE OF POWER.

1152. Express gift to class.—Interest vests until power exercised.]—*COLEMAN v. SEYMOUR*, No. 748, *ante*.

1153. ———.]—*HANDS v. HANDS* (1782), cited in 1 Term Rep. 437, n.; 99 E. R. 1183.

*Annotations*:—*Reid. Wright v. Atkyns* (1815), Coop. G. 111; *Wright v. Atkyns* (1823), Turn. & R. 143.

1154. ———.]—There is no doubt that the residuary legatee has an absolute discretion to exclude any, & perhaps all of her brothers & sisters, from any share in this property; but the words of this will give to the three brothers & sisters a vested interest, until divested by exclusion. This case differs nothing from an interest vested in the brothers & sisters, subject to be defeated by a power of appointment in the residuary legatee. Unless the power of appointment in the one case, or power of exclusion in the other, be exercised, the brothers & sisters will take; & the fund must in the mean time be secured (*LEACH, V.-C.*).—*ROBINSON v. SMITH* (1821), 6 Madd. 194; 56 E. R. 1065.

1155. ———.]—Where a trust of money, under a will & codicil, is to B. for life, remainder after B.'s decease as to both principal & interest, to & amongst her children as B. should by deed or will appoint; but if B. should leave no child living at her decease, then over:—*Held*: all the children of B. who survived testator took a vested interest in the money, & B. having left a child living at her decease, the share of a child of B. who died in B.'s lifetime, belonged to the representatives of that child.

If a sum of money be given to A. for life, with remainder as he should by deed or will appoint & in default of appointment then to the children of A. the children of A. take in default of appointment whether they died in A.'s lifetime or not. Here the power was to be executed by deed or will; the tenant for life was not bound to suspend her judgment until her death in respect to the parties who were to take; therefore all the children who survived testator might have been objects of the power, & under the authorities entitled to a share where no appointment was made. Where words used are capable of a sensible effect, it is not safe to depart from them; & where vested interests first given by a will are defeated by an alternative form of expression not so plain & decisive, & which cannot take effect, the alternative branch of the sentence fails, & the preliminary expression which gave the vested interests takes effect (*WIGRAM, V.-C.*).—*FAULKNER v. WYNFORD* (LORD) (1845), 15 L. J. Ch. 8; 6 L. T. O. S. 188;

*sub nom. FALKNER v. WYNFORD* (LORD), 9 Jur. 1006.

1156. ———.]—Testator gave a fund to his wife for life, with a power for her to appoint it by will amongst "A., B. & C., & their respective children," & in default of appointment, he directed "the same, at his wife's death, to go amongst all the said children equally." The wife made no appointment:—*Held*: (1) the children alone took, to the exclusion of their parents; (2) they took *per capita*; (3) the fund vested in the children living at the death of testator, subject to its being either divested by the exercise of the power or by the birth of other children before the death of the tenant for life.—*PATTISON v. PATTISON* (1855), 19 Beav. 638; 52 E. R. 498.

*Annotation*:—*As to* (3) *Apld. Re Hutchinson, Alexander v. Jolley* (1886), 55 L. J. Ch. 574.

1157. ———.]—*LAMBERT v. THWAITES*, No. 750, *ante*.

1158. ———.]—*Re MASTER'S SETTLEMENT, MASTER v. MASTER*, No. 749, *ante*.

1159. ———.]—*Re HUGHES, HUGHES v. FOOTNER*, No. 1137, *ante*.

1160. ———.]—*Only child*.]—Where property is settled on husband & wife for life, remainder to the issue, subject to a power of appointment, an interest vests in an only child, though no appointment was made.—*MADOC v. JACKSON* (1789), 2 Bro. C. C. 588; 29 E. R. 322, L. C.

1161. ———.]—*Interest of after-born children—Vests on birth*.]—Where a leasehold estate for lives was settled upon the husband for life; remainder to the wife for life, with remainders to the children, the husband having renewed by putting in the wife's life, is to be considered as a creditor upon the estate for the fine & charges of renewal.

Limitation of a leasehold estate in a marriage settlement after the decease of husband & wife, in trust for such child & children as they should appoint; & in default of appointment, to all & every the child & children equally:—*Held*: to be a vested remainder, which opened to take in the issue, as they came *in esse*.—*LAWRENCE v. MAGGS* (1759), 1 Eden, 453; 28 E. R. 760.

*Annotation*:—*Reid. Pickering v. Vowles* (1783), 1 Bro. C. C. 197.

1162. ———.]—By marriage settlement, £1,500 was provided for younger children in such shares as the parents should appoint, in default of appointment to all the children, after the death of the wife. The parents afterwards made an appointment excluding one child. This deed vests the portions in the children born or to be born.—*MAYHEW v. MIDDLEDITCH* (1782), 1 Bro. C. C. 162; 28 E. R. 1054, L. C.

1163. ———.]—*DOE d. WILLIS v. MARVIN*, No. 751, *ante*.

1164. ———.]—*Trust in marriage arts.* to pay certain funds, the property of the wife, to all & every her child & children in such parts shares, & proportions, as she should by will give, etc., & for want of such gift, etc., to all & every her child & children part & share alike; & for want of such issue, over. By her will she gave ten guineas, part of the fund, to her eldest son; declaring, that he was otherwise provided for by the will of his uncle; & the remainder she gave to all her other children, naming them, equally, with survivorship in case of the death of any during minority, & before receipt of his, or their shares; & in case of the death of her eldest son, before he comes to the possession of his uncle's fortune, she gave her second son only ten guineas. The only provision of the eldest son was a remainder in tail after the life estate of his father; who survived his

**Sect. 3.—Vesting of interest pending exercise of power. Sect. 4: Sub-sect. 1, A., B. & C.]**

wife:—*Held*: (1) children illegitimate, being born after elopement, & no access, clearly could not take; (2) the share appointed to a child, who died in the life of her mother, lapsed; (3) under the circumstances the appointment of ten guineas was illusory, & therefore the whole was void, & the fund was distributed among the surviving children & the representative of deceased child, the interest vesting on the birth, liable to be divested only by appointment.—*VANDERZEE v. ACLOM* (1799), 4 Ves. 771; 31 E. R. 399.

*Annotations*:—As to (3) *Reid*. *Kemp v. Kemp* (1801), 5 Ves. 849; *Butcher v. Butcher*, *Gooday v. Butcher* (1812), 1 Ves. & B. 79.

1165. ————]—*PATTISON v. PATTISON*, No. 1156, *ante*.

**SECT. 4.—EFFECT OF FAILURE TO EXERCISE POWER.**

**SUB-SECT. 1.—WHEN TRUST IMPLIED IN FAVOUR OF OBJECTS OF POWER.**

**A. In General.**

1166. *Power to appoint among class.*—Trust deed whereby trustees were to give the residue of A.'s estate "among his friends & relations, where they should see most necessity, & as they should think most just."

Though in other cases the ct. will not interfere where trustees, declining to aid, have a power to distribute generally according to their discretion, without any defined object, it was held that here a rule was laid down; the word "friends" meaning "relations" & the ct. could judge of the respective families' necessities & occasions by a reference to the master.—*GOWER v. MAINWARING* (1750), 2 Ves. Sen. 87; 28 E. R. 57, L. C.

*Annotation*:—*Reid*. *Re Caplin's Will* (1865), 2 Drew. & Sm. 527.

1167. ————]—Testator devised a freehold estate to his wife for her life, & then directed that she should dispose of the same amongst testator's children by her at her decease, as she should think proper. The wife made no disposition of the estate. The children take no interest in the estate under the will.—*CROSSLING v. CROSSLING* (1794), 2 Cox, Eq. Cas. 396; 30 E. R. 183.

1168. ————]—Testator bequeathed a leasehold estate, after an estate for life, to his nephew A. & the heirs male of his body lawfully, by other, & in default of such heirs to one of the sons of his nephew B. as A. shall direct by a conveyance in his life or by his last will. Another leasehold estate he bequeathed to A. upon trust subject to certain charges, to employ the remainder of the rent to such children of B. as A. should think most deserving, & that will make the best use of it, or to the children of his nephew L. if such there are or shall be. A. dying in testator's life, the bequest of the latter estate was established in favour of all the children.—*BROWN v. HIGGS* (1799), 4 Ves. 708; 31 E. R. 366; *re-heard* (1800), 5 Ves. 495; *affd.* (1801), 8 Ves. 561, L. C.; (1813), 18 Ves. 192, H. L.

*Annotations*:—*Consd.* *Longmore v. Broom* (1802), 7 Ves. 124. *Apld.* *Birch v. Wade* (1814), 3 Ves. & B. 199; *Prevost v.*

*Clarke* (1816), 2 Madd. 458. *Distd.* *Meredith v. Heneage* (1824), 1 Sim. 542. *Consd.* *Toldervy v. Colt* (1836), 1 M. & W. 250. *Apld.* *Burrough v. Philcox* (1840), 5 M. & Cr. 71; *Penny v. Turner* (1848), 2 Ph. 493. *Consd.* *Cowper v. Mantell* (No. 2) (1856), 22 Beav. 231; *Salisbury v. Denton* (1857), 3 K. & J. 529. *Distd.* *Bernard v. Minshull* (1859), John. 276. *Consd.* *Re White's Trusts* (1860), John. 656. *Distd.* *Golding v. Inwood* (1861), 3 Giff. 139; *Re Strickland's Trust* (1862), 1 New Rep. 164. *Apld.* *Izod v. Izod* (1863), 32 Beav. 242. *Consd.* *Re Jeaffreson's Trusts* (1866), 12 Jur. N. S. 680; *Re Phone's Trusts* (1868), L. R. 5 Eq. 346. *Apld.* *Butler v. Gray* (1869), 5 Ch. App. 26; *Carthew v. Enraght* (1872), 26 L. T. 834. *Consd.* *Briggs v. Upton* (1872), 26 L. T. 435; *Pocock v. A.-G.* (1876), 3 Ch. D. 342. *Distd.* *Re Sprague, Milley v. Cape* (1880), 43 L. T. 236. *Apld.* *Wilson v. Duguid* (1883), 24 Ch. D. 244. *Distd.* *Re Weekes' Settlement*, [1897] 1 Ch. 289. *Apld.* *Re Hughes, Hughes v. Footner*, [1921] 2 Ch. 208. *Consd.* *Re Combe, Combe v. Combe*, [1925] Ch. 210. *Reid*. *Benson v. Whittam* (1831), 5 Sim. 22; *Hemming v. Whittam* (1831), 1 L. J. Ch. 94; *Foley v. Parry* (1833), 2 My. & K. 138; *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195; *Sheffield v. Coventry* (1853), 17 Jur. 289; *Robinson v. Wheelwright* (1855), 21 Beav. 214; *Jool v. Mills*, *Harvey v. Mills* (1857), 3 K. & J. 458; *Howarth v. Dewell* (1860), 6 Jur. N. S. 1360; *Re Eddowes* (1861), 1 Drew. & Sm. 395; *Jool v. Mills*, *Horvby v. Mills* (1861), 30 L. J. Ch. 354; *Pilcher v. Randall* (1861), 4 L. T. 398; *Lambert v. Rendle* (1863), 3 New Rep. 247; *Mellor v. Stanley* (1864), 2 De G. J. & Sm. 183; *Robson v. Flight* (1864), 54 Beav. 110; *Shattock v. Shattock* (1866), 35 L. J. Ch. 509; *Re Blight, Blight v. Hartnoll* (1881), 30 W. R. 513; *Re Brierley, Brierley v. Brierley* (1894), 43 W. R. 36; *Re Lowman, Devonish v. Pester*, [1895] 2 Ch. 348; *Re Llewellyn's Settlement*, Official Solicitor v. Evans, [1921] 2 Ch. 281. *Mentd.* *Blackburn v. Jepson* (1814), 2 Ves. & B. 359; *Deerhurst v. St. Alban* (1831), 2 Russ. & M. 702; *Scarlsbrick v. Skelmersdale* (1840), 4 Y. & C. Ex. 78; *Christ's Hospital v. Grainger* (1849), 1 H. & Tw. 533; *Marker v. Kekowich* (1850), 8 Hare, 291; *Porter v. Baddeley* (1877), 5 Ch. D. 452; *Re Fickus, Farina v. Fickus* (1899), 69 L. J. Ch. 161.

—————]—*GRIEVESON v. KIRSOPP*, No. 1221,

*post*.

1170. ————]—*BURROUGH v. PHILCOX, LACEY v. PHILCOX*, No. 1142, *ante*.

1171. ————]—By a marriage settlement, a fund was limited to the husband for life, with remainder to his wife absolutely if she survived, but if she predeceased him, then for all the children of the marriage in such shares as she should appoint; & if there should be no issue of the marriage living at her death, upon trust as she should appoint generally, & in default, to the husband absolutely, but there was no express gift to the children in default of appointment. The husband survived, & there were children living:—*Held*: such children, notwithstanding the mother never appointed, were entitled to the fund.—*FENWICK v. GREENWELL* (1847), 10 Beav. 412; 11 Jur. 620; 50 E. R. 640.

*Annotation*:—*Mentd.* *Macnamara v. Carey* (1867), 15 W. R. 374.

1172. ————]—*WINN v. FENWICK*, No. 1197, *post*.

1173. ————]—Where there is a power of selection among certain objects, & an intention manifested that the objects should not be disappointed, for instance, where there is a bequest to testator's wife for life, & after her decease to be divided or distributed amongst such of his children as she should appoint, as the right to exclude some does not prevent the class from taking in default of appointment, it would now be held, notwithstanding the decision in *Marlborough (Duke) v. Godolphin (Earl)*, No. 22, *ante*, that the children take in default of appointment, either by implication or because the power is coupled with a trust (*PAGE-WOOD, V.-C.*)—*SALUSBURY v. DENTON* (1857), 3 K. & J. 529; 26 L. J. Ch. 851; 30 L. T.

**PART IX. SECT. 4, SUB-SECT. 1.—A.**

1166 i. *Power to appoint among class.*—*RE STIMPSON'S ESTATE*, [1910] 1 I. R. 47.—*IR.*

1166 ii. ————]—Testatrix made a devise of lands, held under a lease for

lives renewable for ever, to A. for life, with a power of appointment to A. among her children, but made no gift over in default of appointment:—*Held*: there being nothing in the instrument creating the power from which the intention that the objects should

take in default of appointment could be gathered, that A. took a mere life estate coupled with a power of appointment, & there being no trust for the children, there was consequently no gift by implication to them.—*CURBORN v. HORAN*, [1921] 1 I. R. 93.—*IR.*

O. S. 63; 21 J. P. 726; 3 Jur. N. S. 740; 5 W. R. 865; 69 E. R. 1219.

**Annotations** :—*Consd.* *Re Brierley*, *Brierley v. Brierley* (1894), 43 W. R. 36. *Refd.* *Lambe v. Eames* (1870), L. R. 10 Eq. 267; *Wilson v. Duguid* (1883), 24 Ch. D. 244; *Re Clarke*, *Bracey v. Royal National Lifeboat Institution*, [1923] 2 Ch. 407. *Mentd.* *Hunter v. A.-G.*, [1899] A. C. 309; *Re Davis*, *Thomas v. Davis*, [1923] 1 Ch. 225.

1174. —. —.]—*Re CAPLIN'S WILL*, No. 1193, *post*.

1175. —. —.]—*WILSON v. DUGUID*, No. 1232, *post*.

1176. —. —.]—A bequest to A. for life, "with remainder as he shall by deed or will & in his sole discretion appoint amongst" certain named persons, creates a trust by implication, in default of appointment, for such of those persons as survive testator, whether they survive the life tenant or not.—*Re WALFORD*, *KENYON v. WALFORD* (1911), 55 Sol. Jo. 384.

1177. **Power to appoint to individual.**—Devise of absolute interest to one with any expression that he shall dispose of the whole or part to A., not properly a devise but a trust for A. which the ct. will execute after death of the first devisee.

Devise to one for life, or absolutely, with directions that he shall dispose of it to another at his death, operates as an immediate devise, without any such disposition.—*BULL v. VARDY* (1791), 1 Ves. 270; 30 E. R. 338.

**Annotations** :—*Consd.* *Brown v. Higgs* (1800), 5 Ves. 495; *Re Brierley*, *Brierley v. Brierley* (1894), 43 W. R. 36. *Refd.* *Cowper v. Mantell* (1856), 22 Beav. 231. *Mentd.* *Morice v. Durham* (Bp.) (1805), 10 Ves. 522.

1178. — **Conditional power—Satisfaction of condition impossible.**—Testator gave his trustees power, if his daughter married with their consent, to appoint part of her fortune on her death to her husband. She married in testator's lifetime with his consent :—*Held* : the provision was equivalent to a gift to the husband of the life interest.—*TWEEDALE v. TWEEDALE* (1878), 7 Ch. D. 633; 47 L. J. Ch. 530; 38 L. T. 137; 26 W. R. 457.

#### *B. Necessity for Intention to Benefit.*

1179. **General rule—Intention to benefit necessary.**—Testator by will bequeathed his residue equally among his seven children, & by a codicil revoked the share given by his will to one of his sons, & gave the same to his trustees upon trust at their uncontrolled discretion to apply the same or such parts thereof as they should think proper, for the personal maintenance & support or otherwise for the benefit of his son, or otherwise to apply the same in augmentation of the shares of testator's other children. The trustees did not exercise the power, but paid the share in question into ct. under Trustee Relief Act :—*Held* : there being no gift in favour of the person who would be benefited by the exercise of the power, as in *Brown v. Higgs*, No. 1168, *ante*, no gift could be implied, & therefore there was an intestacy with respect to the share.—*Re EDDOWES* (1861), 1 Drew. & Sm. 395; 5 L. T. 389; 7 Jur. N. S. 354; 62 E. R. 430.

1180. —. —.]—*Re WEEKES' SETTLEMENT*, No. 1146, *ante*.

1181. —. —.]—There is no inflexible rule that, if a testator confers a power to appoint among a class but makes no gift over in default of appointment, the ct. will imply a gift to the class in equal shares if the power be not exercised. It is only when upon the construction of the will testator shows an intention to create a trust in

favour of the class that this implication will be made.

By his will testator devised & bequeathed his residuary real & personal estate to trustees upon trust for conversion & to hold the net proceeds & the investments representing the same. In trust to pay the income to his wife during widowhood & after her death or remarriage in trust for his only son for life & from & after his death "In trust for such person or persons as my son . . . shall by will appoint, but I direct that such appointment must be confined to any relation or relations of mine of the whole blood." There was no gift over in default of appointment :—*Held* : the ct. would not imply a gift in default of appointment to the objects of the power, as the will did not show any intention on the part of testator to create a trust in favour of the objects of the power; & therefore, if the son released his power of appointment the property would go subject to the two life interests as on an intestacy.—*Re COMBE*, *COMBE v. COMBE*, [1925] 1 Ch. 210; 94 L. J. Ch. 267; *sub nom.* *Re COOMBE*, *COOMBE v. COOMBE*, 133 L. T. 473; 69 Sol. Jo. 397.

#### *C. Where Gift Over.*

1182. **Whether trust implied.**—A trust for raising money for a *feme sole* if she marry with consent of the trustees; & if not, such as the trustees shall name, or else to themselves, shall enure to the administrator of the *feme sole*.—*FLEMING v. WALGRAVE* (1664), 1 Cas. in Ch. 58; 22 E. R. 693.

**Annotations** :—*Refd.* *Fry v. Porter* (1669), 1 Cas. in Ch. 138; *Croagh v. Wilson* (1706), 2 Vern. 572; *Hervoy v. Aston* (1737), 1 Atk. 361; *Reynish v. Martin* (1746), 3 Atk. 330.

1183. —. —.]—*PATTISON v. PATTISON*, No. 1156, *ante*.

1184. —. —.]—Devise in 1817 of a freehold estate for lives renewable for ever, "to my son W. during his life, & after his death, to his lawful issue, in such manner, shares, & proportions as he, by deed or will, shall appoint, & for want of such appointment then to his issue equally, if more than one; & if only one child, to said child; & in failure of issue of W." to J. Another estate, consisting of fee simple lands, was devised in the same terms to son J.; & on failure of the issue of J., it was to go to W. J., & W., before the birth of any child to W., J. himself never married, joined in a recovery as to the lands devised to J., & to which W. afterwards succeeded in possession on J.'s death without issue. W. died, leaving four children, he had not executed any appointment, but during his life disposed of both descriptions of lands to creditors for value.

The estate to the issue does not arise by implication, but there is an express devise to the issue in default of appointment under the power. . . . In *Sugden on Powers*, it is said, "Where there is a gift over in default of appointment to the objects of the power, or to other persons, of course the words of the power cannot operate to vest any estate in the objects of it by implication if there be no appointment. . . ." Indeed the general rule of *expressum facit cessare tacitum*, seems plainly to exclude any increase of an estate by implication where there is an estate expressly limited as in the present case (*CROMPTON, J.*).—*RODDY v. FITZGERALD* (1857), 6 H. L. Cas. 823; 10 E. R. 1518, H. L.

**Annotations** :—*Consd.* *Bradley v. Cartwright* (1867), L. R. 2 C. P. 511; *Clifford v. Koe* (1880), 5 App. Cas. 447. *Refd.* *Jordan v. Adams* (1859), 6 C. B. N. S. 748; *Felham*

#### PART IX. SECT. 4, SUB-SECT. 1.—B.

11791. **General rule—Intention to benefit necessary.**—*HEALY v. DONNERY* (1853), 3 I. C. L. R. 213.—*IR.*

**Sect. 4.—Effect of failure to exercise power: Sub-sect. 1, C.; sub-sect. 2, A. (a).]**

*Clinton v. Newcastle*, [1902] 1 Ch. 34. *Mentd. Surtees v. Surtees* (1871), 19 W. R. 1043; *Leach v. Jay* (1877), 6 Ch. D. 496; *Re Nelley's Trusts* (1877), 26 W. R. 88; *Taylor v. St. Helen's Corp'n.* (1877), 6 Ch. D. 264; *Bowen v. Lewis* (1884), 9 App. Cas. 890; *Re Score, Tolman v. Score* (1887), 57 L. T. 40; *Van Grutten v. Foxwell*, *Foxwell v. Van Grutten*, [1897] A. C. 658; *Re Wilmot, Wilmot v. Betterton* (1897), 76 L. T. 415; *Foxwell v. Van Grutten* (1898), 79 L. T. 617; *Re Simcoe, Vowler-Simcoe v. Vowler*, [1913] 1 Ch. 552; *Re Lawrence, Lawrence v. Lawrence*, [1915] 1 Ch. 129.

**1185.** —[S. bequeathed residue to children in equal shares. Then directed that a part of each son's share should be set apart on trust for the son until bkpcy., then for such of his children as he should appoint, & in default of appointment for such children as should attain twenty-five. One son became bkpt., & without having exercised his power of appointment:—*Held*: the fund set apart vested in his trustee, & not in his children by implication in default of appointment.—*Re SPRAGUE, MILEY v. CAPE* (1880), 43 L. T. 236.

**1186.** —[—*RICHARDSON v. HARRISON*, No. 70, *ante*.

**1187.** —*Residuary gift.*—Where testator by his will gives his wife a life interest in certain property, & a power of appointing such property among a class, & subsequently makes her residuary legatee, the residuary gift is not such a gift over as will prevent the ct. from implying from the power a gift to the class, to take effect even if no appointment is made by the wife:—*Held*: in such a case, upon the construction of the particular will, the wife did not on releasing her life interest become absolutely entitled to the property which she had power to appoint.—*Re BRIERLEY, BRIERLEY v. BRIERLEY* (1894), 43 W. R. 36; 38 Sol. Jo. 647; 12 R. 55, C. A.

*Annotation*:—*Consd. Re Weekes' Settltmt.*, [1897] 1 Ch. 289.

**1188.** On what limitation depends—Default of appointment—Not default of object.]—Settlement to such uses as the husband & wife shall jointly appoint, & in default of such appointment, to them for life; & after the decease of the survivor to the use of all or any of the child or children of them in such shares & proportions & for such estate & estates, term or terms, & payable at such time or times & in such manner & form, as the husband should by deed or will appoint; & in default thereof to him & his heirs. The event, upon which the last limitation depends, is default of appointment, not of children.—*JENKINS v. QUINCHANT* (circa 1745), 5 Ves. 596, n.; 31 E. R. 760, L. C.

*Annotations*:—*Mentd. Barstow v. Kilvington* (1800), 5 Ves. 593; *Bedford v. Abercorn* (1836), 1 My. & Cr. 312.

**1189.** Power extinguished by insolvency.]—A fund was settled upon trust to pay the interest to the husband, unless & until he should become insolvent, or until his death, whichever should first happen; & after the happening of either of such events, upon trust to pay the interest of the fund to the wife for her life; & after the determination of the several trusts thereinbefore created, upon trust for the children of the marriage, as the survivor should appoint; & in default of appointment, from & after the several deceases of the husband & wife, or the sooner determination of the trust for the children of the marriage equally. The husband became insolvent, & the wife afterwards died in the lifetime of the husband:—*Held*: the interests of the children & their issue in default of appointment thereupon became vested & could no longer be varied by the execution by the

surviving husband of his power of appointment.—*HASWELL v. HASWELL* (1860), 2 De G. F. & J. 456; 30 L. J. Ch. 97; 3 L. T. 393; 6 Jur. N. S. 1222; 9 W. R. 129; 45 E. R. 698, L. C.

*Annotations*:—*Consd. Bradley v. Bury* (1864), 10 L. T. 868. *Distd. Wickham v. Wing* (1865), 2 Hem. & M. 436. *Consd. Re Stone's Estate* (1869), 18 W. R. 222; *Re Aylwin's Trusts* (1873), L. R. 16 Eq. 585; *Re Kelly's Settltmt.*, *West v. Turner* (1888), 59 L. T. 494; *Re Master's Settltmt.*, *Master v. Master*, [1911] 1 Ch. 321.

**SUB-SECT. 2.—DISTRIBUTION OF PROPERTY AMONG CLASS.**

**A. What Persons Entitled.**

**(a) In General.**

**1190.** Where no gift & no gift over—Only persons who could take by appointment.]—*WALSH v. WALLINGER*, No. 130, *ante*.

**1191.** Where invalid appointment—Members of class living at death of donee of power.]—Testator gave a legacy to his "relatives" in such shares, etc., as his wife should appoint. She appointed part to children of testator's illegitimate brother:—*Held*: (1) "relatives" are legitimate relatives, where there is nothing on the face of the will itself to lead to a different conclusion; (2) the class of relatives, who were to take the share which was badly appointed, was to be ascertained at the death of the donee of the power, & not of testator.—*Re SAVILLE'S TRUSTS* (1866), 14 W. R. 603.

**1192.** Where life interest in donee of power—Power to appoint to relations.]—N. by will gave to E., his wife, all his estate, leases & interest in his house in Hatton Garden, & all the goods & furniture therein at the time of his death, & also all his plate, jewels, etc., but desired her, at or before her death, to give such leases, etc., unto such of his own relations as she should think most deserving.

E., by her will, gave all her estate & interest to S., in the house in Hatton Garden, & after several legacies, the residue of her personal estate to deft. & two other persons, & made them exors.; but neither gave at or before her death, the goods in the house, or her husband's jewels to his relations.

The Master of the Rolls was of opinion that E., under the will of N. took only beneficially during her life, & that so much of the household goods in Hatton Garden, not disposed of by her according to the power given her by the will of N. in case the same remains *in specie*, or the value thereof, ought to be divided equally among such of the relations as were his next of kin at the time of her death.—*HARDING v. GLYN* (1739), 1 Atk. 409; cited in 5 Ves. at p. 501; 26 E. R. 299.

*Annotations*:—*Expld. Brown v. Higgs* (1803), 8 Ves. 561. *Apld. Cruwys v. Colman* (1804), 9 Ves. 319. *Consd. Walter v. Maunde* (1815), 19 Ves. 424; *Wright v. Atkyns* (1815), Coop. G. 111. *Apld. Grant v. Lynam* (1828), 4 Russ. 292. *Consd. Benson v. Whittam* (1831), 5 Sim. 22; *Burrough v. Philcox*, *Lacey v. Philcox* (1840), 5 My. & Cr. 72. *Apld. Croft v. Adam* (1842), 12 Sim. 639. *Consd. Williams v. Williams* (1851), 1 Sim. N. S. 358; *Salisbury v. Denton* (1857), 3 K. & J. 529; *Bernard v. Minshull* (1859), John. 276. *Distd. Re Bond, Cole v. Hawes* (1876), 4 Ch. D. 238. *Consd. Wilson v. Duguid* (1883), 24 Ch. D. 244; *Re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565. *Refd. Pierson v. Garnet* (1786), 2 Bro. C. C. 38; *Biroh v. Wade* (1814), 3 Ves. & B. 198; *Wright v. Atkyns* (1823), Turn. & R. 143; *Meredith v. Henage* (1824), 1 Sim. 542; *Foley v. Parry* (1833), 2 My. & K. 138; *Re Stanger, Moorsom v. Tate* (1891), 60 L. J. Ch. 326; *Re Brierley, Brierley v. Brierley* (1894), 43 W. R. 36.

**1193.** —[—Testator bequeathed a fund to his wife for life, & after her death to be paid to such & so many of the relations or friends of the

**PART IX. SECT. 4, SUB-SECT. 1.—C.**

**1197 I.** *Whether trust implied—Residuary gift.*—*Re HALL, SHERRILL v. CLARK*, [1899] 1 I. R. 308.—*IR.*



wife as she should by will appoint, but the will contained no gift in default of appointment. The wife by will appointed among certain relations of her own:—*Held*: relations or friends must be construed relations, there being a gift for life to the donee of power, the relations must be ascertained at her death, & be limited to next of kin; there being no gift over in default of appointment there was an implied trust in favour of such next of kin; & the will of the donee, not operating as an execution of the power which was special, the next of kin were entitled under such implied trust to the fund.—*Re CAPLIN'S WILL* (1865), 2 Drew. & Sm. 527; 6 New Rep. 17; 34 L. J. Ch. 578; 12 L. T. 526; 11 Jur. N. S. 383; 13 W. R. 646; 62 E. R. 720.

*Annotation*:—*Consd. Re Weekes' Settlt.*, [1897] 1 Ch. 289.

1194. ———.]—*Power to appoint to children.*—*KENNEDY v. KINGSTON*, No. 123, *ante*.

1195. ———.]—*WALSH v. WALLINGER*, No. 130, *ante*.

1196. ———.]—*FENWICK v. GREENWELL*, No. 1171, *ante*.

1197. ———.]—By a marriage settlement, a power was given to the wife, in case she left any child of the marriage living at her death, to appoint amongst all & every the children; but if there should be no issue of the marriage living at her death, then she was to have a general power of disposition. She did not exercise the power, & died leaving several children:—*Held*: those children alone who survived her were entitled to take by implication.

The power to appoint is to arise in the event of her leaving one or more child or children living at her death, & in that event only; & taking this, in connection with the clause, by which the property is to revert to the settlor, in the event of there being no issue of the marriage living at her death, I think, that the true meaning of the settlement is, that those children only who were living at her death are entitled to take (*LANGDALE, M.R.*).—*WINN v. FENWICK* (1849), 11 Beav. 438; 18 L. J. Ch. 337; 13 L. T. O. S. 155; 13 Jur. 906; 50 E. R. 886.

*Annotation*:—*Consd. Lambert v. Thwaites* (1866), L. R. 2 Eq. 151.

1198. ———.]—Testator gave to trustees certain freehold & leasehold property, upon trust to pay the rents, issues, & profits to his granddaughter for life, & after her decease, "in case she should leave issue of her body lawfully begotten, then upon trust to dispose of his said estate in such manner amongst such issue as his said granddaughter by deed or will should appoint, & for default of such issue," then upon certain ulterior trusts. The granddaughter had several children & grandchildren, & by her will, purporting to be made in execution of the power, appointed the whole of the property amongst some only of her children:—*Held*: upon the construction of the above clause, that issue living at the death of the donee of the power of appointment were alone objects thereof; an exclusive appointment was not authorised, & the appointment was therefore invalid; & the issue of the granddaughter of every degree living at her death became entitled to the property on her death as tenants in common.—*STOLWORTHY v. SANCROFT* (1864), 33 L. J. Ch. 708; 10 Jur. N. S. 762; 12 W. R. 635; *sub nom. STODWORTHY v. SANCROFT*, 10 L. T. 223.

*Annotation*:—*Consd. Re Veale's Trusts* (1876), 4 Ch. D. 61.

1199. ———.]—Settlement of a fund after the death of A. & B. for such descendants of C. as B. should by will appoint:—*Held*: (1) to create a power in the nature of a trust for descendants

of C. living at B.'s death, entitling such descendants in equal shares in default of appointment; (2) an appointment to the legal personal representatives of descendants dying before the death of the donee of the power was unauthorised.—*Re SUSANN'S TRUSTS* (1877), 47 L. J. Ch. 65; 28 W. R. 93.

1200. *Where life interest in other than donee of power.*—Testator expressing his will & desire, that one-third of the principal of his estate & effects be left entirely to the disposal of his wife among such of her relations as she may think proper after the death of his sisters, a trust for her next of kin at the time of her death, having made no disposition.—*BIRCH v. WADE* (1814), 3 Ves. & B. 198; 35 E. R. 454.

*Annotations*:—*Consd. Re Weekes' Settlt.*, [1897] 1 Ch. 289. *Reid. Burreough v. Philcox, Lacey v. Philcox* (1840), 5 My. & Cr. 72; *Re Brierley, Brierley v. Brierley* (1894), 43 W. R. 36.

1201. ———.]—Bequest to trustees for A. for life, & if he should die childless, upon trust to apply the sum to the benefit of such of testator's children or their issue as the trustees should think fit, for the interest & good of testator's family; with no gift in default of appointment. No appointment having been made, & the tenant for life having survived the donees of the power, & died childless:—*Held*: children & remoter issue took in equal shares *per capita* & the period for ascertaining the class was the death of the tenant for life.—*Re WHITE'S TRUSTS* (1860), John. 656; 70 E. R. 582.

*Annotations*:—*Consd. Re Weekes' Settlt.*, [1897] 1 Ch. 289. *Apld. Re Llewellyn's Settlt.*, *Official Solicitor v. Evans*, [1921] 2 Ch. 281. *Reid. Wilson v. Duguid* (1883), 24 Ch. D. 244; *Re Stanger, Moorsom v. Tate* (1891), 60 L. J. Ch. 326; *Re Combe, Combe v. Combe*, [1925] 1 Ch. 210. *Mentd. Crosland v. Wrigley* (1895), 73 L. T. 60.

1202. ———.]—*Re PHENE'S TRUSTS*, No. 1231, *post*.

1203. ———.]—Testator directed that after the death of his wife his trustees should (*inter alia*) pay & divide a sum of £1,000 equally between such ten of the children or remoter issue of H. as the trustees should think fit. At the death of the widow there were only six descendants of H. living:—*Held*: the £1,000 was to be divided equally amongst them.—*CARTHEW v. ENRAGHT* (1872), 26 L. T. 834; 20 W. R. 743.

1204. ———.]—*Power to appoint to children over twenty-one.*—J. devised all his freehold & copyhold estates to his wife for life, & directed that after her death his brother R., if he should survive her, should, "part & share out or divide all & singular my said copyhold & freehold estates, in such manner, amongst all my children, sons & daughters, as they shall severally arrive at their ages of twenty-one years, as my brother shall think equitable & fair." But in case his wife should survive R., he directed that she should make her will, & devise the said estates: "amongst all my children in the best & fairest manner that she can." J. left a son & two daughters, who died in the lifetime of the wife. R. survived her, & died without having made any appointment:—*Held*: no estate of inheritance vested in the younger children of J., for there was no devise to them, & all the children died before the power to appoint in their favour had accrued.—*HALFHEAD v. SHEPPARD, SAME v. HALL, SAME v. TYLER* (1859), 1 E. & E. 918; 28 L. J. Q. B. 248; 1 L. T. 162; 5 Jur. N. S. 1162; 7 W. R. 480; 120 E. R. 1155.

1205. *Where part of fund appointed—Right of appointee to share.*—An appointment to one of a class of a part of a fund as "her part, share, & proportion," does not prevent her participating in the unappointed fund, limited to the class equally in default of appointment.



**Sect. 4.—Effect of failure to exercise power: Sub-sect. 2, A. (a) & (b), & B.]**

A mother had a power of appointing a reversionary fund to her daughters. A daughter, who was under age, being about to marry, the mother appointed that a moiety of the fund should, on the marriage, become the portion of the daughter, & be vested in her or her intended husband in her right, & to be paid to the husband, his exors., administrators, or assigns, on the death of the tenant for life:—*Held*: although the husband was not an object of the power & the fund was reversionary & the daughter an infant, there was a valid appointment.—*WOMBWELL v. HANROTT* (1851), 14 Beav. 143; 20 L. J. Ch. 581; 18 L. T. O. S. 60; 51 E. R. 241.

*Annotations*:—*Apprvd.* *Foster v. Cantley* (1855), 6 De G. M. & G. 55. *Refd.* *Re Gosset's Settlement* (1854), 19 Beav. 529.

**(b) Express Gift to Class.**

**1206. General rule—All members of class—including representative of deceased member.]—***VANDERZEE v. ALOM*, No. 1164, *ante*.

**1207. ———.]—**Devise to deviser's wife for life, & after her decease unto & among all & every their children, in such manner & proportions as she should in her life or by will appoint; empowering her to sell, & receive the interest for life; & appointing after her decease both principal & interest to & among their children, in such proportions, as aforesaid. All the children, having died in the life of their mother, who died without appointment, were held entitled as tenants in common to several estates of inheritance.—*CASTERTON v. SUTHERLAND* (1804), 9 Ves. 445; 32 E. R. 674.

*Annotations*:—*Distd.* *Halfhead v. Sheppard* (1859), 1 E. & E. 118. *Consd.* *Lambert v. Thwaites* (1866), L. R. 2 Eq. 151. *Refd.* *Hardingham v. Thomas* (1854), 2 W. R. 547.

**1208. ———.]—***FAULKNER v. WYNFORD* (LORD), No. 1155, *ante*.

**1209. ———.]—***LAMBERT v. THWAITES*, No. 758, *ante*.

**1210. ———.]—***WILSON v. DUGUID*, No. 1232, *post*.

**1211. ———.]—**By her will E., in exercise of a power to appoint amongst her children or remoter issue given to her by the will of M., directed her trustees to pay the income of a certain trust fund to such child or children of hers as should survive her, during their lives, in equal shares if more than one, & in case of the death of any of her children in her lifetime or afterwards, she directed that the issue of such child, or any one or more of them should take his, her, or their parents' share, in such shares & proportions as his, her, or their parents should by will appoint; in default of such appointment such issue to take equally as tenants in common. E. had several children, all of whom were born in the lifetime of M., & all of whom survived E. Some of these children were now dead, without having exercised the power of appointment given by the will of E. They had children, of whom some predeceased & others survived their parents:—*Held*: the persons to take in default of appointment by the children of E. were all the children of such children, whether they survived their parents or not.—*Re HUTCHINSON, ALEXANDER v. JOLLEY* (1886), 55 L. J. Ch. 574; 54 L. T. 527.

**1212. ———.]—***Re WOLFORD, KENYON v. WOLFORD*, No. 1176, *ante*.

**1213. Gift to children—Grandchildren.]—**Devise of £1,500 in trust for the children of A., as A. should advise. She dies, making no appointment. A.

has only one child, & several grandchildren, the child only shall take, & not the grandchildren; but if there had been no child of A. living, the grandchildren might have taken.—*CROOK v. BROOKING* (1889), 2 Vern. 106; 23 E. R. 679.

*Annotations*:—*Consd.* *Berry v. Berry* (1861), 3 Gift. 134. *Distd.* *Re Atkinson, Pybus v. Boyd*, [1918] 2 Ch. 138. *Refd.* *Oates v. Jackson* (1741), 7 Mod. Rep. 439; *Wyth v. Blackman* (1749), 1 Ves. Sen. 196; *Hussey v. Berkeley* (1763), 2 Eden, 194; *Kelley v. Fowler* (1768), Wilm. 298; *Radcliffe v. Buckley* (1804), 10 Ves. 195; *Doe d. Stewart v. Sheffield* (1811), 13 East, 528; *Fenn v. Death* (1856), 2 Jur. N. S. 700; *Crook v. Whitley* (1857), 7 De G. M. & G. 490; *Pride v. Fooks* (1858), 3 De G. & J. 252; *Re Hopkins' Trusts* (1878), 9 Ch. D. 131. *Mentd.* *Newton v. Bennet* (1782), 1 Bro. C. C. 134; *R. v. Darlington* (1792), Nolan, 124; *Smith v. Attersoll* (1826), 1 Russ. 266; *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594.

**1214. ———.]—**Testator bequeathed a sum of £6,000 in trust for his daughter for life, " & on her decease, I give the £6,000 to the children, or their descendants, of T. in such proportions to each as my daughter may direct." The daughter died without having made any appointment:—*Held*: the children of T. were entitled to the fund to the exclusion of their issue.—*JONES v. TORIN* (1833), 6 Sim. 255; 58 E. R. 589.

*Annotation*:—*Distd.* *Penny v. Turner* (1846), 15 Sim. 368.

**1215. ——— Representative of grandchild.]—***Re LLEWELLYN'S SETTLEMENT, OFFICIAL SOLICITOR v. EVANS*, No. 1228, *post*.

**1216. After-born child.]—**Bequest to exors., in trust, that they shall pay, etc., unto & amongst testator's two brothers & his sister, or their children, in such shares, etc., & at such times, etc., as the trustees, or the major part, or the survivor, his exors., etc., shall think proper. All the children living at the death of testator held entitled with the parents, *per capita*, the ct. not having a discretion.

The fund vests at the time of the death & after-born children would not take (*GRANT, M.R.*).—*LONGMORE v. BROOM* (1802), 7 Ves. 124; 32 E. R. 51.

*Annotations*:—*Appld.* *Penny v. Turner* (1848), 2 Ph. 493. *Consd.* *Salisbury v. Denton* (1857), 3 K. & J. 529. *Appld.* *Little v. Neil* (1862), 31 L. J. Ch. 627. *Refd.* *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195; *Miller v. Chapman* (1855), 24 L. J. Ch. 409; *Joel v. Mills, Hervey v. Mills* (1861), 30 L. J. Ch. 354.

**1217. Gift to testator's relations—Next of kin at time of death.]—**Bequest of residue to testator's wife for life, with a direction to dispose of the residue among his relations in such manner as she should think fit.

Appointment to relations, not being next of kin void, & the residue decreed to be distributed amongst those who were next of kin to testator at the time of his death.—*POPE v. WHITCOMBE* (1810), 3 Mer. 689; 36 E. R. 264.

*Annotations*:—*Expld.* *Flinch v. Hollingsworth* (1855), 21 Beav. 112. *Consd.* *Re Deakin, Starkey v. Eyres*, [1894] 3 Ch. 565.

**1218. Gift to nieces & their children—Direction as to time of payment—Members of class then living.]—**Testator gave £200 to each of his nieces & their children, to be paid within nine months after the death of his wife, amongst his nieces & their children as his wife should by will appoint. The wife died without having made any appointment. The exors., within nine months after her death, paid the legacies to the nieces. They afterwards died without having had any children:—the payment was properly made.—*PYNE v. FRANKLIN* (1832), 5 Sim. 458; 2 L. J. Ch. 58; 58 E. R. 410.

**B. In What Proportions Entitled.**

**1219. General rule—In equal shares.]—***DOYLEY v. DOYLEY, A.-G. v. DOYLEY* (1735), 7 Ves. 58, n.;

32 E. R. 35; *sub nom.* DOYLEY v. A.-G., 2 Eq. Cas. Abr. 194; 4 Vin. Abr. 485, pl. 16.

*Annotations*:—*Consd.* Moggridge v. Thackwell (1803), 7 Ves. 38; Morice v. Durham (Bp.) (1805), 10 Ves. 522. *Foll.* Salusbury v. Denton (1857), 3 K. & J. 529. *Consd.* Wilson v. Duguid (1883), 24 Ch. D. 244. *Refd.* Cole v. Wade (1807), 18 Ves. 27; James v. Allen (1817), 3 Mer. 17; Ellis v. Selby (1836), 1 My. & Cr. 286; Fordyce v. Bridges (1848), 2 Ph. 497; *Re* Douglas, Obert v. Barrow (1887), 35 Ch. D. 472; Hunter v. A.-G., [1899] A. C. 309; *Re* Clarke, Bracey v. Royal National Lifeboat Institution, [1923] 2 Ch. 407; *Re* Davis, Thomas v. Davis, [1923] 1 Ch. 225.

1220. ———.]—Jewels, etc., given to the wife for life, & then to such grandchildren as she shall appoint. If she makes no appointment, they shall go equally.—WITTS v. BODDINGTON (1790), 3 Bro. C. C. 95; 29 E. R. 428, L. C.

*Annotations*:—*Consd.* Brown v. Higgs (1800), 5 Ves. 495; Burrough v. Philcox, Lacey v. Philcox (1840), 5 My. & Cr. 72. *Refd.* Pocock v. A.-G. (1876), 3 Ch. D. 342; *Re* Weekes' Settlement, [1897] 1 Ch. 289.

1221. ———.]—Testator gave to his widow, "for the benefit & advantage of his children," power of selling his W. estate. By a codicil he expressed himself, in effect, thus: "I do empower my wife to sell all my estates whatsoever, & the money arising from such sale, together with my personal estate, she my wife shall & may divide & proportion among my children as she shall think fit & proper or as she shall direct by will." The estate was neither sold nor appointed by the widow:—*Held*: a trust for the children was created by the will, & they were entitled equally.—GRIEVESON v. KINSOPP (1837), 2 Keen, 653; 6 L. J. Ch. 261; 48 E. R. 780.

1222. ———.]—A gift to testator's three sisters or their children as his mother should, by deed or will, appoint:—*Held*: to be a gift, in default of appointment, to the whole class of the daughters & the children equally; not on the ground that "or" was to be construed "and," but that it was referable only to the power given to the mother, of selection from among the class, & as power had not been exercised, & the ct. could not assume the exercise of it, the whole class must take equally.—PENNY v. TURNER (1848), 2 Ph. 493; 17 L. J. Ch. 133; 41 E. R. 1034, L. C.

*Annotations*:—*Apld.* *Re* White's Trusts (1860), John. 656. *Refd.* Fordyce v. Bridges (1848), 2 Coop. temp. Cott. 324; Prendergast v. Prendergast (1850), 3 H. L. Cas. 195; *Re* Llewellyn's Settlement, Official Solicitor v. Evans, [1921] 2 Ch. 281.

1223. ———.]—PATTISON v. PATTISON, No. 1156, *ante*.

1224. ———.]—*Re* WHITE'S TRUSTS, No. 1201, *ante*.

1225. ———.]—By a marriage settlement the trustees were empowered to apply the income & capital of the trust estate for the use & benefit of such one or more of the wife & children of J., & the issue of such children, as the trustees in the exercise of a free & unlimited discretion should select & determine; but such provision for the wife to be by annuity depending on the life of J. The trustees declined exercising their discretion, & the ct. directed the fund to be divided equally between the wife & children & grandchildren, without making any provision as to an annuity to the wife.—LITTLE v. NEIL (1862), 31 L. J. Ch. 627; 10 W. R. 592.

1226. ———.]—Bequest to trustees to apply the income or principal for the benefit of S. widow, & of her three children in such proportions, etc., as the trustees in their absolute discretion should think proper; but in case S. married again, her interest to cease. The trustees declined to act:—*Held*: the fund must be divided equally between S. & her three children.

Where the ct. has to administer a fund, the

distribution of which is intrusted to the discretion of one who refuses to exercise it, the only distribution the ct. can make is to divide it, equally, between the objects of testatrix's bounty, it being impossible to divide it in such a manner as the donee of the power should think fit (ROMILLY, M.R.).—IZOD v. IZOD (1863), 32 Beav. 242; 1 New Rep. 462; 9 L. T. 191; 9 Jur. N. S. 1216; 11 W. R. 452; 55 E. R. 95.

1227. ———.]—*Re* SUSANNI'S TRUSTS, No. 1199, *ante*.

1228. ———.]—By marriage settlement property of the wife was vested in trustees on trust for her for life, then for her husband for life if he survived, which he did not, & upon the death of the survivor, if there should be any child or children, to grant, convey & transfer to such child or children or their issue in such shares as she by deed or will should appoint, such shares to be payable to such child or children as they respectively should attain twenty-one or if a daughter marry under that age, & in case there should be no more than one such child for such only child, & in case no issue should attain twenty-one or marry as aforesaid, over. There was no limitation in default of appointment. She died without exercising the power, leaving adult children & infant grandchildren:—*Held*: the property went to them equally *per capita*. *Qu.*: whether, if a grandchild had predeceased her, his legal personal representative would have taken.—*Re* LLEWELLYN'S SETTLEMENT, OFFICIAL SOLICITOR v. EVANS, [1921] 2 Ch. 281; 90 L. J. Ch. 493; 126 L. T. 285.

1229. ———.]—As tenants in common.]—Where there is a general power of appointment among children, & the appointment from any circumstances becomes void, the children take as tenants in common.

A., having been indebted to the estate of B. in a sum of money, but from which he had been discharged under a commission of bkpt., voluntarily executed to C., the widow of B., a bond for the payment of part of such debt, for the use of herself & children, but at her disposal. Two years afterwards, A. executed to C. another bond for the payment of the remainder of such debt, for the use & benefit of herself & children only, in what proportions among the latter she may think proper to direct, but for no other use, purpose, or intent whatsoever:—*Held*: the widow took a life interest in the money secured by the bonds, & the principal, after her decease, became payable among the children, in such manner, & in such proportions, as she should direct; & the widow having made an exclusive appointment in favour of two of her children, such appointment was void, & all the children took as tenants in common.—FOWLER v. HUNTER (1829), 3 Y. & J. 506, Ex. Ch.

1230. ———.]—Testator gave his real & personal estate to his wife for life, & after her decease "unto & amongst his three children P., E., & T., & their lawful issue, in such proportions, manner & form, & subject to such charges, etc., as his wife should appoint":—*Held*: in default of appointment, the children took estates tail, & an appointment to a deceased child & the heirs of her body was invalid.—MARTIN v. SWANNELL (1840), 2 Beav. 249; 9 L. J. Ch. 174; 48 E. R. 1176.

1231. ———.]—Testator gave £3,000 to his exors. upon trust for the benefit of M. during her life, & from & immediately after her death "in trust for the benefit of her children, to do that which they, my exors., may think most to their advantage." The exors. died in the lifetime of M.:—*Held*: the children of M., who were living at the time of her death, were entitled to the fund

*Annotation*: — *Apld. Re Llewellyn's Settlmt., Official Solicitor v. Evans*, [1912] 2 Ch. 281.

*Annotations*:—**Mentd.** Lotheuiller v. Tracey (1753), Amb.  
204; Chichester v. Coventry (1867), L. R. 2 H. L.  
71.

of annuities & of portions appointed under a power & secured by a term, is determined by the position of the term in the original deed creating them —*BEVAN v. BEVAN* (1883), 13 L. R. Ir. 53.—IR.

in the events which happened, as she should by deed or will appoint. In 1843 the husband joined with his wife in appointing part of the trust funds to secure a debt due from him to A., & notice of that appointment was given to the two then surviving trustees of the settlement. In 1848 the then surviving trustee of it was released from the trusts, & three new trustees appointed. The two survivors of those trustees, & afterwards the sole survivor of them, joined with the wife in various dealings with the trust funds. In 1867 the wife appointed a portion of the funds to the sole surviving trustee of the settlement by way of indemnity

to him, & the estate of the other trustee who had dealt with the funds at her request. There were other subsequent dealings with the funds. Bills were filed to administer various incumbrancers. The sole surviving trustee of the settlement alleged that he had had no notice of the appointment of 1843 :—*Held* : the appointees under that deed were entitled in priority to all other incumbrancers on the funds.—*PHIPPS v. LOVEGROVE*, *PROSSER v. PHIPPS* (1873), L. R. 16 Eq. 80 ; 42 L. J. Ch. 892 ; 28 L. T. 584 ; 21 W. R. 590, L. JJ.

*Annotations* :—*Mentd.* *Newman v. Newman* (1885), 28 Ch. D. 674 ; *Low v. Bouverie*, [1891] 3 Ch. 82.

## PRACTICE AND PROCEDURE.

Owing to the special character of the cases contained in this Title arrangements are being made for it to be dealt with at a later stage of the work.

## PRECATORY TRUSTS.

*See* GIFTS ; TRUSTS AND TRUSTEES.

## PREFERENCE.

*See* BANKRUPTCY AND INSOLVENCY ; COMPANIES.

## PRELIMINARY ACT.

*See* ADMIRALTY ; SHIPPING AND NAVIGATION.

## PREMIUM.

*See* INSURANCE ; LANDLORD AND TENANT ; MASTER AND SERVANT ; AND TITLES *passim*.

## PREROGATIVE OF THE CROWN.

*See* CONSTITUTIONAL LAW.

## PRESCRIPTION.

*See* COMMONS AND RIGHTS OF COMMON; EASEMENTS AND PROFITS À PRENDRE; FERRIES; FISHERIES; HIGHWAYS, STREETS, AND BRIDGES; MINES, MINERALS AND QUARRIES; WATERS AND WATERCOURSES.

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## Part I.—Formal Requirements.

### SECT. 1.—REGISTRATION OF NEWSPAPERS.

**Obligation to register.**—*See* Newspaper Libel & Registration Act, 1881 (c. 60), ss. 9, 13.

**Newspapers of which registration required.**—*See* Newspaper Libel & Registration Act, 1881 (c. 60), ss. 1, 18.

**Particulars required.**—*See* Newspaper Libel & Registration Act, 1881 (c. 60), ss. 1, 7, 9, 11, 12.

**1. Object of registration.**—The object of the registration of newspaper printers is not only to hold out the person so registered as liable to criminal proceedings, etc., for what appears in the newspaper, but also for goods supplied for the use or carrying on of the paper.—*GLENNISSON v. ROBERTSON* (1867), 10 L. T. 298.

**2. —.**—A newspaper is within Copyright Act, 1842 (c. 45), & requires registration under that Act in order to give the proprietor the copyright in its contents & so enable him to sue in respect of a piracy.—*WALTER v. HOWE* (1881), 17 Ch. D. 708; 50 L. J. Ch. 621; 44 L. T. 727; 29 W. R. 776.

**Annotations.**—*Apld.* *Cate v. Devon & Exeter Constitutional Newspaper Co.* (1889), 40 Ch. D. 500. *Consd.* *Trade Auxiliary Co. v. Middlesbrough & District Tradesmen's Protection Assocn.* (1889), 40 Ch. D. 425; *Walter v. Lane*, [1900] A. C. 539. *Refd.* *Asiflov. Lawrence & Bullen*, [1903] 1 Ch. 318.

**3. Sufficiency of registration.**—A periodical or magazine is a book within Copyright Act, 1842 (c. 45), s. 24, & its proprietor, if he has, pursuant to sect. 19, registered the first number at Stationers' Hall, is entitled to restrain the publication without his consent in a separate form of a serial published in successive numbers of the periodical, the copyright of which belongs to him under sect. 18, although neither the serial nor the first number containing it has been separately registered.—*HENDERSON v. MAXWELL* (1876), 4 Ch. D. 163; 46 L. J. Ch. 59; 25 W. R. 66; *subsequent proceedings* (1877), 5 Ch. D. 892.

**Omission to register.**—*See* Newspaper Libel & Registration Act, 1881 (c. 60), s. 10.

**4. — Owners not deprived of copyright.**—Pltfs. in this case, C, the T. co., & P., were respectively the proprietors of three newspapers or periodicals called *The Commercial Compendium*, *Perry's Gazette*, & *Stubbs' Weekly Gazette*. All these papers were published for the protection of traders by giving them information about the position of persons with whom they might have to deal, & consisted mainly of lists of bkpcies., bills of sale, & deeds of arrangement registered under the Bkpcy. Act, 1883 (c. 52). The three pltfs. jointly employed clerks to obtain these lists from the Govt. offices, & bore jointly the expense of the fees for searching the registers & other expenses of making out their list. All these papers were registered under Copyright Act, 1842 (c. 45), but they were not registered under Newspaper Libel & Registration Act, 1881 (c. 60). Pltf., C., besides publishing the *Commercial Compendium* in the ordinary way sold a certain number of copies to various trade protection societies, among others to the London Assocn. for the Protection of Trade. The numbers sold to this assocn. had the title *Commercial Compendium* omitted & “Commercial, Private, & Confidential List” substituted, & in this shape was circulated by the assocn. among its subscribers. Defts. were the proprietors of certain newspapers published in the West of England. They subscribed to the London Assocn. for the Protection of Trade, & on receipt of the weekly *Commercial, Private & Confidential List* they copied the deeds of arrangement registered by persons resident in the counties of Devon & Cornwall, & published them in their own paper. This was a motion by pltfs. to restrain this publication.—**Held:** non-registration of a newspaper under the Newspaper Libel & Registration Act, 1881 (c. 60), does not deprive the owners of their

### PART I. SECT. 1.

**a. Failure to register—What penalties can be recovered.**—Under Printers & Newspapers Registration Statute, 1864 (No. 212), s. 26, cumulative penalties can be recovered for publishing separate issues of a newspaper without having entered into the recognisance required by sect. 19.—*A.-G. v. SYMES* (1885), 11 V. L. R. 544.—**AUS.**

**b. —.**—*Who may sue—Whether*

*common informer.*—*A.-G. v. SMITH* (1892), 13 N. S. W. L. R. (L.) 293; 9 N. S. W. N. 67.—**AUS.**

**c. —.**—The business of printing & publishing a newspaper constitutes the partners employed in it a partnership “for trading purposes, within 33 Vict. c. 20, s. 1 (O), & liable to the penalty for not registering such partnership.”—*PINKERTON v. ROSS* (1873), 33 U. C. R. 508.—**CAN.**

**d. Liability to deposit security.**—*Indian Press Act.*—Every keeper of a printing press who makes a declaration under Press & Registration of Books Act (XXV. of 1867), s. 4, after the commencement of the above Act is simultaneously liable to deposit such security as the magistrate demands under sect. 3 (1) of the Indian Press Act even though the press & newspaper published therein were in

*Sect. 1.—Registration of newspapers. Sects. 2, 3 & 4. Part II. Sects. 1 & 2. Part III. Sect. 1: Sub-sect. 1.]*

copyright.—*CATE v. DEVON & EXETER CONSTITUTIONAL NEWSPAPER CO.* (1889), 40 Ch. D. 500; 58 L. J. Ch. 288; 60 L. T. 672; 37 W. R. 487; 5 T. L. R. 229.

*Annotations.—Reid. Walter v. Lane*, [1900] A. C. 539. *Mentd. Walter v. Steinkopf*, [1892] 3 Ch. 489.

*Proof of entries in register.*—*See Newspaper Libel & Registration Act, 1881* (c. 60), s. 15.

## SECT. 2.—NECESSITY FOR NAME OF PRINTER TO APPEAR.

*See 2 & 3 Vict. c. 12, ss. 2, 3, 4; Newspapers, Printers & Reading Rooms Repeal Act, 1869* (c. 24), s. 1, sched. II.

**5. Effect of omission — In action for work done.**—(1) An action for work & labour cannot be brought for printing a work distributed weekly as a newspaper, unless the printer comply with the provisions of 38 Geo. 3, c. 78.

(2) *Qu.*: whether the action could be maintained by a printer of intermediate numbers, the first & last numbers being printed by another person, of a volume of a work published half-yearly, if the name of the printer of the first & last numbers was printed at the beginning & end of the volume.—*MARCHANT v. EVANS* (1818), 8 Taunt. 142; 2 Moore, C. P. 14; 129 F. R. 337.

*Annotations.—As to (1) Apld. Bensley v. Bignold* (1822), 5 B. & Ald. 335; *Stephens v. Robinson* (1832), 2 Cr. & J. 209. *Generally, Mentd. Cundell v. Dawson* (1847), 4 C. B. 376.

**6. — — — — —**—A printer cannot recover for labour or materials used in printing any work, unless he affixes his name to it, pursuant to the 39 Geo. 3, c. 79, s. 27.—*BENSLEY v. BIGNOLD* (1822), 5 B. & Ald. 335; 106 E. R. 1214.

*Annotations.—Consd. Clay v. Yates* (1856), 1 H. & N. 73. *Reid. Stephens v. Robinson* (1832), 2 Cr. & J. 209; *A.-G. v. Beauchamp* (1918), 89 L. J. K. B. 219. *Mentd. Brown v. Duncanson* (1829), 5 Man. & Ry. K. B. 114; *Swan v. Blair* (1835), 3 Cl. & Fin. 810; *McCallan v. Mortimer* (1842), 9 M. & W. 636; *Smith v. Mawhood* (1845), 14 M. & W. 452; *Cundell v. Dawson* (1847), 4 C. B. 376; *Bateman v. Ball* (1887), 56 L. J. Q. B. 291; *Hermann v. Charlesworth* (1905), 74 L. J. K. B. 620; *Lougher v. Molyneux*, [1916] 1 K. B. 718; *Brightman v. Tate*, [1919] 1 K. B. 463; *Anderson v. Daniel* (1923), 93 L. J. K. B. 97.

**— Interrogatories to discover printers' identity — Libellous matter.**—*See DISCOVERY*, Vol. XVIII., p. 240, No. 1831.

**— Corrupt practice at elections.**—*See further, ELECTIONS*, Vol. XX., pp. 101, 102, 130, 139, 146, Nos. 804, 805, 1036–1038, 1137, 1138, 1203–1212.

**7. Penalty for omission—Who may be liable — Publishers.**—*Resp.*, who was the publisher of a newspaper, sold & delivered to a purchaser certain copies of the paper on which the name & address of the printer were not printed. *Resp.* was not the printer of the paper:—*Held*: *resp.*, as being the person publishing the copies, was liable to penalties under 2 & 3 Vict. c. 12, s. 2, even though he was not the printer, & notwithstanding the fact that the words "or published" did not occur in the last line of the sect. before the words "by him or her."—*A.-G. v. BEAUCHAMP*, [1920] 1 K. B. 650; 89 L. J. K. B. 219; 122 L. T. 527; 84 J. P. 41; 36 T. L. R. 174; 26 Cox, C. C. 563, D. C.

**8. — In whose name proceedings taken.**—By 2 & 3 Vict. c. 12, s. 2, confirmed by the Newspapers, Printers & Reading Rooms Repeal Act, 1869 (c. 24), any person who prints any paper or book intended for publication on which the name & place of abode of the printer does not appear is liable to a fine; provided (sect. 4) that it is not lawful to prosecute unless "in the name of H.M. Attorney-General or Solicitor-General," & if any prosecution takes place in the name of any other person the same is null & void. The provision in sect. 4 that the proceedings shall be in the name of the Attorney-General or Solicitor-General is a condition precedent, & if that condition is not fulfilled, the proceedings are null & void, & the ct. has no jurisdiction to amend the defect.—*KEY v. BASTIN*, [1925] 1 K. B. 650; 94 L. J. K. B. 428; 132 L. T. 748; 89 J. P. 74; 41 T. L. R. 283; 27 Cox, C. C. 749, D. C.

## SECT. 3.—PRESERVATION OF COPIES.

*See Unlawful Societies Act, 1798* (c. 79), s. 29; *Seditious Meeting Act, 1846* (c. 33), s. 1; *Newspapers, Printers & Reading Rooms Repeal Act, 1869* (c. 24).

## SECT. 4.—DELIVERY OF COPIES.

*See Copyright Act, 1911* (c. 46), s. 15, as amended by *Copyright (British Museum) Act, 1915* (c. 38), & 15 & 16 Geo. 5, c. 73, s. 5; *Copyright, Vol. XIII.*, p. 200, Nos. 353, 354.

# Part II.—Printers and Publishers.

## SECT. 1.—PRINTERS.

**9. Right of action for work done—Immoral & libellous work.**—A printer cannot recover against a publisher for printing a work which contains the life of a prostitute, & the history of her amours with various persons; & it is no answer that the parties are *in pari delicto*.—*POPLETT v. STOCKDALE* (1825), 2 C. & P. 198; Ry. & M. 337, N. P.

**10. — Printer registered as sole proprietor on false affidavit—No remedy against real proprietors.**—A printer, who makes a false affidavit,

that he is sole proprietor of a paper cannot sue the real proprietors for printing such paper, nor for any matter connected with or assisting its circulation.—*STEPHENS v. ROBINSON* (1832), 2 Cr. & J. 209; 2 Tyr. 280; 1 L. J. Ex. 85; 149 E. R. 90.

*Annotations.—Mentd. Smith v. Mawhood* (1845), 14 M. & W. 452; *Feret v. Hill* (1854), 2 W. R. 493.

**11. — Part delivery of work—Destruction of premises by fire.**—Where a printer has been employed to print a work, of which the im-

existence before the passing of Press Act.—*Re BESANT* (1916), 1 L. R. 39 Mad. 1164.—*IND.*

**e. — Whether information may charge more than one offence.**—*HAYES*

*v. BUTCHER* (1892), 12 N. Z. L. R. 569. —*N.Z.*

## PART I. SECT. 2.

**1. Effect of omission — On benefits**

*given by Libel Act.*—*SKRYHA v. TELEGRAM PRINTING CO.* (1914), 29 W. L. R. 505; 7 W. W. R. 187; 20 D. L. R. 692; 24 Man. L. R. 721.—*CAN.*

pression is to be a certain number of copies, if a fire break out & consume the premises before the whole number have been worked off, the printer cannot recover anything, although a part have actually been delivered.—*ADLARD v. BOOTH* (1835), 7 C. & P. 108, N. P.; *subsequent proceedings*, 1 Bing. N. C. 693.

*Annotations*.—*Reid*. *Clay v. Yates* (1856), 2 Jur. N. S. 908. *Mentd.* *Appleby v. Myers* (1867), L. R. 2 C. P. 651.

**12. Libellous matter—Refusal to complete printing.**—*Pltf.*, a printer, verbally agreed to print for *deft.* five hundred copies of a treatise, to which a dedication was to be prefixed, at a certain price per sheet, including paper. The treatise was printed, & after the proof sheet of the dedication was revised by *deft.* & returned to *pltf.*, he, for the first time, discovered that it contained libellous matter, & refused to complete the printing of it:—*Held*: as the dedication was libellous *pltf.* was justified in refusing to complete the printing of it, & was entitled to recover for printing the treatise.—*CLAY v. YATES* (1856), 1 H. & N. 73; 25 L. J. Ex. 237; 27 L. T. O. S. 126; 2 Jur. N. S. 908; 4 W. R. 557; 150 E. R. 1123.

*Annotations*.—*Mentd.* *Lee v. Griffin* (1861), 1 B. & S. 272; *Appleby v. Meyers* (1867), 36 L. J. C. P. 331; *Stubbs v. Holywell Ry.* (1867), 15 W. R. 869.

—**Effect of omission of name.**—*See* Nos. 5, 6, *ante*.

**13. Termination of employment—Four weeks' notice or wages in lieu of notice—Usage of trade between printers & newspaper proprietors.**—*Semble*: there is in fact a usage of trade between the printers & proprietors of newspapers, that the latter should give to the former four weeks' notice of taking the work from them, or pay them four weeks' wages; but such usage seems not to be mutual.—*CUNNINGHAM v. FONBIANQUE* (1833), 6 C. & P. 44, N. P.

**Usages in printing trade.**—*See* CUSTOM & USAGES, Vol. XVII., p. 66, Nos. 693–695.

**14. Engagement of employees—Whether agreement stamp necessary—Overseer.**—An overseer in a printing office is an artificer within the Stamp Acts.—*BISHOP v. LETTS* (1858), 1 F. & F. 401, N. P.

**15. Wages of employees—Scale for composing advertisements—How far award binding.**—In London, the business of printing is regulated by committees of masters & compositors, who make rules, which are binding upon the trade; & by the rules relating to the arbitration committee, a barrister is to preside, & in certain cases decide:—*Held*: (1) a compositor who entered upon his

employment after the barrister had decided upon the construction of a rule, in a reference to which the compositor was not a party, was not bound by the barrister's construction of the rule; (2) under the trade rule relating to the wrappers, a compositor is entitled to charge according to the scale for each page wherein new matter is inserted with a standing advertisement; & in such case, although the standing advertisements, if they had been collected together, would have made up one or more complete pages, he is not limited to charge only for time in making up.—*HILL v. LEVEY* (1858), 3 H. & N. 702; 28 L. J. Ex. 80; 23 J. P. 36; *sub nom.* *LEVEY v. HILL*, 4 Jur. N. S. 589; 6 W. R. 691, Ex. Ch.

**16. Liability for libel—Indemnity not enforceable.**—*Defts.* gave to *ptfcs.*, who were printing & publishing a paper for them, an undertaking that they, *defts.*, would indemnify *ptfcs.* against any claims whatever that might be made against them in respect of any libel that might appear in the paper. A libel was inserted in the paper with the knowledge of *ptfcs.* staff, & an action was brought against *ptfcs.* in respect thereof which they had to compromise by paying a certain sum of money & costs. In an action on the undertaking to indemnify:—*Held*: such a contract could not be enforced in law.—*SMITH (W. II.) & SON v. CLINTON & HARRIS* (1908), 99 L. T. 840; 25 T. L. R. 34.

*Annotation*.—*Reid*. *Neville v. Dominion of Canada News Co.*, [1915] 3 K. B. 656.

**Liability for infringement of copyright.**—*See* COPYRIGHT, Vol. XIII., pp. 218, 219, Nos. 546, 547, 560.

**Lien of printer—Undelivered copies.**—*See* LIEN, Vol. XXXII., p. 251, No. 367.

—**Stereotype plates.**—*See* LIEN, Vol. XXXII., p. 239, No. 240.

**Necessity for name on publication.**—*See* Part I., Sect. 2, *ante*.

## SECT. 2.—PUBLISHERS.

**17. Relation between publisher & author—Agreement to publish at publisher's expense & risk—Termination.**—*READE v. BENTLEY*, No. 65, *post*.

**Statutory duties of publishers.**—*See* Part I., *ante*.

**Liability of publisher for libel.**—*See* LIBEL & SLANDER, Vol. XXXII., pp. 80 *et seq.*

## Part III.—Editors, Authors, and Journalists.

### SECT. 1.—EDITORS.

#### SUB-SECT. 1.—IN GENERAL.

**18. Legal interest in matter published—& original report from which taken—Inspection.**—In an action against the proprietors of a newspaper for the breach of a contract to employ *pltf.* as sub-editor, *defts.* justified the dismissal of *pltf.* on the ground of his having, from improper motives, lent himself to the insertion of a garbled report of proceedings in a ct. of justice. The ct.

refused to allow *pltf.* to inspect, & take copies of, the original report & of the alleged garbled statement, he having no recognised legal interest therein.—*POWELL v. BRADBURY* (1847), 4 C. B. 541; 136 E. R. 619; *subsequent proceedings* (1849), 7 C. B. 201.

**19. Subjection to control by proprietor.**—(1) The proprietors of a copyright in a journal are not bound to insert any articles which the editor may think fit, & the ct. refused to restrain them by

### PART II. SECT. 2.

**g. Meaning of word "publisher"**  
—*Whether seller of book included in term.*—The word "publisher" has been used in Printing Presses & Newspapers Act, 1867, in the restricted sense,

& does not include a person who merely sells a book or a paper.—*R. v. BANKA FARMI* (1896), 1 L. R. 23 Calc. 414.—*IND.*

**h.**—*—*—A press association receiving telegrams & sending them to

newspapers for publication is the "publisher" of such telegrams within Electric Lines Act, 1884, s. 38, although the association does not publish a newspaper.—*JONES v. ATTACK* (1890), 9 N. Z. L. R. 174.—*N.Z.*

**Sect. 1.—Editors: Sub-sects. 1, 2, 3 & 4. Sect. 2: Sub-sect. 1.]**

injunction, from interfering with the editor, or from inserting, or altering, or omitting articles, which he might think advisable to be inserted therein.

(2) Where the agreement between the proprietors & the editor provided that the title should not be altered without mutual consent, & the name of the editor was placed upon the title page, & the proprietors afterwards discontinued placing it there, the ct. refused to restrain them by injunction from omitting it in future, on the ground that the name of the editor on the title page is no part of the title.—*CROOKES v. PETTER* (1860), 3 L. T. 225; 6 Jur. N. S. 1131.

**20. Name of editor—No part of title of journal.]**—*CROOKES v. PETTER*, No. 19, *ante*.

**21. Right to refuse to deliver manuscript — Employer intending fraud on public—Untrue title page.]**—Where a person who had undertaken to edit a guide book to London, refused to deliver up his manuscript, for which he had received the agreed price, unless his employer consented to abandon his intention of stating on the title page that the work was "edited" by a person who had taken no part in the preparation of the work, "assisted" by the true editor:—*Held*: the editor could not be compelled to carry out his agreement under circumstances which involved the committal of a fraud upon the public.—*POST v. MARSH* (1880), 16 Ch. D. 395; 50 L. J. Ch. 287; 43 L. T. 628; 29 W. R. 198.

**Salary—Preferential claim in bankruptcy.]**—*See* BANKRUPTCY, Vol. IV., p. 476, Nos. 4301, 4302.

**SUB-SECT. 2.—AUTHORITY AS AGENT OF PROPRIETOR.**

**Libel inserted by editor—Liability of proprietor.]**—*See* LIBEL & SLANDER, Vol. XXXII., pp. 82, 83, Nos. 1133, 1135, 1136.

**SUB-SECT. 3.—LIABILITIES.**

**22. Libel—Action against editor—Libellous article inserted under instruction of association employing editor—Availability of association's funds in defending action.]**—A nursing assn. incorporated by royal charter were the proprietors & publishers of a newspaper on nursing & employed one of the members of the assocn. as honorary editor. An action for libel having been brought against the editor alone in respect of an article inserted in the newspaper under the express instructions of the assocn.:—*Held*: as a matter of ordinary business, & apart from any question as to the legal right of the editor to be indemnified, the funds of the assocn. could be lawfully applied in undertaking the defence of the action.—*BREAY v. ROYAL BRITISH NURSES ASSOCN.*, [1897] 2 Ch. 272; 66 L. J. Ch. 587; 76 L. T. 735; 46 W. R. 86; 13 T. L. R. 467, C. A.

*Annotation*:—*Mentd.* Jenkin v. Pharmaceutical Soc. of Gt. Britain, [1921] 1 Ch. 392.

**23. — Action against proprietor—Editor not liable to indemnify proprietor.]**—*Seem*: the proprietor of a newspaper, convicted & fined for the publication of a libel in the paper, inserted without his knowledge & consent by the editor, cannot

recover against the editor the damages sustained by such conviction.—*COLBURN v. PATMORE* (1834), 1 Cr. M. & R. 73; 4 Tyr. 877; 3 L. J. Ex. 317; 149 E. R. 999.

*Annotations*:—*Consd.* R. v. Holbrook (1878), 4 Q. B. D. 42. *Mentd.* Shackell v. Rosier (1836), 2 Bing. N. C. 634; Feret v. Hill (1854), 2 W. R. 493; Burrows v. Rhodes, [1899] 1 Q. B. 816; Leslie v. Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652; Weld-Blundell v. Stephens, [1920] A. C. 958.

—*See, further*, LIBEL & SLANDER, Vol. XXXII., pp. 80 *et seq.*

**SUB-SECT. 4.—TERMINATION OF EMPLOYMENT.**

**24. Length of notice to terminate engagement—Special agreement.]**—Declaration stated that, in consideration that *pltf.* would enter into *defts.* employ, to wit in the capacity of editor of a newspaper, at & for a certain salary, to wit at the rate of £400 *per annum*, & would continue in their service till the expiration of three months after notice to determine the contract, *defts.* promised to employ him in the capacity, at the salary, & to continue him in the service till the expiration of three months after notice, etc., or to pay him a proportionate part of the salary for three months: but that *pltf.* had been dismissed without notice or the three months' salary. *Defts.* paid £37 10s. into ct. generally. On the trial, *pltf.* did not prove the contract for £400, but relied on the payment into ct. as an admission of the amount:—*Held*: the sum of £400 specified as the rate of salary, not being material in itself, & being laid under a *videlicet*, *pltf.* would not have been bound to prove it as laid, if *non assumpsit* had been pleaded: & therefore, that the payment into ct. did not bind *defts.* as an admission of that rate of salary. But the capacity in which *pltf.* engaged to serve was material, & though laid under a *videlicet*, must, on *non assumpsit*, have been proved as laid, & was admitted by the payment into ct.—*COOPER v. BLICK* (1842), 2 Q. B. 915; 2 Gal. & Dav. 295; 11 L. J. Q. B. 85; 6 Jur. 368; 114 E. R. 354.

*Annotation*:—*Mentd.* Harris v. Phillips (1851), 10 C. B. 650.

**25. — By custom—Twelve months.]**—In an action by an editor against the proprietor of a newspaper for wrongful dismissal the jury found for *pltf.*, his claim being based on an alleged right to twelve months' notice of dismissal by the custom of the profession.—*BRENNAN v. GILBART-SMITH* (1892), 8 T. L. R. 284.

*Annotation*:—*Reftd.* Fox-Bourne v. Vernon (1894), 10 T. L. R. 647.

**26. — Reasonable notice—Six months.]**—The question for the jury is whether *pltf.* is entitled to twelve months' notice, or whether six months' notice is such a notice as *defts.* are legally entitled to give *pltf.* . . . The jury had no question of "custom" to consider, for "custom" in its strict legal sense is a uniform & universal practice so well defined & recognised that contracting parties must be assumed to have had it in their minds when they contracted. The fact that in a large percentage of cases there were special agreements shows that no such universal custom exists (*LORD RUSSELL, C.J.*).—*FOX-BOURNE v. VERNON & CO., LTD.* (1894), 10 T. L. R. 647.

**27. — — Three months—Where journal not leading journal.]**—From the evidence of the

witnesses an editor appears to have almost sacred qualities. An editor's dignity is such that he is entitled to a year's notice. I give no opinion as to whether the notice applies to leading journals of this country but it is clear no such notice is applicable to a journal like *Financial Answers*. . . . I think I shall be doing justice if I award three months' notice (CHARLES, J.).—*BAKER v. MANDEVILLE* (1896), 13 T. L. R. 71.

**28. — Where editorial functions involved.**—Pltf., who contributed to a newspaper a weekly column of literary matter for children under the *nom de plume* of Aunt Naomi:—*Held*: (1) pltf. was entitled to a declaration that she was the owner of the *nom de plume*; (2) on the facts, pltf.'s engagement involved the performance of editorial & managerial functions outside the scope of an ordinary contributor, & she was entitled to reasonable notice, which was agreed to be three months, before the engagement was terminated.—*LANDA v. GREENBERG* (1908), 24 T. L. R. 441; 52 Sol. Jo. 354.

**29. — Twelve months.**—In an action by an editor against the proprietors of a newspaper for wrongful dismissal, there was no evidence of any custom as to the length of notice to which in the absence of express agreement an editor was entitled, & the jury found for pltf. on the basis that he was entitled to twelve months' notice:—*Held*: in the circumstances of the case it could not be said that the view of the jury was unreasonable.—*GRUNDY v. SUN PRINTING & PUBLISHING ASSOCN.* (1916), 33 T. L. R. 77, C. A.

**30. — Sub-editor — Six months.**—A sub-editor of a daily paper found by a jury to be entitled to six months' notice apart from special agreement.—*CHAMBERLAIN v. BENNETT* (1892), 8 T. L. R. 234.

**31. — Film editor — Performing duties analogous to those of newspaper editor.**—Pltf. was engaged by defts. as editor of a reel film of current events, his duties being to send out operators for the purpose of photographing current events, to make up the stories, & arrange, describe, cut down, trim, & condense them. He made out posters describing the contents, & the stories were sent round to the cinema halls & thrown on the screens with the captions & explanatory matter which pltf. had written. Defts. terminated pltf.'s employment by giving him one month's notice, & pltf. brought an action claiming that as editor he was entitled to six months' notice according to the custom of journalism:—*Held*: though pltf. performed duties analogous to those of a newspaper editor, yet, as there was no evidence that the customary notice applied in a case which was only analogous to that of a newspaper editor, the action failed.—*MCCABE v. PATHE FRERES CINEMA, LTD.* (1919), 35 T. L. R. 313.

**32. Customary length of engagement.**—(1) In an action for wrongfully dismissing the editor of a newspaper, the declaration stated that he was engaged for a year. There was no direct evidence as to the time for which pltf. was engaged:—*Held*: pltf. might go into evidence to show a custom for editors of newspapers to be engaged for a year, unless there was an express stipulation to the contrary.

(2) *Semble*: the custom is, that the engagements of editors, sub-editors, & reporters of newspapers are for a year, unless there be an express stipulation to the contrary, & this custom is binding on both parties.—*HOLCROFT v. BARBER & WATSON* (1843), 1 Car. & Kir. 4, N. P.

**33. — Whether applicable to newly started publications.**—(1) A. was engaged as editor of a

new periodical publication by B. at a salary to be paid weekly. The publication was abandoned by B. soon after its commencement. In an action by A. against B. for dismissing him before the termination of a year, a usage was proved that such a hiring was annual with regard to established periodicals:—*Held*: the jury were properly directed to consider whether such usage was applicable to a newly started publication.—*BAXTER v. NURSE* (1844), 6 Man. & G. 935; 7 Scott, N. R. 801; 13 L. J. C. P. 82; 2 L. T. O. S. 311; 8 Jur. 273; 134 E. R. 1171.

*Annotations*:—*Consd. Re Hutton, Ex p. Allpas, Ex p. Chipchase* (1867), 17 L. T. 179. *Mentd. Parker v. Ibbetson* (1858), 27 L. J. C. P. 236.

**34. Recovery of salary in lieu of notice — In addition to arrears of salary.**—When the custom is shown that parties engaged upon a daily newspaper are, upon dismissal or the stoppage of the paper, entitled to a month's salary in lieu of notice, they may prove accordingly in addition to arrears of salary then actually due.—*Re HUTTON, Ex p. ALLPAS, Ex p. CHIPCHASE* (1867), 17 L. T. 179; 16 W. R. 142.

**35. Effect of entry on engagement inconsistent with duties.**—*DEVENISH v. WATERS* (1892), *Times*, Feb. 27, C. A.

*Annotation*:—*Mentd. Macpherson v. Warner* (1893), 9 T. L. R. 397.

## SECT. 2.—AUTHORS.

### SUB-SECT. 1.—PROPERTY IN ARTICLES SUPPLIED FOR REPRODUCTION.

**Rights in regard to manuscript—Copyright based on payment.**—*See COPYRIGHT*, Vol. XIII., pp. 186, 193, 194, Nos. 216–219, 282, 283.

**36. — Publisher's right to republish — In altered form.**—If A., being the author of a law book, sell the copyright to B., & B., publish a third edition of the work edited by another, but not stated to be so, & which purchasers were likely to suppose was edited by A., such edition having errors & mistakes in it, calculated to injure the reputation of A. as an author:—*Held*: an action lies by A., against B.—*ARCHBOLD v. SWETT* (1832), 5 C. & P. 219; 1 Mood. & R. 162, N. P.

**37. — — — — —**—*Semble*: unless there be a special contract, either express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter & deal with it as he thinks proper.—*Cox v. Cox* (1853), 11 Hare, 118; 1 Eq. Rep. 94; 22 L. T. O. S. 63; 1 W. R. 345; 68 E. R. 1211.

**38. — — — — —**—*GILBERT v. BOOSEY & Co.* (1889), 87 L. T. Jo. 355.

**39. — — — — —**—This was a motion on behalf of pltf., an author, to restrain deft., a publisher, from publishing or selling a certain book otherwise than in the form in which it was prepared by the author, or from representing that pltf. was the author of the book published by deft. The book was originally published in its complete form in 1880. In 1892 the publisher issued an edition of the book, omitting the preface, table of contents, introduction, bibliographical notice, & index. The ground of the motion was that the publication of the book in a mutilated form caused an injury to pltf.'s reputation as an author:—*Held*: pltf.'s remedy in law was libel.—*LEE v. GIBBINGS* (1892), 67 L. T. 263; 8 T. L. R. 773; 36 Sol. Jo. 713.

*Annotation*:—*Mentd. Monson v. Tussaud, Monson v. Tussaud* (1894), 63 L. J. Q. B. 454.

## Sect. 2.—Authors: Sub-sect. 2, A. &amp; B.]

## SUB-SECT. 2.—PUBLISHING AGREEMENT.

## A. In General.

**40. Nature of contract — Whether personal contract.**—Publishers agreed with an author to print, reprint & publish a work by him at their own risk, on the terms of dividing equally with him any profits that there might be after payment of all expenses: & that if all the copies should be sold & another edition should be required, the author should make all necessary alterations & additions, & the publishers should print & publish a second & subsequent editions on the same terms. After the publication of the first edition the firm of the publishers was changed, & the interest of the old firm in the work was expressed to be assigned to the new firm. The author prepared & the new firm published a second edition without any new agreement being entered into. Afterwards, a partner in the new firm, the only remaining member of the old firm, became bkpt., & his assignees, with the solvent partner, sold & assigned to other law publishers all the interest of the firm in the work & all the unsold copies:—*Held*: the purchasers had no share in the copyright of the work, & were not entitled to an injunction to restrain the publication of a third edition by another publisher with the author's concurrence, the agreement being held to be of a personal nature on both sides, & the benefit of it not assignable by either party without the other's consent.—*STEVENS v. BENNING* (1855), 6 De C. M. & G. 223; 3 Eq. Rep. 457; 24 L. J. Ch. 158; 24 L. T. O. S. 205; 1 Jur. N. S. 74; 3 W. R. 149; 43 E. R. 1218, L. J.J.

*Annotations*:—*Consol. Shepherd v. Conquest* (1856), 17 C. B. 427. *Apld. Reade v. Bentley* (1858), 4 K. & J. 656; *Hole v. Bradbury* (1879), 12 Ch. D. 886. *Consol. London Printing & Publishing Alliance v. Cox*, [1891] 3 Ch. 291. *Apld. Griffith v. Tower Publishing Co. & Moncrieff*, [1897] 1 Ch. 21; *Re Jude's Musical Compositions*, [1906] 2 Ch. 595. *Reid, Macdonald v. Eyles*, [1921] 1 Ch. 631. *Mentd. Rosa v. Scovell* (1889), 5 T. L. R. 207.

**41. — — — — —]**—*READE v. BENTLEY*, No. 65, *post*.

**42. — — — — —]**—The joint authors of a book, one of whom composed the letter press, & the other sketched the drawings from which the illustrations were engraved, entered into a verbal agreement with a firm of publishers, by which the firm were to engrave the illustrations & to print & publish the book. If the publication resulted in a loss the firm were to bear the whole of it; if there was a profit, they were to pay half of it to the authors. The profits were to be ascertained after deducting the cost of the engraving, printing, & publication, but without allowing any sum to the authors for the illustrations & letter press. The book was published, & the publication resulted in a profit:—*Held*: the agreement was merely personal to the individuals then composing the publishers' firm, & the benefit of it could not, without the consent of the authors, be assigned by the publishers' firm to a firm which had succeeded to their business, but which contained none of the partners of the original firm.—*HOLE v. BRADBURY* (1879), 12 Ch. D. 886; 48 L. J. Ch. 673; 41 L. T. 153; 28 W. R. 39.

*Annotations*:—*Apld. Griffith v. Tower Publishing Co. & Moncrieff*, [1897] 1 Ch. 21. *Mentd. Warne v. Seeborn* (1888), 39 Ch. D. 73; *Chappell v. Columbia Gramophone Co.*, [1914] 2 Ch. 745.

**43. — — — — —]**—Pltf. agreed to act as reader & literary adviser to deft., who was a publisher. Subsequently pltf. wrote a book which was to be published by deft., it being agreed that the profits should be shared equally between them. Several editions of the book were published, & subsequently

deft. became bkpt.:—*Held*: the agreement as to sharing profits did not vest the copyright in the book in deft.; & the contract was a personal one, & therefore, deft.'s trustee in bkpcy. had not the right of reprinting & publishing the book.—*LUCAS v. MONCRIEFF* (1905), 21 T. L. R. 683.

**44. — — — — —]**—**Agreement between author & limited company.**—The principle established by *Stevens v. Benning*, No. 40, *ante*, *Reade v. Bentley*, No. 65, *post*, & *Hole v. Bradbury*, No. 42, *ante*, that a publishing agreement between an author & a publisher, or a firm of publishers, is personal to the individuals entering into it, & that the benefit of such an agreement is not assignable without the author's consent, applies equally to the case of a similar agreement between an author & a limited co.—*GRIFFITH v. TOWER PUBLISHING CO., LTD. & MONCRIEFF*, [1897] 1 Ch. 21; 66 L. J. Ch. 12; 75 L. T. 330; 45 W. R. 73; 13 T. L. R. 9; 41 Sol. Jo. 29.

**45. — — — — —]**—**Agreement containing option to publish author's future work — Specific performance.**—Pltfs. entered into a written agreement with deft., E., an authoress, for the publication of a novel already written by her, & by the same agreement secured an option to publish her "next three books" upon certain royalty terms therein contained. The agreement provided that if they exercised their option in the case of any of her next three books, pltfs. were during the legal term of the copyright to have the exclusive right of producing & publishing the book within a defined area together with the entire control of the publication & terms of sale of the book, & also the right of suing in respect of infringement of copyright. The agreement also provided that E. was not without the consent of pltfs. to publish, or allow to be published, any abridgment, translation or dramatised version of the book, & that on the determination of the agreement in certain events therein specified the right to print & publish the book was to revert to E. who was then to be entitled to be registered as the proprietor thereof. In breach of this agreement E. agreed with defts. C. & co., a rival firm of publishers, who had notice of pltfs.' agreement, to print & publish her next novel. In an action by pltfs. to restrain both defts. from publishing the novel until it had been first submitted to pltfs. for their acceptance:—*Held*: (1) the agreement was not a contract of personal service but was a contract by E. to sell the products of her labour or industry, of which the ct. would grant specific performance by restraining her from disposing of the novel in breach of her agreement with pltfs.; (2) by virtue of their agreement & Copyright Act, 1911 (c. 46), s. 1, pltfs. would upon exercising their option in respect of any of the specified books thereby become equitable owners of a part of, or of an interest in, the copyright thereof, & until they exercised it they had an option to become entitled to an interest in such copyright which option they were entitled to protect against E. & also against C. & co., who had notice of pltfs.' agreement.—*MACDONALD v. EYLES*, [1921] 1 Ch. 631; 90 L. J. Ch. 248; 124 L. T. 625; 37 T. L. R. 187; 65 Sol. Jo. 275.

*Annotation*:—*Generally. Mentd. Performing Right Soc. v. London Theatre of Varieties*, [1922] 2 K. B. 433.

**46. — — — — —]**—**Whether agreement implied as to future editions.**—An authoress, who was a married woman, entered into a verbal agreement with a publisher that he should publish a work at his own expense, & pay her a royalty on the copies sold. The work was accordingly published, but, before all the copies were sold, the authoress arranged with another publisher to bring out a

second edition of the same work:—*Held*: no agreement could be implied on the part of the authoress not to bring out another edition until all the first edition was sold, & a suit against the authoress & her husband & the second publisher to restrain such publication could not be sustained. —*WARNE v. ROUTLEDGE* (1874), L. R. 18 Eq. 497; 43 L. J. Ch. 604; 30 L. T. 857; 22 W. R. 750.

47. — **Sale of copyright on royalty terms—Analogy to sale of goods.**—An author sold the copyright of his book to a publisher upon the terms that the publisher should print & publish it & should pay him certain royalties upon the sales of the book. The publisher became bkpt., & the trustee in bkpcy. carried on bkpt.'s business until he sold it as a going concern with all copyrights. During the time the trustee carried on the business sales of the book were effected, & the trustee received the proceeds of these sales. The author claimed to be paid in full the royalties on these sales:—*Held*: the transaction between the author & the publisher was analogous to that of a sale of goods at a price varying in amount & depending on certain events, & the author was only entitled to prove in the bkpcy. for the damages sustained by breach of the contract.—*Re GRANT RICHARDS, Ex p. WARWICK DEEPING*, [1907] 2 K. B. 33; 76 L. J. K. B. 643; 96 L. T. 712; 23 T. L. R. 388; 51 Sol. Jo. 345; 14 Mans. 88.

*Annotation*:—*Refd.* Barker v. Stickney, [1919] 1 K. B. 121.

48. **Effect of restrictive covenant—Not to write for another person.**—Contract with the proprietors of a theatre not to write dramatic pieces for any other, legal; as a similar restraint of a performer would be; not resembling a covenant restraining trade generally.—*MORRIS v. COLMAN* (1812), 18 Ves. 437; 34 E. R. 382.

*Annotations*:—*Distd.* Clarke v. Price (1819), 2 Wils. Ch. 157. *Refd.* Stevens v. Benning (1855), 6 De G. M. & G. 223. *Mentd.* Kemble v. Kean (1829), 6 Sim. 333; Taylor v. Davis (1834), 4 L. J. Ch. 18; Kimberley v. Jennings (1836), 6 Sim. 340; Hills v. Croll (1845), 1 Coop. temp. Cott. 83; Dietrichsen v. Cabburn (1846), 1 Coop. temp. Cott. 72; Lumley v. Wagner (1852), 1 De G. M. & G. 604; Merchants' Trading Co. v. Banner (1871), L. R. 12 Eq. 18; Donnell v. Bennett (1883), 31 W. R. 316; Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416.

49. — — — — — *STIFF v. CASSELL*, No. 56, post.

50. **Contract for appearance of articles in particular publication—Rights of author—Periodical discontinued—Completion of treatise unnecessary.**—An author was engaged to write for a certain sum an article to appear among others in a work called *The Juvenile Library*. Before he had completed his article, & before any portion of it was published, the work in which it was to appear was discontinued:—*Held*: the publishers were not entitled to claim the completion of the article, it might be published in a separate form for general readers, but were bound to pay the author a reasonable sum for the part which he had prepared. —*PLANCHE v. COLBURN* (1831), 5 C. & P. 58, N. P.; *subsequent proceedings*, 8 Bing. 14.

51. — — — — — **Separate publication restrained.**—Pltf. obtained an injunction to restrain defts. from printing & publishing an article or essay as a separate or distinct work or otherwise than as a part of a work called the *Encyclopædia Metropolitana*. Pltf. stated that the article was written solely for the *Encyclopædia*, that no agreement had been executed between him & the publishers, & that he did not intend to give any additional right beyond that of publishing the article in the *Encyclopædia*. A motion to dissolve, on the

ground that pltf. had parted with all his right in the article, & that, in the absence of any agreement to the contrary, it was the custom of the trade that articles furnished to publications of this nature might be reprinted in a separate form, was refused, with costs.—*HEREFORD (Bp.) v. GRIFFIN* (1848), 16 Sim. 190; 17 L. J. Ch. 210; 10 L. T. O. S. 438; 12 Jur. 255; 60 E. R. 846.

*Annotations*:—*Apld.* Smith v. Johnson (1863), 4 Giff. 632. *Consd.* Aflalo v. Lawrence & Bullen, [1903] 1 Ch. 318.

52. **Price of publication—Who entitled to fix.**—An agreement between an author & a publisher, that the latter should publish a certain work at his own expense & risk, & after deducting from the produce of the sale thereof the charges for printing, paper, advertisements, embellishments, & other incidental expenses, including the allowance of 10 per cent. on the gross amount of the sale for commission, the profits remaining of any edition that should be printed, should be divided equally between author & publisher. The books sold to be accounted for at the trade sale price, unless it should be thought advisable to dispose of any copies or of the remainder at a lower price, which was left to the publisher's discretion:—*Held*: it was to be inferred from the agreement, that the publisher was to fix the selling price of the book.—*READE v. BENTLEY* (1857), 3 K. & J. 271; 69 E. R. 1110; *subsequent proceedings* (1858), 4 K. & J. 656.

*Annotations*:—*Refd.* London Printing & Publishing Alliance v. Cox, [1891] 3 Ch. 291. *Mentd.* Gibbs v. Gibbs (1858), 27 L. J. Ch. 577; Stamford v. Dawson (1867), L. R. 4 Eq. 352.

#### B. Remedies for Breach.

53. **By author—Injunction.**—*BROOK v. WENTWORTH* (1797), 3 Anst. 881; 145 E. R. 1069.

54. — — — — — The ct. cannot specifically perform an agreement, whereby A. agrees to compose & write reports of cases determined in a ct. of justice, to be printed & published by a particular individual for a stipulated remuneration, nor interfere by injunction to restrain the party from permitting reports written by him to be published by another person. The remedy, if any, is at law. —*CLARKE v. PRICE* (1819), 2 Wils. Ch. 157; 37 E. R. 270.

*Annotations*:—*Apld.* Baldwin v. Soc. for Diffusing Useful Knowledge (1838), 9 Sim. 393. *Mentd.* Kemble v. Kean (1) (1829), 6 Sim. 333; Taylor v. Davis (1834), 4 L. J. Ch. 18; Pickering v. Ely (Bp.) (1843), 2 Y. & C. Ch. Cas. 249; Dietrichsen v. Cabburn (1846), 1 Coop. temp. Cott. 72; Dietrichsen v. Cabburn (1846), 1 De G. M. & G. 604; Hope v. Lumley v. Wagner (1852), 1 De G. M. & G. 604; Hope v. Lumley (1850), 22 Beav. 351; Brace v. Wehnert (1858), 25 Beav. 348; De Maltos v. Gibson (1859), 4 De G. & J. 276; Fechter v. Montgomery (1863), 33 Beav. 22; Merchants' Trading Co. v. Banner (1871), L. R. 12 Eq. 18; Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 416; Mortimer v. Beckett, [1920] 1 Ch. 571; Prosperity v. Lloyds Bank (1923), 39 T. L. R. 372.

55. — — — — — By an agreement between pltf. & defts., the former, in consideration of certain payments to be made by them to the latter, were to have the exclusive right of engraving & publishing a series of maps from drawings to be furnished to them, from time to time, by the latter. The ct. refused to restrain defts. from acting in violation of the agreement, as it could not compel defts. to furnish the drawings; & therefore, could not decree a specific performance of the agreement.—*BALDWIN v. SOCIETY FOR DIFFUSING USEFUL KNOWLEDGE* (1838), 9 Sim. 393; 2 Jur. 961; 59 E. R. 409.

*Annotation*:—*Mentd.* Pickering v. Ely (Bp.) (1843), 12 L. J. Ch. 271.

56. — — — — — S., proprietor of a weekly newspaper, by a letter to F., an author, agreed that F. should write two tales, extending over one

#### PART III. SECT. 2, SUB-SECT. 2.—B.

m. *By author—Action for damages.*—*LE SUEUR v. MORANG* (1910), 20 O. L. R. 594; 15 O. W. R. 705.—CAN.



*Sect. 2.—Authors: Sub-sect. 2, B., C. & D. Sect. 3. Part IV. Sect. 1.]*

year, at £10 per week for each number, to contain about the same quantity as was sent under a former similar engagement, & to receive the first number on Apr. 22, 1855, & to continue to receive one number weekly during one year, conditionally that F. should not write for any other newspaper published at less than 6d. F. accepted, received £20 deposit, & wrote regularly for some weeks; then, went to Paris, sent an abrupt conclusion of the then current tale in a small quantity of manuscript, refused to proceed with his engagement with S., & entered into another engagement with C. S. thereupon stopped his payments to F., & employed another author to conclude the half-finished tale:—*Held*: (1) the above engagement was a yearly engagement, & could not be closed by F., as a weekly engagement; (2) the condition as to F. not engaging elsewhere was valid; (3) under the circumstances, S. had behaved reasonably, & not so as to deprive himself of his remedy by injunction.—*STIFF v. CASSELL* (1856), 2 Jur. N. S. 348.

**57. — Action for damages — Measure of damages.]**—A. agrees to supply B. with a manuscript work to be printed by B., the profits of which are to be equally divided. B. may maintain an action at law against A. for refusing to supply the manuscript. For this is not an action for partnership profits, but for refusing to contribute the labour of debt. towards the attainment of profits. It would be a good defence to such an action, to show that the intended publication was of an illegal nature, but this is not to be presumed, the work itself not being produced.

The main question therefore, for your consideration is the amount of the damages; you will no doubt indemnify plffs. against the expenses which they have incurred in paper & in printing; it is a waste of time to say that to this they are entitled in the strictest justice. The sum of £90 has been stated by the witnesses as the amount of the profit which would probably have been derived from the first edition, & it is doubtful whether it would have reached a second (*LORD ELLENBOROUGH*).—*GALE v. LECKIE* (1817), 2 Stark, 107; 171 E. R. 588, N. P.

**58. — Defence of illegality.]**—*GALE v. LECKIE*, No. 57, *ante*.

**59. — Specific performance.]**—*CLARKE v. PRICE*, No. 54, *ante*.

**60. By publisher — Injunction — Breach of agreement for engagement as editor of all editions.]**—An author & publisher entered into an agreement in 1894 under which the author was to edit the whole of the plays of Shakespeare, to be called the Temple Shakespeare, & was to write an introduction, notes, & glossary for each play. The publisher was to pay the author a royalty, & the copyright was vested in the publisher. Clause 10 provided: "In the event of a cheaper or other form of edition of any or either of the plays being thought advisable by the publisher, it shall form the subject of an agreement with the author on similar *pro rata* terms to those embodied herein." The publication was very successful, & in 1899 a large Temple Shakespeare was produced, the notes & glossary being identical with those in the smaller edition, but illustrations were added; a royalty was paid to the author upon this edition. Discussion took place as to the production of a Shakespeare for schools, & the author stated that in Mar. 1901, a definite agreement was made as to the royalty to be paid him in respect of this

edition, & denied that he ever failed or neglected or threatened to abandon its production. The publisher produced a Temple Shakespeare for schools with notes, introduction, & glossary written by a person other than the author. The author applied for an injunction restraining the issue of this edition, or, in the alternative, for damages for breach of the agreement:—*Held*: there had been an agreement that the author should be paid a royalty on the school Shakespeare, & he had always been ready to perform the work, & the publisher had committed a breach of the agreement of 1894, supplemented by the verbal agreement of 1901; it was not a case for an injunction, but there must be a reference to chambers to assess the damages.—*GOLLANCZ v. DENT* (1903), 88 L. T. 358.

**61. — Damages — Assessment of damages.]**—A firm of publishers agreed with the authors of a series of articles to print & publish the articles, first in a magazine on certain terms, & after that in the form of a book on the terms of paying the authors 4d. for every copy of the book sold. The form & price of the book, the number of copies to be printed, & the date of the publication were left to the discretion of the publishers. They printed & published the articles in the magazine upon the agreed terms, but refused to print or publish them in the form of a book. In an action by the authors for damages for breach of the contract:—*Held*: they [defts.] were bound to publish such a number as was reasonable in all the circumstances, & the damages were to be measured by the amount plffs. lost through defts.' refusal to do this.—*ABRAHAM v. HERBERT REIACH, LTD.*, [1922] 1 K. B. 477; 91 L. J. K. B. 404; 126 L. T. 546; 60 Sol. Jo. 390, C. A.

*C. Accounts.*

**62. When ordered.]**—*Semble*: this ct. will entertain a suit instituted by an author against his publisher for an account, where the latter refuses to render an account altogether; but if such publisher renders an account showing a certain balance due from the author for which he brings an action, this ct. will not, in the absence of fraud or misstatement, allow a suit to be instituted by the author praying an account & an injunction, but will leave the question to be determined at law.—*BARRY v. STEVENS* (1802), 31 Beav. 258; 31 L. J. Ch. 785; 6 L. T. 568; 9 Jur. N. S. 143; 10 W. R. 822; 54 E. R. 1137.

**63. Items in account—Percentage to publisher on wholesale price—Effect of publisher receiving retail price.]**—Defts., who were publishers & book-sellers, made a written offer to publish a book for pltf., who was an author, on the terms that they would "account" for all sold copies "at the wholesale trade price, less their commission of 15 per cent.," pltf. to pay the cost of printing & binding. Subsequently defts. orally agreed, as the ct. found, to publish & sell the book on the terms of accounting to pltf. for all moneys received by them less a remuneration of 15 per cent. The book was published at 5s. net, & the wholesale trade price was 3s. 4d., but in some cases defts. received more than 3s. 4d. from retail purchasers in their book-selling department. Defts. claimed to retain not only their commission of 15 per cent. but also the sums which they had received in excess of 3s. 4d. a copy. In an action by pltf. for a declaration that defts. were bound to account for the actual sale price of all copies, less 15 per cent., defts. alleged that there was no "wholesale trade price," & that it varied with different customers, & that there was a usage entitling them to retain the excess over

the 3s. 4d. :—*Held*: pltf. was entitled to the declaration in view of the finding of the ct. as to the terms of the oral agreement, & if the real contract between the parties was assumed to be contained in the written offer by defts., then although the relationship between the parties was not that of principal & agent, but of principals, yet the effect of the use of the terms "account," "price," etc., in defts.' written offer was that the same result followed & defts. were bound to account to pltf. for all sold copies at the prices actually received by them, less 15 per cent.—*KITSON v. KING (P. S.) & SON, LTD. (1919), 36 T. L. R. 162.*

#### D. Termination.

**64. Contract to write tale extending over year—For publication in weekly parts.]—***STIFF v. CASSELL, No. 56, ante.*

**65. Contract contemplating issue of several editions—Notice after publication of given edition.]—**Agreement between the author of a work & a publisher, by which the publisher agreed to publish the work at his own expense & risk, & after deducting all charges & expenses & a percentage on the gross amount of the sale for commission & risk of bad debts, the profits remaining of every edition that should be printed of the work were to be equally divided between the author & publisher :—*Held*: (1) to create a joint adventure between the parties, which the author was at liberty to terminate upon notice to his publisher after the publication of a given edition, it appearing that, at the date of such notice, no fresh expense had been incurred by the publisher in printing, advertisements, or otherwise, since the publication of that edition; (2) the circumstance of the publisher having stereotyped the work previously to the publication of the last published edition, did not affect the right of the author to terminate the agreement as above.

(3) It is true that, according to *Stevens v. Benning, No. 40, ante*, a licence like the present would, I apprehend, be restricted to deft.

personally, & would not extend to his exors., or to any future partner or assignee (*PAGE-WOOD, V.-C.*).—*READ v. BENTLEY (1858), 4 K. & J. 656; 27 L. J. Ch. 254; 30 L. T. O. S. 269; 4 Jur. N. S. 82; 6 W. R. 240; 70 E. R. 273.*

*Annotations*:—As to (1) *Apld. Abrahams v. Reisch, [1922] 1 K. B. 477. As to (3) Apld. Griffith v. Tower Publishing Co. & Moncrieff, [1897] 1 Ch. 21.*

#### SECT. 3.—JOURNALIST.

**66. Reporters—Whether compelled to disclose employer.]—**A witness who attended a riotous meeting as a reporter will not be compelled to answer for what newspaper he was reporting.—*R. v. STRAPPS (1848), 12 J. P. 536.*

—Copyright in report of speech.]—*See COPYRIGHT, Vol. XIII., p. 184, No. 194.*

**67. —Article supplied for morning paper—Publication in previous evening paper—Remedy.]—**On a contract to furnish intelligence to the proprietor of a morning newspaper, to be published therein only, on the day after it was received, deft. also publishing an evening edition of the same paper, the contract being that pltf. should be at liberty to send the intelligence to other morning newspapers :—*Held*: the publication of it in the evening edition on the day on which it was received was a breach of contract for which pltf. was entitled to recover the sums he would otherwise have received from the other morning papers.—*WOODS v. JOHNSTONE (1859), 1 F. & F. 455, N. P.*

**68. Contributors—Title to nom de plume.]—***LANDA v. GREENBERG, No. 28, ante.*

—Article rewritten by sub-editor—Remedy against copier.]—*See COPYRIGHT, Vol. XIII., p. 184, No. 195.*

—Termination of employment by notice—Employment involving editorial duties.]—*See No. 28, ante.*

As to contracts of service generally.]—*See MASTER & SERVANT, Vol. XXXIV., pp. 41–82, Nos. 165–600.*

## Part IV.—Newspapers.

#### SECT. 1.—IN GENERAL.

**69. In whom property may vest.]—***NAZARBEK v. SEVASLEY (1896), Times, Dec. 5.*

—.]—*See, also, Part III., Sect. 2, sub-sect. 1, ante.*

**70. Nature of property—Personal property.]—**A share in a newspaper shall be considered as the personal property of the proprietor, & the profits of printing the same subsequent to his death be distributed accordingly.—*GIBBLETT v. READ (1744), 9 Mod. Rep. 459; 88 E. R. 573.*

*Annotations*:—*Mentd. Abbott v. Parfitt (1871), L. R. 6 Q. B. 346; Moseley v. Rendell (1871), L. R. 6 Q. B. 335.*

—Whether assignable.]—*See Nos. 76, 103, 104, post.*

**71. Use of type—Loan for hire not restrained.]—**If the proprietors of a morning newspaper agree, for a pecuniary consideration, with the proprietors of an evening paper, to give the latter the use of types, etc., belonging to the former, the ct. will not, on the complaint of pltf., who had himself long acquiesced in that agreement,

grant an injunction against this application of the partnership property.—*GLASSINGTON v. THWAITES (1823), 1 Sim. & St. 124; 1 L. J. O. S. Ch. 113; 57 E. R. 50.*

**72. —No right conferred by long continued usage.]—**The presumption of a grant from long continued usage arises only where the origin of the usage is unknown. Long continued usage will not create or prove rights which did not exist upon the original creation of a property.

A bill was filed by Messrs. P., part proprietors of the *Evening Mail* newspaper, for the purpose of having it declared that the proprietors of the *Evening Mail* were entitled to the use of the matter & types of the *Times*. They also prayed a dissolution of partnership, & an account. Ptf's. derived their title under a purchase made in 1820, from a son of the founder of the *Times* in 1788, & of the *Evening Mail* in 1790, since which date until 1864 the practice had always been to make up the *Evening Mail* out of the two last preceding issues of the *Times*. There was no agreement in

#### PART IV. SECT. 1.

n. Condition precedent to publication—Affidavit to be delivered to prothonotary—Who may make affidavit—Managing director of corporation.]—*ASHDOWN v. MANITOBA FREE PRESS CO. (1891), 20 S. C. R. 43.—CAN.*

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*Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2, A. & B. (a).]*

writing touching on the question, which depended on usage. The bill was dismissed.—*PLATT v. WALTER* (1867), 17 L. T. 157, L. C.

**78. Covenant by vendors not to compete—Undue restriction.]**—On the sale of *Bell's Life* in London the vendors agreed with the purchaser not to print or publish any sporting paper within ten miles of a certain London street:—*Held*: the publication within this area of a paper containing no racing or betting odds, but merely recording such amateur sports as cricket, football, cycling, & running, was not a breach of the agreement.—*McFARLANE v. HULTON*, [1899] 1 Ch. 884; 68 L. J. Ch. 408; 80 L. T. 486; 47 W. R. 507.

**Copyright in matter published.]**—See *COPYRIGHT*, Vol. XIII., pp. 164–167, 171, 177, 178–182, 186–195, 197, 200, 202–212, 215–224, Nos. 17–31, 35–43, 81–83, 131–181, 212–221, 231, 233, 236–298, 318, 319, 355, 374–478, 511–523, 539–635.

**Registration of newspapers.]**—See Part I., Sect. 1, *ante*.

## SECT. 2.—TITLE OF PUBLICATION.

### SUB-SECT. 1.—IN GENERAL.

**74. Right of co-owners — Partners — Effect of dissolution.]**—Deft. was one of the proprietors & the editor of a weekly periodical, called *Household Words*:—*Held*: on a dissolution of the partnership, he was not justified in advertising that the publication would be discontinued; for the right to use the name must be sold for the benefit of all the partners, it being part of the partnership assets; but he might advertise the discontinuance of the publication as regarded himself.—*BRADBURY v. DICKENS* (1859), 27 Beav. 53; 28 L. J. Ch. 667; 33 L. T. O. S. 54; 54 E. R. 21. *Annotations*.—*Consd.* *Platt v. Walter* (1867), 17 L. T. 157. *Mentd.* *Mellersh v. Keen* (1860), 28 Beav. 453.

**75. Contents of title—Name of editor as part of title.]**—*CROOKES v. PETER*, No. 19, *ante*.

**76. Nature of right — To prevent adoption of same name for other publication.]**—There is nothing analogous to copyright in the name of a newspaper, but the proprietor's right is to prevent any other person from adopting the same name for any other similar publication, which right is a chattel interest capable of assignment.—*KELLY v. HUTTON* (1868), 3 Ch. App. 703; 37 L. J. Ch. 917; 19 L. T. 228; 16 W. R. 1182, L. JJ.

*Annotations*.—*Consd.* *Bradbury v. Beeton* (1869), 39 L. J. Ch. 57. *Distd.* *Walter v. Emmott* (1885), 54 L. J. Ch. 1059. *Mentd.* *Lee v. Haley* (1869), 21 L. T. 546; *Whitham v. Davey* (1885), 30 Ch. D. 574; *Watts v. Driscoll*, [1901] 1 Ch. 294.

**77. — Whether assignable.]**—*KELLY v. HUTTON*, No. 76, *ante*.

**78. When right of property accrues — Registration of title.]**—The protection afforded to the title of a newspaper by registration under Copyright Act, 1842 (c. 45), is not prospective, & only dates from the time of the first publication of such newspaper or periodical.—*CORRESPONDENT NEWSPAPER CO., LTD. v. SAUNDERS* (1865), 12 L. T. 540; 13 W. R. 804.

**79. — Advertisement of issue.]**—H., in 1863, registered an intended new magazine, to be called *Belgravia*. In 1866, such magazine not having appeared, M., in ignorance of what H. had done, projected a magazine with the same name, & incurred considerable expense in preparing it, & extensively advertising it in Aug. & Sept., as about to appear in Oct. H. knowing

of this, made hasty preparations for bringing out his own magazine before that of M. could appear, & in the meantime accepted an order from M. for advertising M.'s magazine on the covers of his own publications, & the first day on which he informed M. that he objected to his publishing a magazine under that name was Sept. 25, on which day the first number of H.'s magazine appeared. M.'s magazine appeared in Oct.:—*Held*: (1) M.'s advertisements & expenditure did not give him any exclusive right to the use of the name *Belgravia*, & he could not restrain H. from publishing a magazine under the same name, the first number of which appeared before M. had published his; (2) H.'s registering the title of an intended publication could not give him a copyright in that name, & in the circumstances of the case, he had not acquired any right to restrain M. from using the name, as being H.'s trade mark.—*MAXWELL v. HOGG*, *HOGG v. MAXWELL* (1867), 2 Ch. App. 307; 36 L. J. Ch. 433; 16 L. T. 130; 31 J. P. 659; 15 W. R. 467, L. JJ.

*Annotations*.—*As to* (1) *Consd.* *Weldon v. Dicks* (1878), 10 Ch. D. 247. *As to* (2) *Consd.* *Primrose Press Agency Co. v. Mark Knowles* (1886), 2 T. L. R. 404. *Refd.* *Bradbury v. Beeton* (1869), 18 W. R. 33. *Generally, Refd.* *Kelly v. Byles* (1880), 13 Ch. D. 682; *Licensed Victuallers' Newspaper Co. v. Bingham* (1888), 38 Ch. D. 139; *Lee v. Gibblings* (1892), 67 L. T. 263. *Mentd.* *Springhead Spinning Co. v. Riley* (1868), L. R. 6 Eq. 551; *Dixon v. Holden* (1869), L. R. 7 Eq. 488; *Civil Service Supply Asscn. v. Doan* (1879), 13 Ch. D. 512; *Levy v. Walker* (1879), 10 Ch. D. 438; *Walter v. Ashton*, [1902] 2 Ch. 282.

**80. — Three days' publication.]**—Pltfs., on Feb. 3, 1888, published the first number of a newspaper, & registered it at Stationers' Hall on the next day. No advertisement had been issued that a newspaper under that name was about to be published. On Feb. 6, defts. published the first number of a newspaper with the same name. Very few copies of pltfs.' paper had then been sold:—*Held*: pltfs. could not restrain defts. from publishing their newspaper under that name, for the registration at Stationers' Hall gave pltfs. no exclusive right to the name, & a title to it by user & reputation could not be acquired by a publication for three days with a very small sale.—*LICENSED VICTUALLERS' NEWSPAPER CO. v. BINGHAM* (1888), 38 Ch. D. 139; 58 L. J. Ch. 36; 59 L. T. 187; 36 W. R. 433; 4 T. L. R. 419, C. A.

### SUB-SECT. 2.—INFRINGEMENT OF RIGHT OF PROPERTY—INJUNCTION.

#### A. In General.

**81. Name of proprietor not registered — Effect of.]**—(1) Pltf. purchased & became the proprietor of a weekly newspaper called the *Britannia*, which he afterwards amalgamated with another weekly paper called the *John Bull*. The new publication was issued under the name of the *John Bull & Britannia*. Before the amalgamation took place notice thereof was published in the *Britannia*, of which deft. M. was printer, publisher, & sub-editor. After the amalgamation, on the next usual day of publication of the *Britannia*, deft. M. issued a publication called the *True Britannia*, resembling in size, & as a continuation of the *Britannia*. Upon bill to restrain deft. M. from publishing the *True Britannia* to the injury of pltf. Injunction granted.

(2) Pltf. had not registered his name at the Stamp Office, under the requirements of 6 & 7 Will. 4, c. 76, as proprietor either of the *Britannia* or the *John Bull & Britannia*:—*Held*: pltf. was not thereby disentitled to protection, if the other

circumstances were such as to entitle him to the relief which he asked.—*PROWETT v. MORTIMER* (1856), 27 L. T. O. S. 132; 2 Jur. N. S. 414; 4 W. R. 519.

*Annotation*.—Generally, *Reid*. *Borthwick v. Evening Post* (1888), 37 Ch. D. 449.

### B. Grounds for Granting Injunction.

#### (a) In General.

**82. Colourable variation in form & title.**—*PROWETT v. MORTIMER*, No. 81, *ante*.

**83. Use of similar name—Calculated to deceive.**—An injunction will not be granted to restrain a new journal from adopting a name similar to, but not identical with, that of an existing one, provided that, all things considered, the new journal have such distinctive marks that persons of ordinary intelligence would not mistake it for the old one. On an application for an interlocutory injunction by the publisher of *Punch* against the publishers of a new journal called *Punch & Judy*, with a different frontispiece, different price, & different day of actual publication, to restrain them from using the word *Punch* in the name of their journal, there being also a comic journal of the name of *Judy*:—*Held*: the circumstances were not such as to justify the ct. in granting an injunction.—*BRADBURY v. BEETON* (1869), 39 L. J. Ch. 57; 21 L. T. 323; 18 W. R. 33.

*Annotations*.—*Consd.* *Weldon v. Dicks* (1878), 10 Ch. D. 247. *Mentd.* *Lee v. Halsey* (1869), 21 L. T. 546.

**84.** ———. — The use for many years of two words of common use, *Newcastle Chronicle*, as the name of a newspaper does not give the owner of the newspaper an exclusive right to the use of one of the words, *Chronicle*, so as to entitle him to restrain deft. from publishing in the same town a newspaper having for its name the word *Chronicle*, in conjunction with another, that is to say, *Sporting Chronicle*; the appearance & contents of the two papers being dissimilar, there being no evidence of any one having been deceived, & no apparent intention to deceive on the part of deft. —*COWEN v. HULTON* (1882), 46 L. T. 897, C. A.

*Annotations*.—*Consd.* *Wilcox v. Pearson* (1901), 18 T. L. R. 220. *Reid*. *Walter v. Kinnmott* (1885), 53 L. T. 437.

**85.** ———. — Where the owner of a publication claims an injunction to restrain the issue of another publication with a similar name, he must show not only that the assumption of the name by deft. is calculated to deceive the public, but also that there is a probability of pltf. being injured by such deception.

Pltf. had long been the proprietor of a daily morning newspaper, called the *Morning Post*. Defts. commenced a daily evening newspaper called the *Evening Post*. There was no evidence of any actual injury having been done to pltf. by the conduct of defts.:—*Held*: although the conduct of defts. in taking the name *Evening Post* might be calculated to deceive the public into supposing that there was a connection between the two papers, there was no probability that pltf. would be injured by such supposition; & an injunction was therefore refused.—*BORTHWICK v. EVENING POST* (1888), 37 Ch. D. 449; 57 L. J. Ch. 406; 58 L. T. 252; 36 W. R. 434; 4 T. L. R. 234, C. A.

*Annotation*.—*Consd.* *Wilcox v. Pearson* (1901), 18 T. L. R. 220.

**86.** ———. — *Held*: pltf., who were the proprietors of an evening newspaper called the *Evening Express*, circulating in Liverpool, were not, in the circumstances, entitled to an injunction to restrain the circulation in Liverpool by deft. of a morning newspaper called the *North Express*,

on the ground of similarity of name, the newspapers not being similar in appearance or contents, & not being competing papers, & deft. acting *bond fide* in adopting the name & without any fraudulent intention.—*WILCOX v. PEARSON* (1901), 18 T. L. R. 220.

**87.** ———. — There is in law no monopoly in the name of a newspaper. To entitle the proprietors of a newspaper to an injunction restraining the publication of another newspaper with a similar name, they must show that the use of that name is calculated to lead to the belief that defts.' newspaper is pltf.'; & the use of such name is injurious to them.—*GEORGE OUTRAM & CO., LTD. v. LONDON EVENING NEWSPAPERS CO., LTD.* (1911), 27 T. L. R. 231; 55 Sol. Jo. 255.

**88.** ———. — The right of the proprietor of a newspaper to prevent another person from adopting the same or similar name for a similar publication is not founded on the right of property in the proprietor, but rests upon the equitable doctrine that the user of such name is reasonably calculated to induce the public to believe that the new paper is that of the original proprietor, & to pass off his paper for that of the original proprietor.

The proprietor of an old established paper called *The Mail*, published three days a week at 11 a.m., at the price of 2d., in London, but whose principal circulation was in the provinces & abroad, was held not entitled, upon interlocutory application, to an injunction restraining deft. from using on a daily morning paper which he had just started, & which was published in London at 3 a.m., at the price of 1d., the title of *The Morning Mail*. —*WALTER v. EMMOTT* (1885), 54 L. J. Ch. 1059; 53 L. T. 437; 1 T. L. R. 632, C. A.

**89.** — — User of name by plaintiff for few days prior to defendants' publication. — *LICENSED VICTUALLERS' NEWSPAPER CO. v. BINGHAM*, No. 80, *ante*.

**90. Use of common word.** — Pltf. published in numbers, in a weekly periodical called *Every Week*, a tale entitled "*Splendid Misery*; or, *East End & West End*," by C. A. Hazlewood. Deft. subsequently commenced issuing in weekly parts, in a newspaper published by him, a tale by Miss Braddon entitled "*Splendid Misery*." Pltf. was registered as the proprietor of *Every Week* before the publication of it began. & after the tale had been completed he had himself registered as the proprietor of "*Splendid Misery*; or, *East End & West End*," giving the date of publication of the number of *Every Week* which contained the first number of the tale as the date of the publication of the tale. He then commenced an action to restrain deft. from continuing his publication of Miss Braddon's tale under the title of "*Splendid Misery*," & moved for an injunction. Before the motion was made deft. had altered the title of Miss Braddon's tale, & the motion was ordered to stand over till the trial, deft. undertaking not to alter the new title in the meantime. The tale was finished under the new title before the trial. It was proved that a novel which once had a large circulation had been published in 1801 under the title of "*Splendid Misery*," & that second-hand copies could still be met with. At the trial, the judge held that deft. had infringed pltf.'s copyright, & made an order containing no declaration of right, but simply ordering deft. to pay the whole costs of the action. Deft. appealed, contending that pltf. had no title, & the action ought to have been dismissed:—*Held*: pltf. had no copyright in the title "*Splendid Misery*," for that copyright

**Sect. 2.—Title of publication: Sub-sect. 2, B. (a) (b). Sects. 3 & 4.]**

can only exist in something original, & the mere adopting as a title hackneyed phrase, which moreover had been used as the title of a novel many years before, & which for anything that appeared might have been copied from that novel, could not give any copyright in that title.—*DICKS v. YATES* (1881), 18 Ch. D. 76; 50 L. J. Ch. 809; 44 L. T. 660, C. A.

**Annotations:—***Consd.* *Primrose Press Agency Co. v. Knowles* (1888), 2 T. L. R. 404. *Apld.* *Crotch v. Arnold* (1909), 54 Sol. Jo. 49. *Refd.* *Licensed Victuallers' Newspaper Co. v. Bingham* (1888), 38 Ch. D. 139; *Broad v. Meyer* (1912), 57 Sol. Jo. 145. *Mentd.* *Re Foster v. G. W. Ry.* (1882), 8 Q. B. D. 515; *Re Mills' Estate, Ex p. Works & Public Buildings Comrs.* (1886), 34 Ch. D. 24; *Lambton v. Parkinson* (1887), 35 W. R. 545; *Jones v. G. C. Ry.* (1901), 4 W. C. C. 23; *Andrew v. Grove*, [1902] 1 K. B. 625; *Leckhampton Quarries Co. v. Ballinger & Cheltenham R. D. C.* (1905), 93 L. T. 93; *Ashburton v. Gray*, [1916] 2 K. B. 353; *Ritter v. Godfrey* (1919), 89 L. J. K. B. 467.

**91. — Competition unlikely.] —** *COWEN v. HULTON*, No. 84, *ante*.

**92. — —.] —** *Pltfs., an American co., were the proprietors & publishers of a shilling monthly magazine called Everybody's Magazine, which was first issued in 1899. Subsequently defts. published a weekly penny paper called Everybody's Weekly. In an action by pltfs. to restrain defts. from selling any periodical with the title "Everybody's":—Held: the action failed as the two periodicals were not likely to compete with one another, & the ct. could not restrain the use of a common & popular expression like "Everybody's."*—*RIDGWAY Co. v. AMALGAMATED PRESS, LTD.* (1911), 28 T. L. R. 149.

**93. — —.] —** An injunction will not be granted to restrain the sale of a book on the ground that it bears the same title as a book written by pltf.—*CROTCH v. ARNOLD* (1909), 54 Sol. Jo. 49.

**(b) Particular Instances.**

**94. Real John Bull — Old Real John Bull.] —** *EDMONDS v. BENBOW* (1821), *Sebastian's Digest*, 16.

**Annotation:—***Refd.* *Borthwick v. Evening Post* (1888), 37 Ch. D. 449.

**95. Britannia — True Britannia.] —** *PROWETT v. MORTIMER*, No. 81, *ante*.

**96. The London Journal — The Daily London Journal.] —** In Oct. 1857, A., being the proprietor of a weekly publication called *The London Journal*, the price of which was 1d., assigned his copyright & interest therein to B. for value, & entered into a covenant with B. not to publish, either alone or in partnership with any other person, any weekly periodical of a nature similar to *The London Journal*. In May, 1859, A. issued an advertisement, announcing the publication by him on June 1, following of a daily newspaper to be called *The Daily London Journal*, & to be sold at 1d. B. thereupon filed his bill against A. for an injunction to restrain A. from publishing *The Daily London Journal*: & the judge made an order for an injunction. Upon appeal, the order for an injunction was confirmed upon B. undertaking to abide by any order the ct. might make as to damages, & to bring an action against A. within one week.—*INGRAM v. STIFF* (1859), 33 L. T. O. S. 195; 5 Jur. N. S. 947, L. J.J.

**Annotations:—***Refd.* *Walter v. Emmott* (1885), 54 L. J. Ch. 1059; *Borthwick v. Evening Post* (1888), 37 Ch. D. 449.

**97. Bell's Life in London — The Penny Bell's Life.] —** (1) The registered proprietors of *Bell's Life in London & Sporting Chronicle*, published weekly, at the price of 5d., filed a bill against the proprietors & publishers of a new newspaper

called *The Penny Bell's Life & Sporting News*, & which was published at the price of 1d. The evidence produced showed, that from the similarity of the two names mistakes had occurred, & were likely to occur, on the part of the public, & that inquiries had been made at the office of *Bell's Life in London* for *The Penny Bell's Life*. On motion on behalf of pltfs., the ct. granted an injunction to restrain defts. from the use of the words *Bell's Life* in the title of their newspaper.

(2) In order to establish a case for relief it is not necessary to show a "fraudulent purpose" in deft., but it is sufficient if the similarity of title be such as to have led, & to be likely to lead, to mistakes.—*CLEMENT v. MADDICK* (1859), 1 Giff. 98; 33 L. T. O. S. 117; 5 Jur. N. S. 592; 65 E. R. 841.

**Annotation:—***Generally, Mentd.* *Lee v. Haley* (1869), 21 L. T. 546.

**98. Punch — Punch & Judy.] —** *BRADBURY v. BEETON*, No. 83, *ante*.

**99. Iron Trade Circular (Rylands) — The Iron Trade Circular (edited by Griffiths).] —** *CORNS v. GRIFFITHS*, [1873] W. N. 93.

**100. Church & State.] —** *PRIMROSE PRESS AGENCY Co. v. KNOWLES* (1886), 2 T. L. R. 404.

**101. Morning Post — Evening Post.] —** *BORTHWICK v. EVENING POST*, No. 85, *ante*.

**102. Ally Sloper — Ally Sloper's Comic Kallandar.] —** *PICTURE PRESS, LTD. v. ROSS* (1909), *Times*, Feb. 25.

**SECT. 3.—ASSIGNMENT.**

**103. Whether interest assignable.] —** If the printer & publisher of a newspaper assign his interest therein to a creditor as a security, but continue to print & publish as before, & no affidavit of the change of interest be delivered to the Comrs. of Stamps, & the printer become bkpt., the right to the paper will pass to his assignees, under the assignment of the comrs.—*LONGMAN v. TRIPP* (1805), 2 Bos. & P. N. R. 67; 127 E. R. 547.

**Annotations:—***Apld.* *Re Baldwin, Ex p. Foss* (1858), 2 De G. & J. 230. *Consd.* *Platt v. Walter* (1867), 17 L. T. 157. *Apld.* *Kelly v. Hutton* (1868), 3 Ch. App. 703.

**104. — —.] —** B. was the sole registered proprietor of certain newspapers published by him on premises of which he was the rated occupier, & he was the owner of the type & plant used in the publication. He mortgaged the newspapers type & plant to F., who took no steps to alter the registration of proprietorship. The sheriff entered under an execution issued by a creditor of B., & though possession was demanded by F., remained in possession till B. had become bkpt., which took place after two days:—*Held: the right of publishing a newspaper is goods & chattels within the meaning of the enactment of the Bkpt. Law Consolidation Act as to reputed ownership; the type & plant were not within the order & disposition of the bkpt., at the time of his bkpcy., with the consent of the true owner, but the right of publication of the newspapers was not capable of seizure by the sheriff, & as the bkpt. continued the sole registered proprietor, & nothing had been done to make it apparent that he was not the sole owner, the doctrine of reputed ownership applied to the newspapers.*—*Re BALDWIN, Ex p. Foss* (1858), 2 De G. & J. 230; 27 L. J. Bcy. 17; 31 L. T. O. S. 30; 4 Jur. N. S. 522; 6 W. R. 417; 44 E. R. 977, L. J.J.

**Annotations:—***Consd.* *Platt v. Walter* (1867), 17 L. T. 157.

—*See, also*, No. 76, *ante*.

**105. Effect of assignment—Whole interest passes.]**—Pltfs. had purchased the copyright of & the right to use the name of deft. in the publication of a work called *Beeton's Christmas Annual*, & deft. agreed to give his whole time to the service of pltfs. & not to engage in any other business:—*Held*: deft. must be restrained from advertising a rival work.

When you sell a newspaper it is not merely the right to sell one number of it but continuing to publish it from day to day it may be as long as the world lasts, under the name by which it has become known (MALINS, V.-C.).—WARD v. BEETON (1874), L. R. 19 Eq. 207; 23 W. R. 533.

**106. Contract to assign share of interest—Specific performance.]**—H. & S. were joint proprietors of newspapers, subject to a mtge. to M. S. became bkpt. in Feb. 1861. M., in Mar. 1861, sold H.'s moiety in the copyright, etc. to B., to be paid for by bills of exchange. M. continued to be mtgee. of that moiety, & he, on Mar. 5, 1861, entered into a formal agreement with B., whereby B. agreed to purchase from H. one-half share of the newspapers; & M., in May, 1861, entered into an arrangement with B. for the sale to him of S.'s share, in the newspapers at the same price as paid for the other moiety. Bills of exchange were given to M., at long dates, upon which interest at 6 per cent was to be charged. B. took formal possession of the property, managed it, & caused the name of D. to be entered at Somerset House as the printer; but H. & B. were entered in the books there as sole proprietors, subject to mtges. to M. On July 17, 1862, B. was required to render accounts of the profits to H., on the ground that they were partners, but he refused to do so, alleging that he was the sole proprietor, & he caused his name to be entered at Somerset House as such. On Oct. 2, 1862, H. filed a bill to dissolve the partnership, & for accounts; & on Oct. 30, 1862, B. filed a cross bill against M. & H. for specific performance:—*Held*: there must be a decree to that effect, with costs, & the bill of H. must be dismissed, with costs.—HUTTON v. BEETON & M'MURRAY, BEETON v. M'MURRAY & HUTTON (1863), 9 Jur. N. S. 1310.

#### SECT. 4.—MORTGAGE.

**107. Property as subject of mortgage.]**—Re BALDWIN, *Ex p. Foss*, No. 104, *ante*.

**108. Mortgagor registered as sole proprietor—Effect on mortgagor becoming bankrupt.]**—Re BALDWIN, *Ex p. Foss*, No. 104, *ante*.

**109. Enforcement of mortgage—Printer as mortgagee in possession—Items in taking account.]**—N. was in 1838 appointed the printer of *The Railway Times* newspaper, & in 1840 he became the mtgee. of two fourth parts of the newspaper, with a power of sale, which power he in 1841 exercised, & he sold the two fourth parts to his brother, & at the same time N. became the manager of the paper. In 1846 N. ceased to be the printer & manager, & in 1848 he obtained an assignment

of the two fourth parts from his brother. In 1850 he became the purchaser of the other two fourth parts, & he was then registered as the owner of *The Railway Times*. In 1857 the Court decreed that the sale of 1841 was invalid, & the mtgor. was declared entitled to redeem. An account was directed of all sums received by N., or which but for his wilful neglect & default he might have received, in respect of the proceeds of the newspaper from the date of the sale of 1841: & in taking such account regard was to be had to any debt or debts, other than the said mtge. debt which should be found due from the mtgor. to N. In taking the account N. claimed to be allowed to charge credit prices, on the ground that although he was in receipt of cash payments from 1841 to 1846 yet that he was entitled to apply those payments, first in discharge of a debt due to him for printing, & then in payment of the expenses of the newspaper. On adjourned summons from chambers:—*Held*: (1) deft. was entitled to charge, not credit, but only cash prices in the account.

(2) A balance of £2,201 had been found due to N. in 1841 for printing up to that date. In 1847, N. entered into an agreement with one of the proprietors, to which the mtgor. was not a party, that he, N., would accept £400, "in satisfaction of all claims upon the proprietary." In taking the account with the mtgor., N. claimed to be allowed credit for this sum of £2,201, or for half of it, against the mtgor.: but the ct. disallowed the claim.—ROBERTSON v. NORRIS (1859), 1 Giff. 428; 1 L. T. 123; 5 Jur. N. S. 1238; 65 E. R. 986.

*Annotations*:—Generally, *Mentd.* Shaw v. Brown (1881), 44 L. T. 339; White v. City of London Brewery Co. (1888), 39 Ch. D. 559.

**110. — Receiver & manager appointed.]**—On motion by the mtgee. of a newspaper, a receiver & manager of the mtged. property were appointed until the hearing of the cause.—CHAPLIN v. YOUNG (1862), 6 L. T. 97, L. C.

**111. Obligations of mortgagee after reconveyance—Not to compete with business.]**—I do not think that any case has been made out which will justify me in granting an injunction. I do not refuse the injunction upon the ground that a mtgee. after reconveyance would not be under the same obligations as a vendor. It is not necessary to decide that point. The obligation which a vendor is under is that he may not, although he may set up a rival business, solicit the customers, of the old firm to leave the old firm, & to come to him. It depends upon the nature of the business whether the request to deal with him would be a request to leave the old business. Where the business is that of a newspaper proprietor it appears to me that a request by the vendor to a person to buy his newspaper is not a request to leave off buying the old newspaper. In the present case I do not find a breach of any obligation which K. would be under if he had sold the newspaper to plff. (CHANNELL, J.).—TAYLOR v. CAMBRIDGE GAZETTE CO., LTD. & KILNER (1898), 42 Sol. Jo. 832.

## Part V.—Publications Other than Newspapers.

**112. Property in books—Registration as condition precedent to vesting.]**—The property of books cannot vest without being first registered with the Stationers' Company.—**BLACKWELL v. HARPER** (1740), 2 Atk. 93; Barn. Ch. 210; 26 E. R. 458.

*Annotation* :—**Reid**. *Newton v. Cowie* (1827), 4 Bing. 234.

**113. Liability of joint adventurers—For goods supplied.]**—A. B. & C. verbally agreed that they should bring out & be jointly interested in a periodical publication. A. was to be the publisher, & to make & receive general payments, B. to be the editor, & C. the printer; & after payment of all expenses, they were to share the profits of the work equally. C. was to furnish the paper, & charge it to the account at cost prices. No profits were ever made, nor any accounts settled. Pltf. furnished paper to A. for the purpose of being used by him in printing the periodical.—**Held**: B. & C. were not jointly liable with A. for the price of it.—**WILSON v. WHITEHEAD** (1842), 10 M. & W. 503; 12 L. J. Ex. 43; 152 E. R. 569.

*Annotation* :—**Mentd**. *Kilshaw v. Jukes* (1863), 3 B. & S. 847.

**114. Materials obtained for publication—Supply to rival publication restrained.]**—Canvassers who had been employed by the proprietor under agreements which bound them to devote them-

selves in a particular district exclusively to obtaining from traders advertisements to be inserted in the directory, & to supply the blocks & materials necessary for producing such advertisements, proposed at the expiration of their agreements to assist a rival publication in procuring similar advertisements.—**Held**: they were not entitled to use for the purposes of any other publication the materials which, while in pltf.'s employment they had obtained for the purpose of his publication.—**LAMB v. EVANS**, [1893] 1 Ch. 218; 62 L. J. Ch. 404; 68 L. T. 131; 41 W. R. 405; 1 T. L. R. 87; 2 R. 189, C. A.

*Annotations* :—**Consd**. *Walter v. Lane*, [1900] A. C. 539. **Apld**. *Lawrence & Bullen v. Aflalo*, [1904] A. C. 17. **Reid**.

*Macmillan v. Cooper* (1923), 93 L. J. P. C. 113. **Mentd**. *Louis v. Smelle* (1895), 73 L. T. 226; *Robb v. Green*, [1895] 2 Q. B. 315; *Trego v. Hunt*, [1895] 1 Ch. 462; *Worthington Pumping Engine Co. v. Moore* (1902), 19 T. L. R. 84; *Measures v. Measures*, [1910] 1 Ch. 336; *Ashburton v. Pape*, [1913] 2 Ch. 469; *London Electric Supply Corp. v. Westminster Electric Supply Corp.* (1913), 11 L. G. R. 1046; *Morris v. Saxelby*, [1915] 2 Ch. 57; *Alpertor Rubber Co. v. Manning* (1917), 86 L. J. Ch. 377.

**115. Edition—What constitutes.]**—**READE v. BENTLEY**, No. 65, ante.

**Royalties—Bankruptcy of publisher under agreement to publish—Amount for which author may prove.]**—*See* **BANKRUPTCY**, Vol. IV., p. 256, No. 2436.

## Part VI.—Advertisements.

### SECT. 1.—IN GENERAL.

**116. What is an advertisement—Metropolitan Streets Act, 1867 (c. 134), s. 9.]**—In order that a print may be carried or distributed by way of advertisement within the above sect., the print itself must be an advertisement. Therefore where a print which is a publication of news, but is not in itself an advertisement, is, without the approval of the Comr. of Police, distributed in such a way as to obtain the same consequences as if it were an advertisement, the distributor thereof is not liable to the penalty imposed by the sect. for distributing a print by way of advertisement except in such form & manner as may be approved by the Comr. of Police.—**GAGE v. BREALEY** (1898), 67 L. J. Q. B. 457; 46 W. R. 415; 14 T. L. R. 324; 42 Sol. Jo. 380, D. C.

*Annotation* :—**Reid**. *Westminster Gazette v. Bell* (1925), 69 Sol. Jo. 590.

**117. Advertisement as evidence of notice.]**—An advertisement published in several daily newspapers is not evidence of notice to any individual who is not proved to have taken in, or to have been in the habit of reading one of the newspapers in which it appeared.—**BOYDELL v. DRUMMOND** (1808), 2 Camp. 157; 11 East, 144, n.; 170 E. R. 1114, N. P.; *subsequent proceedings* (1809), 11 East, 142.

*Annotation* :—**Mentd**. *M'Kay v. Rutherford* (1848), 6 Moo. P. C. C. 413.

**Commission of advertising agent.]**—*See* **CONTRACT**, Vol. XII., p. 253, No. 2071.

**118. Payment for advertisements—By deduction from business introduced—Meaning of business introduced.]**—Def't. agreed in writing to advertise for a year in pltf.'s newspaper on the terms that no cash was to be paid by him, & that the cost was to be deducted from business introduced by them during such year. An export order was sent to him through pltf's. by a co. of which they were two of the directors during the year, & after its expiration they themselves sent him an order for goods of less value than the price of the advertisements. He declined to execute the orders, & thereupon they brought an action for the price of the advertisements. They were nonsuited, & the Div. Ct. held that, as they had not introduced any business to him within the terms of the agreement by bringing about the relations of buyer & seller between him & a third party, their motion for a new trial must be dismissed.—**Held**: pltf's. had never put themselves into a position to bring the action.—**NECK & BRANDRETH v. ANDREWS** (1885), 2 T. L. R. 93.

—**By allotment of shares.]**—*See* **COMPANIES**, Vol. IX., p. 304, Nos. 1877–1879.

**Copyright in advertisements.]**—*See* **COPYRIGHT**, Vol. XIII., pp. 166, 173, Nos. 41, 89–91.

**As to exhibition of advertisements.]**—*See* **PUBLIC HEALTH**.

### PART V.

*o. Construction of words "delivered out of the press"—In Press Act.]*—On a construction of Press & Registration

of Books Act, 1867, s. 9 (a), the words "delivered out of the press" are not merely synonymous with "printed," but include at least the further process of folding & binding necessary to make

a book out of the printed matter, if not the actual carrying of the book outside the press.—**R. v. KISHAN LAL** (1926), 1 L. R. 49 All. 315.—**IND**.



**Advertisements amounting to contempt of court.]**—See CONTEMPT OF COURT, Vol. XVI., pp. 27-29, Nos. 253-260.

#### SECT. 2.—ILLEGAL ADVERTISEMENTS.

**119. Advertisement of Sunday concert.]**—WILLIAMS v. WRIGHT (1897), 13 T. L. R. 551.

**Indecent advertisements.]**—See CRIMINAL LAW, Vol. XV., pp. 750, 751, Nos. 8093, 8094.

**Advertisements of rewards for return of property.]**—See CRIMINAL LAW, Vol. XV., p. 707, Nos. 7655-7657.

**Gaming & wagering advertisements.]**—See GAMING & WAGERING, Vol. XXV., pp. 394-397, 446-449, 454-459, 463-465, Nos. 1-15, 395-399, 409-413, 434-449, 456-469, 496-506.

#### SECT. 3.—ADVERTISEMENTS AMOUNTING TO CIVIL INJURY.

**120. Whether injunction granted.]**—BRITON LIFE ASSOCN., LTD. v. ROBERTS (1886), 2 T. L. R. 319.

—.]—See, also, INJUNCTION, Vol. XXVIII., pp. 475, 485, 486, Nos. 814, 901-904.

**Slander of goods.]**—See LIBEL & SLANDER, Vol. XXXII., pp. 209 *et seq.*

#### SECT. 4.—ADVERTISEMENT CONTRACTS.

**121. Action to recover price—Defences—Illegality of contract—Onus of proof.]**—In an action of work & labour, for inserting advertisements in a newspaper, it is not incumbent on pltf. to show compliance with 6 & 7 Will. 4, c. 76, which requires that before a newspaper shall be printed or published, the proprietor shall lodge a declaration & certificate; for if the necessary steps have been taken by pltf., the publication & contract are illegal, & deft. must plead the illegality of the contract.—INGRAM v. FERGUSON (1846), 7 L. T. O. S. 236.

**122. — Misrepresentation as to circulation.]**—ENGLAND NEWSPAPER CO., LTD. v. COSTA & Co. (1886), 3 T. L. R. 28.

**123. — Omission to insert advertisement—Right of advertiser as to extra edition.]**—BROWNE v. STERN (1892), 8 T. L. R. 263.

**124. Action for omission to insert advertisement—Damages.]**—HAWKINS v. TUXFORD (1867), *Times* Dec. 23.

**125. — — — — —.]**—MARCUS v. MYERS & DAVIS (1895), 11 T. L. R. 327.

*Annotations:*—**Mentd.** Cointat v. Myham, [1913] 2 K. B. 220; Turpin v. Victoria Palace, [1918] 2 K. B. 539.

**126. — Immoral character of advertisement as defence.]**—OWEN v. GREENBERG (1898), *Times*, Mar. 10.

## Part VII.—Offences.

#### SECT. 1.—CONTEMPT OF COURT.

*See, generally,* CONTEMPT OF COURT, Vol. XVI., pp. 1 *et seq.*

**Comments prejudicial to fair trial.]**—See CONTEMPT OF COURT, Vol. XVI., pp. 22-30.

**Comments after judgment & verdict.]**—See CONTEMPT OF COURT, Vol. XVI., pp. 30, 31, Nos. 292-298.

**Order of court restraining publication—Publication contrary to order.]**—See CONTEMPT OF COURT, Vol. XVI., p. 31, No. 299.

**Proceedings in camera—Publication or comments.]**—See CONTEMPT OF COURT, Vol. XVI., pp. 31, 32, Nos. 300-302.

#### SECT. 2.—LIBEL.

*See, generally,* LIBEL & SLANDER, Vol. XXXII., pp. 1 *et seq.*

**127. Contracts of indemnity—Illegal & unenforceable.]**—Pltfs., publishers & proprietors of a newspaper, published, at the request & solicitation of deft., a statement obviously libellous, which deft. represented to be correct & true. An action being brought against them for such publications, deft. gave them an undertaking to bear them harmless as to all costs, charges, expenses, etc., to which they might be put by defending such action. In an action for not performing such undertaking:—**Held:** it was void, as founded upon an illegal consideration; & the action could not be maintained.—SHACKELL v. ROSIER (1836),

2 Bing. N. C. 634; 2 Hodg. 17; 3 Scott, 59; 5 L. J. C. P. 193; 132 E. R. 245.

*Annotations:*—**Refd.** Breay v. Royal British Nurses' Assoon. (1897), 76 L. T. 735. **Mentd.** Bradlaugh v. Newdegate (1883), 11 Q. B. D. 1; Lound v. Grimwade (1888), 39 Ch. D. 605; Burrows v. Rhodes, [1899] 1 Q. B. 816; Weld-Blundell v. Stephens, [1920] A. C. 956.

**128. — — — — —.]**—SMITH (W. H.) & SON v. CLINTON & HARRIS, No. 16, *ante*.

**Publication of libel—By employee of newspaper proprietor.]**—See LIBEL & SLANDER, Vol. XXXII., pp. 82, 83, Nos. 1133-1137.

**Evidence—Publication of newspapers.]**—See LIBEL & SLANDER, Vol. XXXII., pp. 85, 86, Nos. 1155-1160.

**Defences to action—Privilege.]**—See LIBEL & SLANDER, Vol. XXXII., p. 137, Nos. 1674-1677.

**Fair comment.]**—See LIBEL & SLANDER, Vol. XXXII., p. 143, Nos. 1743, 1744.

#### SECT. 3.—OTHER OFFENCES.

**129. Printing a will.]**—ANON. (1729), 1 Barn. K. B. 240; 94 E. R. 164.

**130. Distribution by way of advertisement—Without police approval.]**—GAGE v. BREALEY, No. 116, *ante*.

**131. Publication of evidence given in police court—Cases committed for trial.]**—Where evidence of previous convictions is given at a police ct. in a case which is committed for trial, such evidence ought not to be referred to by a

#### PART VI. SECT. 4.

**p. Action to recover price—Defences—Fair remuneration already paid therefor.]**—SINCLAIR v. OTTAWA IRON & STEEL MANUFACTURING CO. (1877), 27 C. P. 410.—CAN.

*Sect. 3.—Other offences. Parts VIII. & IX.]*

newspaper in its report of the proceedings.—*R. v. SANDERSON* (1915), 31 T. L. R. 447; 11 Cr. App. Rep. 197, C. C. A.

**Printing seditious book.]—See CRIMINAL LAW**, Vol. XV., p. 626, No. 6596.

**Publication encouraging murder.]—See CRIMINAL LAW**, Vol. XV., p. 814, Nos. 8871–8873.

**Omission of printer's name.]—See Part I., Sect. 2, ante.**

**Printing reports of judicial proceedings—Indecent matter or medical details—Calculate to injure public morals.]—See Judicial Proceedings (Regulation of Reports) Act, 1926 (c. 61), s. 1 (1) (a).**

**Matrimonial causes.]—See Judicial Proceedings (Regulation of Reports) Act, 1926 (c. 61), s. 1 (1) (b).**

## Part VIII.—Privileges of the Press.

**132. Right to admission to meeting—Meetings of local authorities.]—In a municipal borough neither the public, nor the burgesses, nor reporters for newspapers, have the right to attend the meetings of the borough council without the consent of the council expressed or implied. *Semble*: the same principle applies to the meetings of a district council or of a county council.—*TENBY CORPN. v. MASON*, [1908] 1 Ch. 457; 77 L. J. Ch. 230; 98 L. T. 349; 72 J. P. 89; 24 T. L. R. 254; 6 L. G. R. 233, C. A.**

*See, now, Local Authorities (Admission of the Press to Meetings) Act, 1908 (c. 43).*

**Privilege as defence to action for libel.]—See LIBEL & SLANDER**, Vol. XXXII., p. 137, Nos. 1674–1677.

**Fair comment as defence to action for libel.]—See LIBEL & SLANDER**, Vol. XXXII., p. 143, Nos. 1743, 1744.

*See, generally, Law of Libel Amendment Act, 1888 (c. 64).*

## Part IX.—Stationery Office.

**133. Prerogative right of Crown to grant monopoly—How far grant good.]—STATIONERS' CO. v. PARKER** (1685), Skin. 233; 90 E. R. 107.

*Annotation:—Refd. Millar v. Taylor* (1769), 4 Burr. 2303.

**134. — Printing Bibles.]—STATIONERS' CO. CASE** (1682), 2 Cas. in Ch. 93; 22 E. R. 862.

*Annotation:—Refd. Millar v. Taylor* (1769), 4 Burr. 2303.

**135. — In Scotland.]—BASKETT v. WATSON** (1717), cited in 6 Ves. at p. 699; 31 E. R. 1264.

*Annotation:—Refd. Manners v. Blair* (1828), 3 Bli. N. S. 391.

**136. — — — — —.]—BASKETT v. PARSONS** (1718), cited in 6 Ves. at p. 699; 31 E. R. 1264.

*Annotations:—Consd. Oxford & Cambridge Universities v. Richardson* (1802), 6 Ves. 689. *Refd. Gurney v. Longman* (1807), 13 Ves. 493; *Manners v. Blair* (1828), 3 Bli. N. S. 391.

**137. — — — — —.]—By Royal letters patent under the Seal of Great Britain, granted in 1785, the patentees were appointed sole King's printers for Scotland, so far as such appointment might be consistent with the Act of Union & the laws of Great Britain, with, in particular, the sole privilege of printing in Scotland, in the English tongue, the Bible, the New Testament, Books of Psalms, Books of Common Prayer, Confessions of the Faith, & the larger & shorter Catechisms, & the sole privilege of printing in Scotland Acts of Parliament & other official documents: with an express prohibition under penalty of forfeiture of importation of any books or documents of the above descriptions from any "places beyond the seas" without the licence of the patentees.**

Proceedings were taken in Scotland by the patentees to restrain the importation into & sale

in Scotland of Bibles & Books of Common Prayer, etc., printed in England by the King's printers in England:—*Held*: the prerogative of the Crown in England & Scotland to grant the exclusive right to print the Bible rested on the duty imposed upon the Sovereign as chief executive magistrate to superintend the publication of the works upon which the established doctrines of our religion are founded, so that these works may be published in a correct & authentic form; this duty & the corresponding prerogative are the same in Scotland as in England.—*MANNERS v. BLAIR* (1828), 3 Bli. N. S. 391; 4 E. R. 1379; *sub nom. MANNERS, MILLER & BUCHAN v. KING'S PRINTER*, 2 State Tr. N. S. 215, H. L.

**138. — Printing statutes.]—The King's printer alone has express authority to print the statutes; but the University of Cambridge are also so entitled, under words sufficient to convey the copyright of Acts of Parliament.—BASKETT v. CAMBRIDGE UNIVERSITY (CHANCELLOR)** (1758), 2 Burr. 661; 2 Keny. 397; 1 Wm. Bl. 105; 97 E. R. 499.

*Annotations:—Consd. Oxford & Cambridge Universities v. Richardson* (1802), 6 Ves. 689. *Refd. Millar v. Taylor* (1769), 4 Burr. 2303; *Eyre & Strahan v. Carnan* (1781), 6 Bac. Ab. 509.

**139. — — — — —.]—Collusive notes to an edition of the statutes will not take it out of the King's printer's patent.—BASKETT v. CUNNINGHAM** (1762), 2 Eden, 137; 1 Wm. Bl. 370; 28 E. R. 848.

**140. — Printing almanacs.]—The Crown has not a prerogative or power to grant printing of almanacs to the Company of Stationers exclusive of any other.—STATIONERS' CO. v. CARNAN** (1775), 2 Wm. Bl. 1004; 96 E. R. 590.

### PART VIII.

**1321. Right to admission to meeting—Meetings of local authorities.]—Newspaper reporters have a right of entry into the city hall of the city in which**

the newspaper is carried on, both as representatives of the publishers & as residents of the city, & the enforcement of an order given by the mayor of the city to the city hall officials excluding newspaper reporters from

the city hall will be restrained by injunction.—*JOURNAL PRINTING CO. v. MCVEITY* (1915), 33 O. L. R. 166; 7 O. W. N. 633, 796; 21 D. L. R. 81,—CAN,

## PRESUMPTION AS TO DOCUMENTS AND FACTS.

*See* EVIDENCE.

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## PRESUMPTION AS TO RIGHTS OF PROPERTY.

*See* BOUNDARIES, FENCES, AND PARTY-WALLS ; EASEMENTS AND PROFITS À PRENDRE ; GIFTS ; HIGHWAYS, STREETS AND BRIDGES ; PERSONAL PROPERTY ; REAL PROPERTY AND CHATTELS REAL ; TRUSTS AND TRUSTEES ; WILLS.

## PREVENTION OF CRIME.

*See* CRIMINAL LAW AND PROCEDURE.

## PREVENTION OF CRUELTY.

*See* ANIMALS ; CRIMINAL LAW AND PROCEDURE ; INFANTS AND CHILDREN.

## PRIMATE.

*See* ECCLESIASTICAL LAW.

## PRINCIPAL AND ACCESSORY.

*See* CRIMINAL LAW AND PROCEDURE.

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## PRINCIPAL AND AGENT.

*See* AGENCY.

## PRINCIPAL AND SURETY.

*See* GUARANTEE AND INDEMNITY.

## PRINTERS.

*See* PRESS AND PRINTING.

## PRINTS.

*See* COPYRIGHT AND LITERARY PROPERTY.

## PRIORITY.

*See* BANKRUPTCY AND INSOLVENCY ; BILLS OF SALE ; BONDS ; CHUSES IN ACTION ; COMPANIES ; CONSTITUTIONAL LAW ; DISTRESS ; EQUITY ; EXECUTION ; EXECUTORS AND ADMINISTRATORS ; JUDGMENTS AND ORDERS ; MORTGAGE ; POWERS ; SETTLEMENTS ; TRUSTS AND TRUSTEES.

# PRISONS.

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## Part I.—Prison Authorities.

### SECT. 1.—THE SECRETARY OF STATE.

*See, generally,* Prison Act, 1877 (c. 21), s. 5; & Prison Act, 1898 (c. 41).

#### 1. Liability in trespass—Illegal exercise of powers of classification—Removal of prisoner.]—

(1) The removal of a person from one part of a prison to another in which he is not legally confined is a trespass.

(2) The Secretary of State is liable in trespass if a person be so removed under a general order made by him for the classification of prisoners which he had no legal authority to make.

(3) Trespass will lie against the governor of a prison for causing prisoner to be removed by force or threats of force from one division of the prison to another, in which he ought not by law to be confined, although he acts in obedience to a rule issued by the Secretary of State, if such rule be not in accordance with statutes as to the classification of prisoners.—*COBBETT v. GREY* (1850), 4 Exch. 729; 19 L. J. Ex. 137; 14 L. T. O. S. 182; 154 E. R. 1409.

*Annotations* :—*As to* (1) *Distd.* *Howard v. Hudson* (1853), 2 E. & B. 1. *Generally, Mentd.* *Moody v. Corbett* (1866), 7 B. & S. 544.

2. Liability for assault—Forcible feeding of prisoner.]—On a motion for a rule *nisi* for a *mandamus* to a magistrate to issue summonses against the Home Secretary & the governor & the medical officer of a gaol for an assault alleged to have been committed by the medical officer on one of prisoners who had refused to eat, & who had consequently been fed by force :—*Held* : the fact that the prisons are vested in the Home Secretary by Prison Act, 1877 (c. 21), s. 5, did not render him liable to be summoned in respect of the alleged assault.—*R. v. MORTON BROWN, Ex p. AINSWORTH* (1909), 74 J. P. 53, D. C.

Power to prohibit visit of justices.]—*See* No. 5. *post*.

### SECT. 2.—PRISON COMMISSIONERS AND DIRECTORS OF CONVICT PRISONS.

*See, generally,* Prison Act, 1877 (c. 21), ss. 6–12, 48; Prison Act, 1898 (c. 41); Convict Prisons Act, 1850 (c. 39).

#### 3. Land procured for prison purposes—

*Vested in Prison Commissioners.*]—In 1807 the justices of the county of M. bought land covered with houses subject to leases for long terms, several years of which remained unexpired. The land & the houses were conveyed to the clerk of the peace for the county, “upon trust for justices of the county of M., for the purposes of Prison Act, 1865 (c. 126), & upon or for no other trust, intent or purpose whatsoever.” The land & houses were never used as part of the prison. An action having been brought to try whether the reversion in the land & houses was in the Prison Comrs. or the justices, *deft.* proposed to adduce as evidence the minutes of the proceedings of the justices in order to show that the land had been bought for the purpose of rendering the prison more commodious or safe :—*Held* : the reversion in the land & the houses standing thereon had passed to the Prison Comrs. by virtue of Prison Act, 1877 (c. 21).—*PRISON COMRS. v. MIDDLESEX CLERK OF THE PEACE* (1882), 9 Q. B. D. 506; 51 L. J. Q. B. 433; 46 L. T. 861; 46 J. P. 740; *sub nom.* *PRISON COMRS. v. NICHOLSON*, 30 W. R. 881, C. A.

4. ——— Applicability of local bye-law.]—*GORTON LOCAL BOARD v. PRISON COMRS.* (1887), [1904] 2 K. B. 165, n.; 73 L. J. K. B. 114, n.; 89 L. T. 478, n.; 68 J. P. 27, n.; 52 W. R. 233, n.; 1 L. G. R. 838, n., D. C.

*Annotations* :—*Mentd.* *Cooper v. Hawkins*, [1904] 2 K. B. 164; *Re De Keyser's Royal Hotel, De Keyser's Royal Hotel v. R.*, [1919] 2 Ch. 197.

Amalgamation of directors of convict prisons with Prison Commissioners.]—*See* Prison Act, 1898 (c. 41), s. 1.

### SECT. 3.—VISITING COMMITTEES AND BOARDS OF VISITORS.

Visiting committees of justices.]—*See* Prison Act, 1877 (c. 21), ss. 13–15.

5. Visits by non-visiting justices—Power of Secretary of State to prohibit.]—*Semble* : notwithstanding 31 Geo. 3, c. 46, s. 5, a Secretary of State has the power of preventing those magistrates who are not visiting magistrates from having access to State prisoners.—*R. v. EASTSTAFF* (1818), Gow, 138; 171 E. R. 864.

Boards of visitors.]—*See* Prison Act, 1898 (c. 41), s. 3.

## Part II.—Prison Officers.

### SECT. 1.—THE GOVERNOR.

6. Liability for false imprisonment—Detention of person wrongly arrested—Mistaken identity.]—The keeper of a prison who receives & detains one apprehended & charged in his custody under a warrant, runs the risk of the warrant having been executed against the proper person; & though acting *bonâ fide*, & without the means of

ascertaining the identity of the individual named in the warrant, he is liable to an action of trespass, & false imprisonment, if by the mistake of the officer to whom it was directed, it was executed against another.—*AARON v. ALEXANDER* (1811), 3 Camp. 35; 170 E. R. 1297, N. P.

*Annotations* :—*Mentd.* *Wilson v. Barker* (1833), 1 Nev. & M. K. B. 409; *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 560.

— Detention beyond prescribed time—Default

### PART II. SECT. 1.

a. Failure to send return of prisoners—Liability to penalty.]—*R. v. CLIFFORD* (1895), 16 N. S. W. L. R. (L.) 12;

11 N. S. W. W. N. 109.—AUS.

b. Liability for false imprisonment.]—The gaoler of a common gaol is bound to receive & detain until released a

prisoner delivered into his custody by a constable on a charge of felony, without warrant; & may justify in an action for false imprisonment without showing what the particular felony was with

of prosecution.]—See CRIMINAL LAW, Vol. XV., p. 833, No. 9151.

—Discharge subject to order of court.]—See CRIMINAL LAW, Vol. XV., p. 833, No. 9153.

—Delay between warrant & committal.]—See CRIMINAL LAW, Vol. XV., p. 833, No. 9154.

—Detention after acquittal.]—See CRIMINAL LAW, Vol. XV., p. 834, No. 9155.

7. —Detention on invalid warrant—Sentence altered on appeal—Fresh warrant necessary.]—Pltf. was convicted by a ct. of summary jurisdiction & sentenced to a term of imprisonment with hard labour. He was taken to prison under a warrant of commitment made out by the magistrate, but released pending an appeal to quarter sessions. The conviction was affirmed, but the sentence was altered. No fresh warrant of commitment was made out by the recorder at quarter sessions, but the original conviction by the magistrate was altered by the recorder in accordance with his sentence. Pltf. was then taken to prison, & the only documents handed to the governor of the prison were a copy of the original conviction by the magistrate as altered by the recorder & the original warrant of commitment by the magistrate. He was detained in prison for some days, when the conviction was quashed upon other grounds, & he was released. In an action for false imprisonment against the clerk of the peace of the borough & the governor of the prison for unlawfully imprisoning pltf.:—*Held*: the action could not be maintained against the clerk of the peace, as he was merely a ministerial officer & his act was a ministerial act; but the action was maintainable against the governor, as he was not justified in receiving pltf. into custody & detaining him without a fresh warrant of commitment by the recorder, & the documents which the governor received were not equivalent to such warrant of commitment, & the governor was liable in damages to pltf.—*DEMERY v. COOK* (1903), 88 L. T. 629; 67 J. P. 208; 19 T. L. R. 327; 47 Sol. Jo. 368; 20 Cox, C. C. 444.

8. —[A gaoler receiving & detaining a person under the warrant of a magistrate, is entitled to the protection of Constables Protection Act, 1750 (c. 44); & therefore, on producing & proving the warrant under which the detention was made, it is immaterial whether or not the magistrate had jurisdiction to grant it.—*BUTT v. NEWMAN* (1819), Gow. 97; 171 B. R. 850, N. P. *Annotations*:—*Apprvd.* *Henderson v. Preston* (1888), 21 Q. B. D. 362. *Distd.* *Ferner v. Cook* (1903), 88 L. T. 629.

—Governor in possession of copy of warrant—Representation that warrant original.]—See *ESTOPPEL*, Vol. XXI., p. 138, No. 25.

9. —Removal out of county for trial—Without authority.]—*Semble*: a gaoler bringing prisoner out of his county, to be present at the trial of an information on the game laws, in which he is deft., without having a *habeas corpus* or judge's order for that purpose, is liable to an action for false imprisonment, at the suit of such prisoner.—*BINT v. LAVENDER*, *PITTS v. SAME* (1825), 1 C. & P. 659; 171 E. R. 1357, N. P.

10. Undue exercise of authority—Remedy of prisoner.]—*Semble*: where prisoner complains of an undue exercise of authority by the gaoler, his proper course is, to apply to the ct. or a judge, by petition, for relief under Debtors' Imprison-

ment Act, 1758 (c. 28), s. 11, & not by *habeas corpus*.—*STEAD v. ANDERSON* (1850), 9 C. B. 202; 1 L. M. & P. 109; 19 L. J. C. P. 264; 137 E. R. 894; *sub nom. Ex p. STEAD*, 14 L. T. O. S. 443.

11. —Acts ordered by Secretary of State—Contrary to statute.]—*COBBETT v. GREY*, No. 1, *ante*.

12. Liability for not producing warrant of commitment.]—The ct. will not stay an action against the governor of a convict prison for not producing the warrant of commitment of prisoner as vexatious & an abuse of the process of the ct. Such an application must be made within a reasonable time after action brought.—*COBBETT v. MORISH* (1875), 39 J. P. 103.

13. Liability for assault—Forcible feeding by medical officer.]—*R. v. MORTON BROWN*, *Ex p. AINSWORTH*, No. 2, *ante*.

14. —Joint assault with officers—Personal liability of governor & officers.]—In an action of trespass against the keeper of the Queen's prison & his officers, for joint assaults, the officers are only liable for the part which each actually takes in the trespass complained of. Those are not liable at all who merely attend in obedience to the order of the superior, & witness the execution of his order by other officers. Where, in obedience to such orders, one set of defts. assault pltf. & force him downstairs into a cub, & another set accompany the cub with pltf. to a certain place & back again, both sets of officers are not liable as for one entire trespass, but pltf. must proceed against one or other.—*HERRING v. HUDSON* (1847), 10 L. T. O. S. 287, N. P.; *subsequent proceedings* (1848), 3 Exch. 107.

Extortion by governor.]—See CRIMINAL LAW, Vol. XV., p. 661, No. 7136.

15. Communication of information gained in course of official duties.]—*R. v. BLAKE* (1926), *Times*, Dec. 16.

Disclosure of official information, generally, see CRIMINAL LAW, Vol. XV., p. 659, Nos. 7104–7107.

16. Liability for acts of deputy.]—The Marshal of the Queen's Bench prison is not liable for a tortious act committed by the deputy marshal in ill treating a prisoner in the exercise of his office, unless the appointment of the deputy is proved, or the facts show that the marshal was cognisant of the act done.—*YORKE v. CHAPMAN* (1840), 11 Ad. & El. 813; 3 Per. & Dav. 496; 113 E. R. 623; *previous proceedings* (1839), 10 Ad. & El. 207.

17. Liability to third persons—Acts done in pursuance of a judge's order.]—Pltf. having obtained judgment against F. in an action of assault & false imprisonment, sued out thereon a *ca. sa.*, on which F. was taken & committed to the Queen's prison. F. afterwards petitioned the Ct. of Bkpcy. for his discharge, under 5 & 6 Vict. c. 116, & Execution Act, 1844 (c. 96), & having obtained from the comr. an order for his discharge, was, in obedience thereto, discharged by the keeper of the Queen's prison accordingly. Pltf. having brought an action against the keeper for an escape:—*Held*: whether this was or was not a debt from which the comr. had power to discharge prisoner, deft. was protected, being bound to obey the order of the comr., who was acting judicially in a matter over which he had jurisdiction.—

which pltf. was charged.—*McKEILLAR v. MACFARLAND & KIDD* (1852), 1 C. P. 457.—*CAN.*

c. —j.—*McCOMBE v. GRAY* (1879), 4 L. R. Ir. 432.—*IR.*

d. Returning cause of prisoner—Who makes order.]—An order under 19 Vict. c. 42, requiring the gaoler to return the cause of a prisoner being detained in custody, must be made by a judge, & not by the ct.—*Ex p.*

*CHASE* (1866), 11 N. B. R. (6 All.) 398.—*CAN.*

e. Handcuffing person charged unnecessarily—Whether warden responsible for act of neighbour.]—*HAMILTON v. MASSIE* (1889), 18 O. R. 585.—*CAN.*



**Sect. 1.—The governor. Sects. 2, 3 & 4. Part III.****Sect. 1: Sub-sect. 1.]**

THOMAS v. HUDSON (1847), 16 M. & W. 885; 17 L. J. Ex. 365; 153 E. R. 1450, Ex. Ch.

*Annotations*:—*Apld.*, Harvey v. Hudson (1850), 5 Exch. 845. *Refd.*, Wallinger v. Gurney (1861), 11 C. B. N. S. 182; Lloyd v. Harrison (1865), 6 B. & S. 36. *Mentd.*, Sharpe v. Bluck (1847), 10 Q. B. 280; Allcard v. Wesson (1852), 7 Exch. 753.

18. ———.]—A warrant or order under Judgments Act, 1838 (c. 110), issued out of the Insolvent Debtors Ct., dated Apr. 8, 1850, was directed to the keeper of the Queen's prison, & ordered that prisoner therein named should be "discharged forthwith as to the detainer of S.," & as to the detainer of H., "at the period of three calendar months from Jan. 7, 1850," the date of the vesting order:—*Held*: (1) the instrument was, in effect, an order to the gaoler to discharge the prisoner forthwith, & he was bound to obey the order; (2) such order was a good defence to an action for not bringing up the party under a *habeas corpus*, delivered to the keeper before he had discharged the party, but returnable after such discharge; (3) such defence was admissible under a plea of not guilty "by statute," under Judgments Act, 1838 (c. 110), s. 110.—HARVEY v. HUDSON (1850), 5 Exch. 845; 1 L. M. & P. 660; 20 L. J. Ex. 11; 16 L. T. O. S. 172; 15 J. P. 324; 155 E. R. 370.

**Suitability of prisoner for Borstal treatment—Effect of governor's report.**—*See* CRIMINAL LAW, Vol. XIV., p. 480, No. 5238.

19. **Summary jurisdiction over governor—Cannot be exercised by superior courts.**—This ct. has no summary jurisdiction over gaolers of prisons.—*Ex p.* GRIFFITHS (1845), 1 New Pract. Cas. 119; *sub nom.* R. v. GRIFFITH, 4 L. T. O. S. 319; 9 J. P. Jo. 66.

**SECT. 2.—THE CHAPLAIN.**

*See* Prison Ministers Act, 1863 (c. 79); ECCLESIASTICAL LAW, Vol. XIX., p. 548, No. 4062.

**SECT. 3.—THE MEDICAL OFFICER.**

*See* Prison Act, 1877 (c. 21), s. 5.

20. **Liability for assault on prisoner—Forcible feeding.**—R. v. MORTON BROWN, *Exp.* AINSWORTH, No. 2, *ante*.

21. ———.]—It is the duty of prison officials to preserve the health of prisoners in their custody, & *a fortiori* to preserve their lives, & it is for the jury to say whether the means adopted by those officials, for example the feeding of a prisoner by force, are necessary for that purpose.—LEIGH v. GLADSTONE (1909), 26 T. L. R. 139.

**Reports of medical officer to governor—Whether privileged from production.**—*See* DISCOVERY, Vol. XVIII., p. 169, No. 1221.

**SECT. 4.—OTHER OFFICERS.**

22. **Liability for assault on prisoner.**—HERRING v. HUDSON, No. 14, *ante*.

**Prisoner killed by officers—To prevent escape.**—*See* CRIMINAL LAW, Vol. XV.; p. 812, No. 8815.

**Warder assaulted by prisoner.**—*See* CRIMINAL LAW, Supp. II., p. 373, No. 7685a.

**Communication of information gained in course of official duties.**—*See* Official Secrets Act, 1911 (c. 28), s. 2; & generally, CRIMINAL LAW, Vol. XV., p. 659, Nos. 7104-7107.

**Part III.—Prisoners.****SECT. 1.—COMMITTAL AND TREATMENT.****SUB-SECT. 1.—IN GENERAL.**

*See* Prison Act, 1877 (c. 21).

23. **"Committal to prison"—Meaning of.**—An offender having been summarily convicted by a Metropolitan police magistrate, was conveyed to prison under a warrant by pltf., a police constable. Pltf. thereby incurred certain expenses which prisoner was unable to defray. An order having been made by the magistrate, directed to deft. under 27 Geo. 2, c. 3, to pay to pltf. the amount of such expenses, deft. refused to pay, on the ground that the liability for the expenses of conveying prisoners to prison had been transferred to the Secretary of State by Prison Act, 1877 (c. 21), s. 4. The same question was raised as to the expense of conveying from the police ct. to the

prison a man committed to take his trial for felony:—*Held*: (1) these expenses were payable by the Secretary of State & not by the county treasurer; (2) the words "committed to prison" in Prison Act, 1877 (c. 21), s. 57, refer to the act of the committing magistrate & not to the reception of prisoner in the gaol.—MULLINS v. SURREY COUNTY TREASURER (1881), 7 App. Cas. 1; 51 L. J. Q. B. 145; 45 L. T. 625; 46 J. P. 276; 30 W. R. 157; 15 Cox, C. C. 9, H. L.

*Annotation*:—*Refd.*, Mews v. It. (1882), 8 App. Cas. 339.

"**Criminal prisoner.**"—*See* CRIMINAL LAW, Vol. XIV., p. 31, Nos. 27, 28.

24. **When imprisonment commences—Unauthorised delay between arrest & imprisonment.**—By 7 Geo. 4, c. 57, s. 34, it is enacted that no creditor shall, after the commencement of the imprisonment of a prisoner, "avail himself of any

**PART II. SECT. 2.**

1. **Who may act—Whether vicar-choral.**—The 7 Geo. IV. c. 74, s. 68, enacts that in the appointment of chaplains to gaols in counties in Ireland, preference is to be given to some clergyman officiating within the parish in which the gaol is situate.

A vicar-choral attached to a cathedral within the parish, is not an officiating clergyman within 7 Geo. 4, c. 74, s. 68.—*Re* KIRWAN (1855), 5 I. C. L. R. 167.—*IR.*

**PART III. SECT. 1, SUB-SECT. 1.**

g. **Right to benefit of limits.**—A prisoner in custody for contempt may have the benefit of the limits.—R. v. KIDD (1836), 1 Out. Dig. 386.—*CAN.*

h. ———.]—Debtors in custody on mesne, as well as on final process, may have the benefit of the limits.—MONTGOMERY v. HOWLAND (1838), 1 Out. Dig. 386.—*CAN.*

k. ———.]—*Semble*: a constable may legally allow a debtor, whom he has arrested, to go at large so long as

before the return of the writ he deliver him to the sheriff.—*Ross v. WEBSTER* (1849), 5 U. C. R. 570.—*CAN.*

l. ———.]—DAVIS v. CASPER (1850), 1 Gr. 354.—*CAN.*

m. **When bail may be taken—Whether before debtor be actually conveyed to gaol.**—It is not necessary under C. S. U. C. c. 24, that a debtor be actually conveyed to gaol before bail can legally be taken by the sheriff.—SMITH v. FOSTER (1861), 11 C. P. 161.—*CAN.*

n. **Conveyance to prison—Duty of**

execution, issued or to be issued":—*Held*: where an actual imprisonment within the walls of a prison, follows upon an arrest for debt, as one continuous act, within the usual time allowed & required by law, then the arrest must be taken to be the commencement of the imprisonment; but where after the arrest is made, any delay, not sanctioned by law, takes place before the actual commitment to prison, such as by the favour of pltf., or the negligent or permissive escape of prisoner; then, not the arrest, but the actual coming within the walls of a prison, is the commencement of such imprisonment.—*YAPP v. HARRINGTON* (1837), 3 Bing. N. C. 907; 3 Hodg. 165; 5 Scott, 105; 6 L. J. C. P. 351; 132 E. R. 680.

**25. Maintenance of prisoners in county gaol—Liability of borough council.**—The city of S. in the county of W. had, by charter of James I., a gaol, & quarter sessions. By a local Act, the city was required to pull down & rebuild their gaol, & till it was rebuilt, the city prisoners were to be committed to the gaol of the county of W., the city paying for their maintenance as the justices of W. might direct. By a subsequent local Act, reciting the former Act, that it was not expedient to rebuild the city gaol, that permission had been asked & obtained from the county justices to continue to commit to the county gaol, & that R. had proposed, by way of compensation, to grant to the justices a piece of land for an addition to the gaol, the clauses of the local Act requiring the city to build a gaol, were repealed; the piece of land was vested in the High Sheriff of W. for the time being; & the prisoners were in future to be committed to the county gaol. No express provisions were made as to their maintenance. By the Municipal Corporations Act the bounds of the city of S. were enlarged:—*Held*: the local Acts did not amount to a special contract between the county & city as to the maintenance, etc. of prisoners within Prisons Act, 1842 (c. 98), s. 18. *Semble*: if it had amounted to such a contract between the county & the ancient city, it would not have been one relating to prisoners committed from the enlarged city.—*R. v. NEW SARUM CORPN.* (1853), 2 E. & B. 654; 1 C. L. R. 925; 22 L. J. M. C. 155; 22 L. T. O. S. 81; 17 J. P. 696; 17 Jur. 934; 118 E. R. 912.

*Annotation*.—*Reid*. *Bramston v. Colchester Corpn.* (1856), 6 E. & B. 246.

—*See, also*, LOCAL GOVERNMENT, Vol. XXXIII., p. 112. No. 756.

**26. Cost of conveyance to prison—Local practice**—Sum taken from prisoner by constable—Money directed to be restored to prisoner.]—*Deft.*,

committed to take his trial at the assizes for assaulting a constable, had a sum of £2 3s. 8d. taken from him by the constable who conveyed him to prison, to pay for, as was alleged, the expenses of conveying him to the prison, & his maintenance in prison till the trial, this being the ordinary practice in the county of Stafford:—*Held*: the practice was quite wrong, & the judge at the assizes directed the money to be restored to *deft.*—*R. v. BASS* (1849), 2 Car. & Kir. 822.

**27. Offence committed within Metropolitan Police district.**—The treasurer of a county partly included within the Metropolitan Police district is, under Indictable Offences Act, 1848 (c. 42), s. 26, liable to pay, out of the county rate, expenses, which prisoner has no means of defraying, incurred by a Metropolitan Police constable in conveying prisoners to the county gaol, under warrants of commitment made by justices of the county within the district, directed to the parish constable, & delivered for execution to the police constable under Metropolitan Police Act, 1839 (c. 47), s. 12; the orders upon the treasurer for payment of the expenses being made by county justices within the district; whether such committals are for trial upon charges of felony or misdemeanour, or upon remand followed by a committal or discharge, or upon summary convictions in a penalty, with an adjudication of imprisonment in case of non-payment. The county treasurer is also liable to pay, out of the county rate, like expenses incurred by a Metropolitan police constable under warrants of committal made by Metropolitan police magistrates, sitting at police *cts.*, & directed & delivered to such Metropolitan police constable, the orders for payment on *deft.* being also made by Metropolitan police magistrates, sitting at the police *cts.*, whether such committals are for trial or charges of felony or misdemeanour, or upon remand, or on summary convictions, or for refusing to enter into recognisances to keep the peace. But the county treasurer is not liable to pay a police constable the expenses of reconveying to a police *ct.* from the county gaol prisoner who had been previously committed there for re-examination, when the warrant to bring prisoner up again was made, not on the police constable, but upon the gaoler, who had employed the police constable to reconvey prisoner.

*Semble*: such expenses would be payable if the magistrate made his order to the constable to bring up prisoner at the same time as he ordered the gaoler to deliver him to the constable.—*LEVERICK v. MERCER* (1853), 14 Q. B. 759; 22 L. J. M. C. 81; 21 L. T. O. S. 18; 17 J. P. 196; 17 Jur. 1067; 1 W. R. 180; 117 E. R. 292.

*sheriff.*]—It is the duty of the sheriff of the county in which the city is, & not of the high bailiff of such city, to convey to the penitentiary prisoners sentenced at the recorder's *ct.*—*GLASS SHERIFF v. WIGMORE* (1861), 21 U. C. R. 37.—*CAN.*

—*R. v. PERKINS* (1872), N. B. Dig. 482.—*CAN.*

*p. Who may receive payment of fine—Whether constable.*]—A constable executing a warrant issued under 31 Vict. c. 60 (D), directing him to convey pltf. to gaol, & the gaoler to hold him for thirty days (absolutely, & not until the fine, etc., be sooner paid for the non-payment of which the warrant was issued), has no authority to receive the money & discharge prisoner.—*ABBOTT v. BRADLY* (1873), 23 C. P. 1.—*CAN.*

*q. Deputy keeper of gaol.*—*R. v. COLAHAN* (1907), 9 O. W. R. 661; 14 O. L. R. 379.—*CAN.*

*r. Maintenance of prisoners—Who may maintain—City or county.*]—*WENTWORTH COUNTY CORPN. v. HAMILTON COUNTY CORPN.* (1874), 34 U. C. R. 585.—*CAN.*

*s. ————*—*Re* ST. CATHARINES CORPN. & LINCOLN COUNTY CORPN. (1881), 46 U. C. R. 425.—*CAN.*

*t. ————*—*CHARLETON COUNTY CORPN. v. OTTAWA CORPN.* (1898), 28 S. C. R. 606.—*CAN.*

*a. Hiring out prisoners—Whether contract to give half wages to prisoner & half to municipality legal.*]—Two prisoners who were sentenced to be imprisoned with hard labour in the county gaol of pltf. municipality, there being no means of imposing hard labour on the premises connected with the gaol, were hired out to *defts.*, on the terms that one-half of the wages earned by prisoners was to go to the

municipality & the other half to prisoners. In an action brought by pltf. against *deft.* to recover an amount claimed to be due for work & labour:—*Held*: the contract was illegal, & pltf. could not recover the amount claimed.—*MUNICIPALITY OF LUNENBURG v. SMITH* (1892), 24 N. S. R. 104.—*CAN.*

*b. Warrant of commitment—Validity of.*]—Prisoner convicted at Springhill, in the county of Cumberland, was directed to be committed to the common gaol of the county of Cumberland at Amherst, that being the only common gaol of the territorial division over which the stipendiary magistrate of Springhill had jurisdiction:—*Held*: the imprisonment was properly ordered, & justified both the warrant & the constable in executing it.—*Re BURKE* (1894), 27 N. S. R. 286.—*CAN.*

—*See, also*, *v. MORGAN*

*Sect. 1.—Committal and treatment: Sub-sects. 1, 2, 3, 4, 5, 6 & 7, A. & B. Sect. 2: Sub-sects. 1, 2, 3, 4, 5 & 6. Sect. 3.]*

**28. — On summary conviction—Or committal for trial.]—**MULLINS *v.* SURREY COUNTY TREASURER, No. 23, *ante*.

**Committal on bad warrant.]—**See CROWN PRACTICE, Vol. XVI., p. 266, Nos. 740-742.

**Ball.]—**See CRIMINAL LAW, Vol. XIV., pp. 156-166.

**29. Removal of prisoner—Liability in trespass—Irregular removal.]—**COBBETT *v.* GREY, No. 1, *ante*.

**—.]—**See, also, CROWN PRACTICE, Supp. II., p. 387, Nos. 660a, 797a.

**Inquest on deceased prisoner.]—**See CORONERS, Vol. XIII., pp. 241, 242, Nos. 122, 132.

#### SUB-SECT. 2.—PRISON RULES.

See Prison Act, 1898 (c. 41).

**30. Jurisdiction of court to interfere with.]—**This ct. has no authority to interfere in the regulation & management of the gaols of the kingdom. Therefore, where persons guilty of a misdemeanour, & confined in a county gaol under the sentence of this ct., prayed to be allowed the same indulgences as prisoners confined for felony, the ct. refused to make any order upon the gaoler for that purpose.—*R. v. CARLILE* (1822), 1 Dow. & Ry. K. B. 535; 1 Dow. & Ry. M. C. 129.

**31. —.]—***R. v. COOPER* (1843), 4 State Tr. N. S. 1249; 1 L. T. O. S. 143.

#### SUB-SECT. 3.—PRISONER AWAITING TRIAL.

See Prison Act, 1877 (c. 21), s. 39; CRIMINAL LAW, Vol. XIV., pp. 199-201, Nos. 1788-1801.

**32. Supply of books.]—**A prisoner before trial ought to have any books that he may require.—*R. v. BRYSON* (1848), 12 J. P. 585.

#### SUB-SECT. 4.—TREATMENT OF APPELLANTS.

See CRIMINAL LAW, Vol. XIV., p. 507, No. 5607; SUPP. II., p. 369, No. 5607a.

(1901), 2 O. L. R. 413; 21 C. L. T. 533; *affd.*, 21 C. L. T. 683.—CAN.

**d. Legality of warrant—Extending term of person's imprisonment.]—**Re WHETON (N. S.) (1926), 46 Can. Crim. Cas. 247.—CAN.

**e. Time of imprisonment—How reckoned.]—***Semble*: at whatsoever hour of the day a prisoner is placed in the hands of a gaoler, his term of imprisonment runs from the first moment of that day.—*COOPER v. THE GOVERNMENT*, [1906] T. S. 436.—S. AF.

#### PART III. SECT. 1, SUB-SECT. 2.

**30.1. Jurisdiction of court to interfere with.]—**An application on behalf of prisoner for a relaxation in his favour of the rules of the prison where he is confined, should be brought forward by way of petition, & not as a motion; & will not be heard unless a copy of the rules, properly verified, is before the ct. *Semble*: such applications should not be entertained at all.—*R. v. WALLACE* (1853), 6 Cox, C. C. 193.—IR.

#### PART III. SECT. 1, SUB-SECT. 3.

**1. General rule.]—**The liberty of an

awaiting trial prisoner who is unable to find bail can be restricted legally only by such reasonable measures as are necessary to insure his appearing for examination & trial & to insure the proper management & discipline of the gaol.—*JOHANNESBURG GAOL (GOVERNOR) v. WHITTAKER*, [1911] T. P. D. 798; [1911] W. L. D. 139.—S. AF.

**g. Time for declaring.]—**R.G. 100 is imperative that a prisoner arrested & in close custody must be declared against before the end of the term after his arrest, & it is no excuse that a summons was pending during the last week of the term to set aside the *captas* & arrest.—*HOUTALING v. CUTTLE* (1875), 6 P. R. 251.—CAN.

**h. Harsh & improper treatment of prisoners—Investigation of complaints.]—**Where prisoner states in his affidavit for postponement of his trial that, in consequence of the harshness of the governor of the gaol in which he is confined in refusing to allow him pens, ink, & paper whereby to communicate with his friends & prepare for his trial, he cannot procure witnesses whose names are given in the affidavit, & who are also stated to be necessary for his defence, the ct. will grant a post-

#### SUB-SECT. 5.—PRODUCTION OF PRISONERS IN COURTS OF LAW.

**Habeas corpus.]—**See CROWN PRACTICE, Vol. XVI., pp. 250-275, Nos. 501-888.

**Arraignment.]—**See CRIMINAL LAW, Vol. XIV., p. 248, Nos. 2414-2419.

#### SUB-SECT. 6.—CAPITAL PUNISHMENT.

See Capital Punishment Amendment Act, 1868 (c. 24).

**Time & place of execution—Not part of sentence.]—**See CRIMINAL LAW, Vol. XIV., p. 333, No. 3520-3522.

**Refusal of sheriff to execute condemned prisoner.]—**See CRIMINAL LAW, Vol. XV., p. 667, No. 7214.

#### SUB-SECT. 7.—TREATMENT OF SPECIAL CLASSES.

##### A. Criminal Lunatics.

See Criminal Lunatics Acts, 1800 (c. 94), 1884 (c. 64); Trial of Lunatics Act, 1883 (c. 38); Lunacy Act, 1890 (c. 5); LUNATICS, Vol. XXXIII., pp. 273, 274.

**Necessity for trial & conviction.]—**See CRIMINAL LAW, Vol. XIV., p. 241, No. 2296.

**Necessity for appearance in court—Prisoner dangerously insane.]—**See CRIMINAL LAW, Vol. XIV., p. 246, No. 2392.

**33. Prisoner becoming lunatic in prison.]—**If prisoner becomes a lunatic in prison, he will be properly dealt with & taken care of.—*R. v. KING* (1909), 2 Cr. App. Rep. 306, C. C. A.

##### B. Other Classes.

**Prisoners sent to reformatory & industrial schools.]—**See EDUCATION, Vol. XIX., pp. 576-578.

**Prisoners sent to Borstal institutions.]—**See CRIMINAL LAW, Vol. XIV., pp. 480, 481, Nos. 5238-5252.

**Youthful offenders generally.]—**See CRIMINAL LAW, Vol. XIV., p. 491, Nos. 5406-5411.

**Habitual criminals.]—**See CRIMINAL LAW, Vol. XIV., pp. 481-490, Nos. 5253-5399.

**Habitual drunkards.]—**See CRIMINAL LAW, Vol. XIV., pp. 490, 491, Nos. 5400-5405.

ponement.—*R. v. WALKER* (1851), 5 Cox, C. C. 320.—IR.

**j. Right to photograph accused & take finger prints.]—**ADAMSON *v.* MARTIN, [1916] S. C. 319.—SCOT.

**k. Right to see legal adviser.]—**An awaiting trial prisoner is entitled to access to his legal adviser at reasonable times.—*WHITTAKER v. ROOS, MORANT v. ROOS*, [1912] App. D. 92.—S. AF.

**l. Confinement in punishment cells—Right to claim for damages.]—**WHITTAKER *v.* ROOS, MORANT *v.* ROOS, [1912] App. D. 92.—S. AF.

#### PART III. SECT. 1, SUB-SECT. 5.

**m. Right of prisoner to appear in ordinary clothes at trial.]—**The gaol regulations direct that no prisoner shall be placed on his trial or give evidence in ct. in prison garb. A hard labour prisoner, charged as such with assault on a fellow prisoner, was tried in prison clothes & convicted.—*Held*: the breach of the gaol regulations did not invalidate the proceedings, & as prisoner had not been prejudiced the sentence should not be quashed.—*FENNESSEY v. R.*, [1907] T. S. 74.—S. AF.

## SECT. 2.—RELEASE AND DISCHARGE.

## SUB-SECT. 1.—BY ACT OF GRACE.

See, generally, CONSTITUTIONAL LAW, Vol. XI., pp. 516–518, Nos. 172–234; Criminal Appeal Act, 1907 (c. 23), s. 19.

34. Permission to reside outside gaol.—Under supervision.—No presumption of discharge.]—Deft. to an action in which the East India Co. were pltf's., having had a verdict given against him & judgment signed for damages & costs, was imprisoned in the gaol at Bombay under a writ of *ca. sa.* The medical officer in attendance having reported that a temporary release from confinement was necessary for his health, the Govt. at Bombay gave orders to the sheriff & the superintendent of police that he should be permitted temporarily to reside outside the gaol, under such surveillance as might prove as little irksome as possible to prisoner while consistent with its perfect efficiency. On being informed of the proposal deft. gave a written reply. "I shall be grateful for any change, & the consideration for my health is indeed most welcome." He was removed to a residence outside the gaol, under the charge of the sheriff's peons, & after remaining under their charge for some months, he was remitted to the gaol. An application was made to the Supreme Ct. at Bombay that he should be discharged from custody, & was refused:—*Held*: the removal of deft. to a residence outside the gaol did not, under the circumstances, operate as a discharge, the custody continued; & deft., having assented to such removal, was estopped from alleging that he did not continue in the custody of the sheriff.—*HAINES v. EAST INDIA CO.* (1856), 11 Moo. P. C. C. 39; 6 Moo. Ind. App. 467; 28 L. T. O. S. 165; 5 W. R. 159; 14 E. R. 609, P. C.

## SUB-SECT. 2.—ON EARNING REMISSION.

See Prison Act, 1898 (c. 41), s. 8.

Sentence of hard labour.]—See CRIMINAL LAW, Vol. XIV., p. 478, No. 5200.

## SUB-SECT. 3.—ON COMPLETION OF SENTENCE.

See Prison Act, 1898 (c. 41), s. 12.

35. Time of prisoner's discharge.—Evidence of —Daily book of public prison.]—The daily book

of a public prison is good evidence to prove the time of prisoner's discharge.—*R. v. AICKLES* (1785), 1 Leach, 390; 168 E. R. 297

Annotation:—*Distd. Salte v. Thomas* (1802), 3 Bos. & P. 188.

36. —.]—*Qu.*: whether prisoner under sentence should be discharged at midnight or kept till the morning.—*STOCKDALE v. CHAPMAN* (1835), 7 C. & P. 363, N. P.; *subsequent proceedings* (1836), 4 Ad. & El. 419.

—.]—See CRIMINAL LAW, Vol. XIV., p. 477, No. 5193; Vol. XV., pp. 833, 834, Nos. 9151–9155.

## SUB-SECT. 4.—RELEASE ON LICENCE.

See Penal Servitude Acts, 1853 (c. 99), ss. 9, 10, 1864 (c. 47), ss. 4–6, 10, 1891 (c. 69), ss. 2, 3; Prevention of Crimes Act, 1871 (c. 112), s. 2.

37. Duty to report to police.]—*R. v. HOWARD* (1922), 16 Cr. App. Rep. 145, 161, C. C. A.

Conviction for fresh offence.—Whether sentence concurrent with remanet.]—See CRIMINAL LAW, Vol. XIV., p. 477, No. 5188.

## SUB-SECT. 5.—PROVISIONS ON DISCHARGE.

Gratuities & relief.]—See Prison Acts, 1865 (c. 126), p. 23, 1877 (c. 21), ss. 9, 29; Discharged Prisoners Aid Act, 1802 (c. 44), s. 1; Released Persons (Poor Law Relief) Act, 1907 (c. 14).

## SUB-SECT. 6.—OTHER CASES.

See Cases *infra*.

## SECT. 3.—ESCAPE.

38. Right of gaoler to recapture — Without warrant.]—Prisoner in custody, under a sentence of imprisonment for two years, on a conviction for a misdemeanour, was discharged out of custody, on bringing a writ of error & entering into recognisances to prosecute the writ with effect. No notice was given to prosecutors, nor were the recognisances duly filed in the Crown Office. He was therefore ordered to be recommitted. The judge's warrant under which he was retaken, directed his apprehension & re-committal, stating it to be "in

## PART III. SECT. 2, SUB-SECT. 4.

n. Conviction for fresh offence.—Where prisoner must serve new sentence.]—Under Ticket of Leave Act, R. S. C. 1906, c. 150, ss. 7 & 8, when a prisoner, who has obtained a license to be at large after undergoing part of a gaol sentence in one province & who has afterwards been confined in a penitentiary in another province for a subsequent offence, thus forfeiting his license, is arrested upon the expiration of such later sentence for the purpose of his completing the term of his first sentence, he should, notwithstanding sect. 8 (3) be confined in a gaol in such other province & not in the penitentiary where he was last confined.—*R. v. MCCOLL* (1911), 21 Man. L. R. 552.—CAN.

## PART III. SECT. 2, SUB-SECT. 6.

o. When discharge granted.—Defects in warrant of commitment.]—*R. v. SMITHMAN*, 24 C. L. T. 329.—CAN.

p. —.]—Deft. in custody in execution for a sum not exceeding £100 is not entitled to his discharge unless he has been six months in con-

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finement in gaol.—*DENHAM v. TALBOT* (1836), 5 O. S. 79.—CAN.

q. —.]—Deft., committed to prison on mesne process, & charged in execution in the cause without a new affidavit, before 7 Vict. c. 31:—*Held*: not entitled to his discharge.—*HAMILTON v. MINGAY* (1841), 1 U. C. R. 22.—CAN.

r. — Debt paid.]—A gaoler may release a prisoner imprisoned for debt as soon as the money paid for that person's maintenance becomes exhausted.—*HLANGA v. WINNICOTT*, [1908] K. D. C. 188.—S. AF.

t. Affidavit of detention.—Contents of.]—To detain a prisoner who has applied for his discharge, the affidavit must not only state his possession of property obtained since his imprisonment (or his obtaining his allowance), but also that he has secreted or fraudulently parted with it.—*WILLIAMS v. CROSBY* (1823), Tay. 18.—CAN.

a. Motion to set aside discharge.—Contents of.]—On a motion to set aside an order to discharge prisoner from arrest, it appeared that the affidavit to hold to bail described deponent's

residence as at Canandaigua (State of New York being omitted):—*Held*: description insufficient.—*BYARD v. READ* (1827), Tay. 413.—CAN.

b. To whom application for discharge made.—Court of Chancery.]—Deft. confined in close custody under a writ of arrest, may apply to the Ct. of Ch. for his discharge under C. S. U. C. c. 26, s. 7.—*LAWSON v. CROOKSHANK* (1869), 2 Ch. Ch. 413.—CAN.

## PART III. SECT. 3.

c. Whether escape from building other than prison constitutes offence.]—*R. v. BUDHU* (1891), Udal, 265.—Fiji.

d. —.]—In an action for an escape on final process, a plea of the insufficiency of the gaol is void.—*DOWAN v. McDONELL* (1839), 1 Ont. Dig. 238.—CAN.

e. Arrest.—When set aside.—Whether after prisoner escapes.]—The ct. will not set aside an arrest for irregularity in the affidavit, after prisoner has escaped.—*KEEFER v. MERRILL* (1827), Tay. 490.—CAN.

f. Order of discharge of Lieutenant-Governor.—Whether justifying gaoler in

**Sect. 3.—Escape. Sect. 4: Sub-sects. 1, 2 & 3, A. & B.]**

execution of the judgment in the said prosecution":—*Held*: the warrant was good & it was not necessary to state, on the face of the warrant, how long the renewed imprisonment was to continue.

*Semble*: without any warrant the gaoler would have been justified in retaking prisoner as for an escape, as he was improperly at large.—*DUGDALE v. R.* (1854), 3 C. L. R. 74; 24 L. J. M. C. 55; 24 L. T. O. S. 99; 3 W. R. 24.

**Liability of sheriffs.]—See SHERIFFS.**

*See, further, CRIMINAL LAW, Vol. XV., pp. 712–716, Nos. 7688–7743.*

**SECT. 4.—LEGAL CAPACITY OF PRISONERS.**

**SUB-SECT. 1.—IN GENERAL.**

*See Forfeiture Act, 1870 (c. 23); Penal Servitude Act, 1853 (c. 99), ss. 6, 7; Convict Prisons Act, 1850 (c. 39); & CRIMINAL LAW, Vol. XIV., pp. 494–496, Nos. 5455–5461.*

**39. Competency to make affidavit.]—**If an affidavit made by a convicted felon, the ct. will grant a rule to take it off the file, but it must be shown by affidavit that his competency has not been restored.—*HOLMES v. GRANT* (1835), 1 Gale, 59.

*Annotations:—Mentd. Beck v. Mordaunt* (1835), 4 Dowl. 112; *Lane v. Glennie* (1837), Will. Woll. & Dav. 479; *Wilkinson v. Page* (1844), 6 Man. & G. 1012.

—*See, now, Evidence Act, 1843 (c. 85).*

**Conviction of mortgagor—Foreclosure by mortgage—Effect of.]—See MORTGAGE, Vol. XXXV., p. 551, No. 2798.**

**40. Conviction of trustee—Power to act.]—**A trustee who is a mtgee. can transfer the mtged. trust property, even after a conviction for felony, without the concurrence of the administrator appointed under Forfeiture Act, 1870 (c. 23).—*Re LEVY & DEBENTURE CORPN.'S CONTRACT* (1894), 42 W. R. 533; 38 Sol. Jo. 530; 8 R. 820.

**Conviction of executor.]—See EXECUTORS, Vol. XXIII., pp. 100, 165, Nos. 932, 1785.**

**Forfeiture of rights under will—Testator's death caused by convict beneficiary.]—See EXECUTORS, Vol. XXIII., p. 167, No. 1834.**

**Receipt of alimony by wife in prison.]—See HUSBAND & WIFE, Vol. XXVII., p. 407, No. 4068.**

**Conviction of convict released on licence—Effect of.]—See CRIMINAL LAW, Vol. XIV., p. 496, No. 5466.**

**Franchise disqualification.]—See ELECTIONS, Vol. XX., p. 10, Nos. 38, 39.**

**Whether subject to bankruptcy laws.]—See BANKRUPTCY, Vol. IV., pp. 33, 89, Nos. 279, 803.**

**SUB-SECT. 2.—PROCEEDINGS BY PRISONERS.**

*See Forfeiture Act, 1870 (c. 23), s. 8.*

**Action against governor—For penalty under**

*permitting escape.]—MITCHELL v. HARVIE* (1852), 1 P. E. I. 64.—*CAN.*

**g. Change of prison after escape—Unexpired sentence on recapture—Where served.]—**A statute provided that "Every one who escapes from imprisonment shall, on being retaken, undergo, in the prison he escaped from, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape." After an escape & before recapture, the penitentiary was changed from one building to another:—*Held*: a con-

viction for an escape was not necessary to imprisonment for the unexpired portion of the sentence; & imprisonment in the new building was lawful.—*It. v. PETERSON* (1890), 6 Man. L. R. 311.—*CAN.*

**h. Prisoner allowed out on recognisance—Whether guilty of escape.]—R. v. ROBINSON (1907), 10 O. W. R. 338; 14 O. L. R. 519.—*CAN.***

**k. What escapes come within 51 Geo. 3—Whether escape after conviction under 1 Vict. c. 87.]—**When a prisoner was convicted on an indictment under 51 Geo. 3, c. 63, for an escape from

*Habeas Corpus Act, 1679 (c. 2).]—See CROWN PRACTICE, Vol. XVI., p. 272, Nos. 826–831.*

**Attendance at court.]—See CROWN PRACTICE, Vol. XVI., pp. 274, 275, Nos. 871–875.**

**41. Holder of licence to be at large—Effect of Forfeiture Act, 1870 (c. 23).]—**Testatrix, by her will, dated in July, 1869, devised & bequeathed all her real & personal estate to T. in trust for her sister M. for life, & after her decease upon trust to pay to or permit H. to receive the interest for his life, but if he should become bkpt., or publicly insolvent, or should compound with his creditors, or should assign or encumber his interest under the trust, or any part thereof, or should otherwise by his own act, or by operation of law, be deprived of the absolute personal enjoyment of the same interest, or any part thereof, then, & in either of such cases, the trust in favour of H. should be void, & T. should thenceforth apply the interest for the maintenance, education, & support of the children of H. Testatrix died in 1871, & M. died in 1881. In July, 1878, H. was convicted of felony, & sentenced to ten years' penal servitude. Before the expiration of his sentence he obtained a ticket-of-leave, & commenced this action for the administration of the estate of testatrix, & claimed the arrears of interest:—*Held*: (1) under above Act, s. 30, he could commence the action; (2) he had not been deprived of the actual enjoyment of the life interest by any operation of law; & he was entitled to all arrears of interest.—*Re DASH, DARLEY v. KING, KING v. DARLEY* (1887), 57 L. T. 219.

**Enforcement of rights resulting from crime—Admissibility of evidence.]—See EVIDENCE, Vol. XXII., p. 280, No. 2669.**

**42. Attorney imprisoned during conduct of case—Recovery of costs.]—**An attorney is entitled to recover from his client his costs for conducting the client's defence, though during the greater part of the time that the suit was going on he was in prison.—*NOEL v. PARKES* (1838), 2 Jur. 108.

**SUB-SECT. 3.—PROCEEDINGS AGAINST PRISONERS.**  
**A. Service of Process.**

**43. Delivery to governor for delivery to prisoner—Subpoena.]—**The service of the subpoena on the deputy governor of the gaol in which deft. is confined for a misdemeanour is good service.—*NEWMHAM v. PEMBERTON* (1845), 2 Coll. 54; 5 L. T. O. S. 36; 9 Jur. 637; 63 E. R. 634.

**44. — After prisoner discharged.]—**Where a deft. had given as his address the Q. B. Prison & left before service, but could not be discovered, the ct. refused to allow substituted service of the Q. B. Prison.

I cannot make a prison a man's place of address for service, merely because he has been in such prison (*WIGRAM, V.-C.*).—*WILKINS v. NAINBY* (1846), 8 L. T. O. S. 115.

**45. Delivery to warden for delivery to prisoner**

prison, the former conviction (which was proved by a certificate from the Crown office) having been under 1 Vict. c. 87, ss. 6 & 10, & the sentence six months' imprisonment:—*Held*: the conviction was bad, as the escape did not come within 51 Geo. 3, c. 63.—*R. v. MEANY* (1839), Jebb C. C. 249.—*IR.*

**l. "Breach of prison"—What amounts to.]—**An escape with any violence from lawful custody is a "breach of prison" at common law, although no prison building or enclosure be actually broken.—*R. v. WILLIAMS* (1883), 1 N. Z. L. R. C. A. 493.—*N.Z.*

—**Notice of trial.**]—Notice of trial to a turnkey, good.—*WHITEHEAD v. BARBER* (1720), 1 Stra. 248; 93 E. R. 503.

46. —.]—*MOORE v. NEWBOLD* (1835), cited in Halsbury's Laws of England, Vol. XXIII., p. 253.

**Service of notice to produce document.**]—*See EVIDENCE*, Vol. XXII., p. 248, No. 2278.

47. **Prohibition of—By prison regulations.**]—*DOE d. WESTBROOK v. JOHNSON* (1851), 17 L. T. O. S. 75.

— **By governor.**]—*See CONTEMPT OF COURT*, Vol. XVI., p. 33, No. 323.

*B. Levy of Execution.*

*See, generally, EXECUTION*, Vol. XXI., pp. 407 *et seq.*

48. **Prisoner in custody on mesne process.**]—If judgment is obtained against deft. in custody on mesne process, pltf. in the action may issue execution against the goods without discharging him.—*JONES v. TYE* (1832), 1 Dowl. 181.

49. **Prisoner in custody for contempt.**]—Prisoner in custody under process of contempt of this ct., is liable to be charged in execution upon a judgment in this ct. in the ordinary way.—*WADE v. WOOD* (1845), 1 C. B. 462; 135 E. R. 620.

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## PRIVATE BILLS.

*See PARLIAMENT.*

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## PRIVATE WAYS.

*See EASEMENTS AND PROFITS À PRENDRE.*

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## PRIVILEGED COMMUNICATIONS.

*See BARRISTERS; DISCOVERY, INSPECTION, AND INTERROGATORIES; EVIDENCE; LIBEL AND SLANDER; SOLICITORS.*

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## PRIVILEGES OF MEMBERS OF PARLIAMENT.

*See PARLIAMENT.*

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## PRIVILEGES OF PEERS.

*See PARLIAMENT; PEERAGES AND DIGNITIES.*

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## PRIVILEGES OF THE CROWN.

*See CONSTITUTIONAL LAW.*

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## PRIVY COUNCIL.

*See CONSTITUTIONAL LAW; COURTS; DEPENDENCIES.*

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NOTE.—In this Title decisions of British Vice-Admiralty Courts & Prize Courts abroad are inserted in their appropriate places below the horizontal line on each page.

## Part I.—Definitions.

1. **Prize distinguished from booty.**—I am therefore led to the consideration of the meaning of the word "prize," as here applied. It evidently means maritime capture effected by maritime force only—ships & cargoes taken by ships. It is perfectly well known, that a land force has no interest in prize property so called ; what a land force takes by itself is not prize, but booty. What is taken by a conjunct expedition was formerly erroneously considered as vested, in a certain proportion of it, in the capturing ships under those prize acts ; but in a great & important case lately decided. [*The Hoogskarpel*, No. 410, *post*], it was determined that the whole was entirely out of the effect of these prize acts ; & in so deciding, determined by direct & included consequence, that the words "prizes taken by any of His Majesty's ships or vessels of war," cannot apply to any other cases than those in which capture was made by ships only : & that if a land force is employed in it, the law does not recognise its

title. That decision clearly included in itself an interpretation of those words wherever they occur in any Act of Parliament touching such matters (SIR WILLIAM SCOTT).—*Re GENOA & ITS DEPENDENCIES, SPEZZIA, SAVONA, ETC.* (1820), 2 Dods. 444 ; 165 E. R. 1541.

*Annotations* :—**Reld.** *Booty in the Peninsula Case* (1822), 1 Hag. Adm. 39 ; *Re Cayenne* (1822), 1 Hag. Adm. 41, n. ; *The Thetis* (1835), 3 Hag. Adm. 228.

2. **Prize ship—A ship of war.**—*THE GAUNTLET*, DYKE v. ELLIOTT, No. 262, *post*.

3. **Prize goods.**—*THE OOSTER EEMS* (1784), 1 Ch. Rob. 284, n. ; 1 Eng. Pr. Cas. 106, n. ; 165 E. R. 178, P. C.

*Annotations* :—**Distd.** *The Two Friends* (1799), 1 Ch. Rob. 271. **Consd.** *The Progress* (1810), Edw. 210 ; *The Roumanian*, [1916] 1 A. C. 124. **Montd.** *Bedreechund v. Elphinstone* (1830), 2 State Tr. N. S. 379 ; *Re Ferdinand (Ex-Tsar of Bulgaria)*, [1921] 1 Ch. 107.

4. —.—.—*THE TWO FRIENDS*, No. 997, *post*.

5. **Imminence of war.**—*SORENSEN v. R., THE ARIEL*, No. 120, *post*.

6. —.—.—The rule of the Prize Ct. that

property in goods is considered to be in the shipper until delivery, & that a sale *in transitu* is invalid, does not apply unless war is imminent & expected on the part of the vendor, & the sale is made to defeat the rights of belligerent captors. Between July 20 & 30, 1914, German merchants sold to Dutch merchants various parcels of cargo *in transitu*, shipped on board a British steamship & consigned to a German port "to order." The Dutch merchants duly paid for the goods, which they re-sold to customers of their own. On Aug. 4, 1914, war broke out between Great Britain & Germany, & when the ship called at a British port the cargo was seized as prize & afterwards sold:—*Held*: on the evidence, war

with Great Britain was not regarded as imminent, in its proper meaning of "threatening or about to occur," by the German vendors when they sold the goods; consequently the sales were valid, & the goods were not confiscable as prize; & the proceeds of sale must be released.—*THE SOUTH-FIELD* (1915), [1917] A. C. 390, n.; 85 L. J. P. 78; 113 L. T. 655; 31 T. L. R. 577; 59 Sol. Jo. 681; 13 Asp. M. L. C. 150; 1 Br. & Col. Pr. Cas. 332.

*Annotations*:—*Reid*. The *Daksa*, [1917] A. C. 386; The *Kronprinsessan Margareta*, The *Thal*, [1917] P. 114; The *United States*, [1917] P. 30; The *Parohim*, [1918] A. C. 157. *Mentd*. The *Dirigo*, The *Hallingdale*, etc., [1919] P. 204.

7. *Port*.]—*THE MÖWE*, No. 289, *post*.

## Part II.—Rights in Prize.

### SECT. 1.—PREROGATIVE RIGHTS OF CROWN.

8. *Rights primâ facie in Crown*.]—A belligerent nation which is in the exercise of these rights of war, is bound to find tribunals for the regulation of them, tribunals clear in their authority, as well as pure in their administration; & if from causes of private internal policy, arising out of the peculiar relation of the component parts of the belligerent state, difficulties arise, the neutral is not to be prejudiced on that account; he has a right to speedy & unobstructed justice. . . .

This ct. [Admlty.] has never thought it a breach of that equal justice which it owes to all its suitors, to suffer a cause to be interposed, that, from its magnitude of interests or other circumstances of just weight had a peculiar claim to a pre-audience. . . . If an order [from the govt. for the release of a ship & cargo] had been sent to this ct. it certainly would have met with an instant obedience; because the Crown having the only beneficial interest in droits here, the seisor having nothing but a mere expectation of bounty, & the Crown having an undoubted right to exempt from the operations of war, any individual subject of the enemy himself, this ct. would, in pursuance of such an order release the property, although it directly appeared to be an enemy's property (*SIR WILLIAM SCOTT*).—*THE MADONNA DEL BURSO* (1802), 4 Ch. Rob. 169; 1 Eng. Pr. Cas. 370; 165 E. R. 574.

9. —.]—Capture by a cutter, fitted out by the captain of a man of war, as a tender, & manned from his ship, but without a commission, or authority from the Admlty., will not enure to the benefit of the King's ship.

It is an elementary principle of prize law that all prizes belong to the state, in monarchies to the sovereign. By modern policy this interest has been granted out to persons of certain descriptions, acting under the authority of public commissions (*SIR WILLIAM SCOTT*).—*THE MELOMANE* (1803), 5 Ch. Rob. 41; 1 Eng. Pr. Cas. 419; 165 E. R. 690.

*Annotations*:—*Consd*. The *Donna Barbara* (1831), 2 Hag. Adm. 366. *Reid*. The *Charlotte* (1813), 1 Dods. 212; The *Zepherina* (1830), 2 Hag. Adm. 317; The *Anchab*, etc., [1921] P. 218. *Mentd*. R. v. *Serva* (1845), 1 Den. 104.

10. —.]—The power of Crown to direct the release of property seized as prize, before adjudication & against the will of the captors, is not taken away by any grant of prize conferred in the Order of Council, the Proclamation, or the Prize Act.

The rights of the Crown are public rights, con-

ferred not merely for private purposes or for personal splendour, but for the public service, & to answer the great exigencies of public interest, & claims of public justice; as such, they demand the active protection of every ct., in which the occurrence of them is suggested to arise. The right which is asserted by the claimant, & is denied on the part of the captor, is that of releasing ships & goods that had been taken *jure belli*, before adjudication, & without the consent of the captors. . . . That the Crown has exercised the power in this instance, is . . . sufficiently proved, by the solemn evidence of an official letter from the Secretary of State for the foreign department, to the minister of that country whose subjects were principally interested in the question, informing him that the ships were released, & that orders were given by the Lords of the Admlty. for that purpose. . . . Prize is altogether a creature of the Crown. No man has, or can have, any interest but what he takes as the mere gift of the Crown. . . . The acquisitions of war belong to the Crown (*SIR WILLIAM SCOTT*).—*THE ELSEBE* (1804), 5 Ch. Rob. 173; 1 Eng. Pr. Cas. 441; 165 E. R. 738.

*Annotations*:—*Consd*. *Alexander v. Wellington* (1831), 2 Russ. & M. 35; The *Derfflinger*, The *Förde*, The *Leda*, *Re American Meat Packers' Agreement*, *Re Certain Swedish Copper*, [1919] P. 264. *Reid*. The *Parlement Belge* (1879), 4 P. D. 129.

11. —.]—Formerly there was a Lord High Admiral, who now exists only in contemplation of law. All rights of prize belong originally to the Crown, & the beneficial interest derived to others can proceed only from the grant of the Crown. . . . It appears . . . from the tenor of this order, [Order of Council, 1665], that the distinction between the Admiral & the rights of the Crown is founded in this, that when vessels come in not under any motive arising out of the occasions of war, but from distress or weather, or want of provisions, or from ignorance of war, & are seized in port, they belong to the Lord High Admiral; but where the hand of violence has been exercised upon them, where the impression arises from acts connected with war, from revolt of their own crew, or from being forced or driven in by the King's ships, they belong to the Crown. . . . The rights of the Lord High Admiral, though they are to be duly supported, are not to be extended by construction; & for these reasons, that the grants of the Crown differ, in this respect, from other grants, that they are to be taken strictly, & are not to be interpreted to the benefit of the grantee; &

secondly, that the rights of the Crown, being public rights, deposited there for great public purposes, are not to be alienated beyond the precise tenor of the grant. . . . The grant to the Lord High Admiral, whatever it conveys, carries with it a total & perpetual alienation of the rights of the Crown. They are gone for ever, & separated from the Crown, & nothing short of an Act of Parliament can restore them; whereas the grant to captors is nothing more than a mere temporary transfer of the beneficial interest; the Crown would not be chargeable with a violation of any public law, if it did not issue the grant. . . . With respect to captures in roads, generally, to raise a question of this kind, a road must at least be so connected with the common uses of the port as to constitute a part of the port in which the capture is alleged to have been made. . . . There are roads along many parts of the coasts of this kingdom, which make no part of any port. The port of Yarmouth is very different from the roads of Yarmouth; . . . a ship, lying merely at anchor in a road, without being protected by points of lands, has been held to support a claim of this nature on the part of the Admiralty. It is not enough that ships should anchor there for a short stay. It must . . . be the place where vessels not only arrive, but take up their station for the purpose of unloading their cargoes, in the ordinary course of commerce (SIR WILLIAM SCOTT).—THE MARIA FRANCOISE (1806), 6 Ch. Rob. 282; 1 Eng. Pr. Cas. 559; 165 E. R. 932.

*Annotations*.—*Apld.* The Abonema, The Hillerod, The Florida, The Albania, The Adjutant, [1919] P. 41. *Refd.* *Taft of Russian Timber* (1859), 5 Jur. N. S. 1109.

12. —.]—THURGAR v. MORLEY, No. 21, *post*.

13. —.]—All prize, arising from capture, is *prima facie* in the Crown, & is now derived from the Crown under different acts of the legislature (SIR JOHN NICHOLL).—H.M.S. THETIS (1835), 3 Hag. Adm. 228; 166 E. R. 390.

*Annotation*.—*Refd.* The Tubantia, [1924] P. 78.

14. —.]—All prize belongs absolutely to the Crown, which for the last one hundred & fifty years has been in the habit of granting it to "the takers" who are of two classes, actual captors & joint or constructive captors.—*Re BANDA & KIRWEE BOOTY* (1866), L. R. 1 A. & E. 109; 35 L. J. Adm. 17; 14 L. T. 293; 12 Jur. N. S. 819; 2 Mar. L. C. 323.

*Annotations*.—*Refd.* The Feldmarschall, [1920] P. 289. *Mentd.* *Banda & Kirwee Booty* (1875), 33 L. T. 332; *Re Banda & Kirwee Booty*, Kinloch v. R. Kinloch v. R. & Secretary of State for India in Council, [1882] W. N. 164.

15. — Capture by non-commissioned persons.]—By Admty. law, property of a ship taken from an enemy without letters of mart, vests in the King.—*R. v. BROOM* (1697), 12 Mod. Rep. 134; 5 Mod. Rep. 340; Carth. 398; 87 E. R. 1217; *sub nom.* R. v. BROME, Comb. 444; *sub nom.* BROOM'S CASE, 1 Salk. 32.

*Annotations*.—*Refd.* *Le Caux v. Eden* (1781), 2 Doug. K. B. 594. *Mentd.* *Shermoulin v. Sands* (1697), 1 Ld. Raym. 271.

16. —.]—Sentence in the Ct. of Admty., upon a prize to a privateer, as a droit to the Crown for want of a letter of marque. The property is in the Crown. Motion, to restrain the parties from receiving, & the Register of the Ct. of Admty. from paying, the proceeds under a Treasury Warrant, refused, with costs.—*NICOL v. GOODALL* (1804), 10 Ves. 155; 32 E. R. 803, L. C.

17. Rights not subject to dispossession.—By governor of Crown territory.]—If the King was entitled to any interest by virtue of this seizure, if his right was once vested, no act of this gentleman, in the capacity of an officer of the East

India co.'s settlement at St. Helena, could dispossess the King & defeat his title to confiscation which had already accrued (SIR WILLIAM SCOTT).—THE RICHMOND (1804), 5 Ch. Rob. 325; 165 E. R. 792.

*Annotations*.—*Mentd.* The Sorsfarenen (1915), 85 L. J. P. 121; The Hakan, The Maracalbo, [1916] P. 266.

18. Precedence over all other claims.]—The rights of the Crown as captors of an alien enemy ship take precedence of all other claims, & are not displaced by an antecedent arrest of the ship by claimant for necessaries. Proceedings by claimant for necessaries are suspended on seizure of the ship by the Crown.—THE TERGESTEA (1915), 31 T. L. R. 180; 59 Sol. Jo. 530.

## SECT. 2.—GRANTS OF PRIZE BY CROWN.

Royal Grants, generally, see CONSTITUTIONAL LAW, Vol. XI., pp. 557 *et seq.*

19. Prize a gift of the Crown.]—THE ELSEBE, No. 10, *ante*.

20. —.]—THE MARIA FRANCOISE, No. 11, *ante*.

21. —.]—Charterparty of affreightment between the owners of the ship *M.* & the Comrs. of Transports "for & on behalf of His Majesty." During his continuance in the transport service the ship makes a capture, which is condemned; & upon petition to the Treasury, two-thirds of a moiety of the proceeds arising from the capture ordered by warrant from the Crown to be paid to the owners. These proceeds are entirely in the discretion of the Crown; & upon motion for payment into ct. of a sum admitted by the Comrs. of Transports to be due for freight under the charterparty, which motion was resisted, on the ground that the comrs. were entitled to set off the amount of the proceeds received by the owners under the warrant; payment was ordered accordingly, without prejudice to the question of ownership.

The proceeds of the capture are the undoubted property of the Crown, & as such disposable by the Crown entirely at its own discretion (LORD ELDON, C.).—THURGAR v. MORLEY (1817), 3 Mer. 20; 36 E. R. 8.

22. Construction of grant—"All grants"—Restriction to naval grants.]—57 Geo. 3, c. 127, gives to Greenwich Hospital a claim of 5 per cent. "upon all grants whatsoever":—*Held*: the generality of the terms should be restricted, & confined to remunerative grants purely naval.—*Re BOOTY IN THE PENINSULA* (1822), 1 Hag. Adm. 39; 166 E. R. 14.

23. —.]—*Re CAYENNE* (1822), 1 Hag. Adm. n., 41; 166 E. R. 15.

24. Grant to captors—Distinguished from grant to Lord High Admiral.]—THE MARIA FRANCOISE, No. 11, *ante*.

25. Absolute right of captor to proceed to adjudication.]—THE MERCURIUS, No. 733, *post*.

26. — Power to release prize unaffected.]—THE ELSEBE, No. 10, *ante*.

27. — Temporary transfer of beneficial interest.]—THE MARIA FRANCOISE, No. 11, *ante*.

28. — Legal right conferred.]—STEVENS v. BAGWELL, No. 946, *post*.

29. — Actual or constructive captors.]—BANDA & KIRWEE BOOTY, No. 14, *ante*.

Grant to Lord High Admiral.]—See Part II., Sect. 4, sub-sect. 1, *post*.

Rights reserved to Crown.]—See Part II., Sect. 3, *post*.



## SECT. 3.—DROITS OF CROWN.

30. Distinguished from droits of Admiralty.]—THE MARIA FRANCOISE, No. 11, *ante*.

31. Enemy goods captured at sea.]—During the Russian war one of Her Majesty's ships of war, on her passage to O., fell in with & took possession of a raft of timber, having the Russian imperial mark painted on the several spars composing the same:—*Held*: such timber must be condemned as a droit of the Crown, & not a droit of Admiralty.—RAFT OF RUSSIAN TIMBER (1859), 5 Jur. N. S. 1109.

32. Enemy ship captured at sea.]—By Proclamation under Naval Prize Act, 1918 (c. 30), His Majesty declared his intention of granting prize money to his Naval & Marine Forces out of the proceeds of such prizes captured during the war as the Tribunal appointed under the Act should declare to be droits of the Crown:—*Held*: (1) the proceeds of condemned cargoes ex neutral vessels which were either intercepted at sea by His Majesty's ships & sent into British ports (*The Hillerod*), or which called at British ports under arrangement between their owners & His Majesty's Govt. in order to avoid seizure at sea (*The Florida*), are droits of the Crown; (2) the proceeds of condemned cargoes brought to this country in vessels bound to British ports in the ordinary course of their voyage (*The Abonema*), or diverted voluntarily by their owners (*The Soldier Prince*) or which called in order to bunker (*The Albania*), are droits of Admiralty, & are not payable into the Naval Prize Fund; (3) there is no distinction in principle between the case of goods seized from a ship when she comes into port & the case of goods or their proceeds returned to this country for prize proceedings by the shipowner under arrangement with the Govt., whereby, to avoid delay, the ship is allowed to proceed to her destination on an undertaking to return the goods on demand. If the goods would have been regarded as droits of the Crown, had they been taken out of the ship originally, the returned goods or their proceeds are regarded as droits of the Crown (*The Oscar II.*). Similarly with regard to droits of Admiralty. (*The Garonne*); (4) the British share of the proceeds of enemy vessels seized by a joint force of French & British vessels, & condemned in a French Prize Ct., constitute a droit of the Crown (*The Tinos*); (5) an enemy vessel seized at sea by one of His Majesty's ships constitutes a droit of the Crown (*The Adjutant*); but an enemy vessel, seized, outside a British port by the Collector of Customs being a seizure by a non-commissioned captor, constitutes a droit of Admiralty. (*The Belgia*).—THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, THE ADJUDANT, [1919] P. 41; 88 L. J. P. 113; 120 L. T. 252; 35 T. L. R. 203; 14 Asp. M. L. C. 409.

*Annotations*:—As to (1) *Apld.* The Derfflinger, The Forde, The Leda, *Re American Meat Packers' Agreement*, *Re Certain Swedish Copper*, [1919] P. 264. As to (5) *Reid*. The Feldmarschall, [1920] P. 289.

33. —.]—(1) A number of German & Austrian vessels, which were either in Egyptian ports at the outbreak of war or came in shortly afterwards, declined to leave port & remained there until, under compulsion of the Egyptian authorities, British crews were received on board to navigate them outside territorial waters where they were formally captured by British commissioned ships of war. All the vessels were subsequently brought before His Britannic Majesty's Prize Ct. for Egypt, & on appeal, to the Privy Council, & were condemned as prize:—*Held*: the captures must be treated as having been

made at sea, & not when possession was taken of the vessels while still in Egyptian ports, & accordingly, the proceeds were droits of the Crown & not droits of Admiralty, & passed into the Naval Prize Fund (*The Derfflinger*).

(2) The proceeds of condemned cargoes ex neutral vessels which came into the Downs for examination, owing to the system of patrols established whereby vessels passing through the Straits of Dover were compelled to go into the Downs, are droits of the Crown (*The Forde*).

(3) A German vessel, captured at sea by one of His Majesty's ships, & condemned as prize, was afterwards released by the Crown as an act of grace, as it appeared that, although nominally owned by a German co., the real owners of the vessel were an American co.:—*Held*: it was immaterial that the release took place before the passing of Naval Prize Act, 1918 (c. 30), under which it was clear that such a prize, being a droit of the Crown, enured for the benefit of the fleet, & the value of the vessel, with interest at 5 per cent., should be paid by the Exchequer into the Naval Prize Fund (*The Leda*).

(4) Large quantities of meat consigned by the big American meat packers of Chicago, ostensibly to neutral consignees, were seized as prize. For reasons of State the Crown came to an agreement with the packers whereby a formal decree of condemnation by the Prize Ct. was made, subject to the terms that 75 per cent. of the condemned proceeds should be paid out to the packers:—*Held*: the Exchequer was not bound to bring the value of the released 75 per cent. into the Prize Ct. for adjudication by the tribunal.

(5) Parcels of copper, consigned to Swedish ports & seized as prize, were not brought before the Prize Ct. for adjudication, but a certain sum was paid to the Swedish claimants & part of the copper was taken over by the War Office & the Ministry of Munitions & part was sold, a profit of £18,741 being made on the transaction. By Naval Prize Act, 1918 (c. 30), sched. I., para. 5, there shall be paid into the Naval Prize Fund "any other sums received in respect of ships & goods subject to prize jurisdiction, which the tribunal consider may reasonably be treated . . . as being sums to which, had there been a grant of prize to captors, captors would have been entitled":—*Held*: the Exchequer was not liable to pay the profit realised over the transaction into the Naval Prize Fund.—THE DERFFLINGER, THE FORDE, THE LEDA, *Re AMERICAN MEAT PACKERS' AGREEMENT*, *Re CERTAIN SWEDISH COPPER*, [1919] P. 264; 89 L. J. P. 65; 121 L. T. 517; 35 T. L. R. 588; 14 Asp. M. L. C. 519.

34. — Ships in port at outbreak of war—Towed out for formal capture.]—THE DERFFLINGER, THE FORDE, THE LEDA, *Re AMERICAN MEAT PACKERS' AGREEMENT*, *Re CERTAIN SWEDISH COPPER*, No. 33, *ante*.

35. Share of proceeds of joint capture—Enemy ship condemned in foreign prize court.]—THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, THE ADJUDANT, No. 32, *ante*.

36. Goods ex neutral ships—Returned by arrangement with shipowner.]—THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, THE ADJUDANT, No. 32, *ante*.

37. Proceeds of condemned cargoes ex neutral ships—Ships entering port under restraint.]—THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, THE ADJUDANT, No. 32, *ante*.

38. — —.]—THE DERFFLINGER, THE FORDE, THE LEDA, *Re AMERICAN MEAT PACKERS'*

AGREEMENT, *Re* CERTAIN SWEDISH COPPER, No. 33, *ante*.

39. — Returned by arrangement with shipowner.]—THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, THE ADJUDANT, No. 32, *ante*.

#### SECT. 4.—DROITS OF ADMIRALTY.

##### SUB-SECT. 1.—IN GENERAL.

40. Distinguished from droits of the Crown.]—THE MARIA FRANCOISE, No. 11, *ante*.

41. Operation of grant to Lord High Admiral—Total & perpetual alienation of rights of Crown.]—THE MARIA FRANCOISE, No. 11, *ante*.

42. Grant construed strictly.]—Dutch ships detained in port at the Cape of Good Hope, before declaration of hostilities against Holland, claimed as droits of Admty. condemned to the Crown, *jure coronæ*.

The question arises on certain Dutch ships, which were found at the Cape of Good Hope, by [a] squadron, & which have been proceeded against as prize, on the part of His Majesty, *jure coronæ*. An intervention has been now given, on the part of the Admty., claiming them as droits & perquisites of Admty.; . . . such an intervention may be rightly given; because as long as the office of Lord High Admiral, though now residing in the person of His Majesty, continues in this kingdom to have a legal existence, it is extremely proper, that the droits & perquisites of the office should continue as anciently distinguished. . . . The rights of the Lord High Admiral are to be considered as rights *stricti juris*, as rights originally granted in derogation of those higher rights of the Crown, which are vested in the Crown for general utility: such grants are to be construed strictly on the known presumption that the Crown has not parted with any right which the public wisdom has conferred upon it, further than the express words of the grant import.

The grant alluded to is to be found recognised in the Order in Council of Charles II. That order, among other things, directs "that all ships & goods belonging to enemies coming into any port, creek, or road of this His Majesty's Kingdom of England, or of Ireland, by stress of weather or other accident, or mistake of port, or by ignorance, not knowing of the war, do belong to the Lord High Admiral"; but certainly not in foreign ports. It is the first time that I have heard the idea started that it was to extend beyond the dominions of the Crown, to ports belonging to foreign powers. . . . It has always been understood that such a coming in must be during the subsisting war . . . & all other seizures made anywhere else, or under any other circumstances, before a war, do belong to His Majesty (SIR WILLIAM SCOTT).—THE GERTRUYDA (1799), 2 Ch. Rob. 211; 165 E. R. 292.

43. —.]—(1) A capture made by the crews of the King's ship stationed at the island of St. Marcou, adjudged to be not a droit of Admty., but prize to the actual captor.

(2) All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; & upon this just ground, that the prerogatives & rights & emoluments of the Crown

being conferred upon it for great purposes, & for the public use, it shall not be intended that such prerogatives, rights, & emoluments, are diminished by any grant, beyond what such grant, by necessary & unavoidable construction shall take away.

(3) The grant to the Lord High Admiral . . . gives him the benefit of all captures by whomsoever made, whether commissioned or non-commissioned persons . . . "of all ships & goods coming into ports, creeks, or roads of England or Ireland, unless they come in voluntarily upon revolt, or are driven in by the King's cruisers."

(4) Every anchorage ground is not a roadstead—a roadstead is a known general station for ships, *statio tutissima nautis*, notoriously used as such, & distinguished by the name, & not every spot where an anchor will find bottom & fix itself. The . . . expression of "coming into a road" shows, that by road is meant something much beyond mere anchorage ground on an open coast.

(5) A capture at sea made by a force upon the land, . . . is considered generally as a non-commissioned capture, & enures to the benefit of the Lord High Admiral. . . . All title to sea prize must be derived from commissions under the Admty., which is the great fountain of maritime authority; & a military force upon the land is not invested with any commission so derived, impressing upon them a maritime character, & authorising them to take upon that element for their own benefit (SIR WILLIAM SCOTT).—THE REBECKAH (1799), 1 Ch. Rob. 227; 165 E. R. 158.

Annotations:—As to (1) *Refd.* The Roumanian, [1910] 1 A. C. 124. As to (2) *Consd.* R. v. Forty-nine Casks of Brandy (1836), 3 Hag. Adm. 257; The Panda (1842), 1 Notes of Cases, 603. *Refd.* Raft of Russian Timber (1859), 5 Jur. N. S. 1109; Feather v. R. (1865), 8 B. & S. 257. As to (3) *Consd.* The Miramichi, [1915] P. 71; The Anichab, etc., [1921] P. 218. *Generally Refd.* The Brazil (1855), Sw. 75; The Feldmarschall, [1920] L. 289; The Pollworm, [1922] 1 A. C. 292; Procurator-General v. Netherlands State, The Pollworm (1922), 91 L. J. P. 102.

.]—See CONSTITUTIONAL LAW, Vol. XI., pp. 565, 566, Nos. 653, 654.

##### SUB-SECT. 2.—CAPTURE IN PORT, CREEK OR ROADSTEAD.

44. Capture in port—Ships in port at outbreak of hostilities.]—THE GERTRUYDA, No. 42, *ante*.

45. — Ships in port of conquered country—Conquest not confirmed by treaty.]—Ships seized in the harbour of an island conquered & taken possession of by British Forces are condemnable as droits of Admty. though the conquest of the island may not have been confirmed to Great Britain by a treaty of peace.—THE FOLTINA (1814), 1 Dods. 450; 165 E. R. 1374.

Annotation:—*Consd.* The Anichab, etc., [1921] P. 218.

46. — Goods found on cartel ship.]—LA ROSINE, No. 348, *post*.

47. — Goods warehoused at outbreak of hostilities.]—THE EDEN HALL, No. 293, *post*.

48. — —.]—THE BATAVIER II., No. 295, *post*.

49. — Goods discharged after outbreak of hostilities.]—THE ROUMANIAN, No. 291, *post*.

50. — Goods returned by arrangement with shipowner.]—THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, THE ADJUDANT, No. 32, *ante*.

#### PART II. SECT. 4, SUB-SECT. 1.

a. Breach of instructions relating to prize—Whether droit of Admiralty or

*jure coronæ*.]—LA REINE DES ANGES (1803), Stewart, 9.

b. — —.]—THE HERKIMER

(1808), Stewart, 128.

c. — Forfeiture for misconduct.]—THE COSSACK (1813), Stewart, 513.

*Sect. 4.—Droits of Admiralty: Sub-sects. 2 & 3. Part III. Sect. 1: Sub-sect. 1.]*

51. — *Proceeds of sale of goods—Ship in port at outbreak of hostilities.*—THE ALDWORTH (PART CARGO EX), No. 328, *post*.

52. — *Ship entering port in ordinary course of voyage.*—THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, THE ADJUDANT, No. 32, *ante*.

53. — *Ship entering port under voluntary directions of owner.*—THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, THE ADJUDANT, No. 32, *ante*.

54. — *Ship entering port to bunker.*—THE ABONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, THE ADJUDANT, No. 32, *ante*.

55. *Capture in roadstead—General rule.*—(1) Property taken in a roadstead is generally condemned as droits of the Admty.

Its being taken in a roadstead though that generally entitles the Crown in its office of Admty., has no such effect if taken in a conjoint expedition; but it enures totally to the captors, under the Acts of Parliament, subject only to the Crown's power of distribution according to the royal pleasure (LORD STOWELL).

(2) An act of taking possession was not indispensably necessary to make capture; but . . . obedience to an hostile attack or hostile force, known to be hostile, was sufficient (LORD STOWELL).—LA ESPERANZA (1822), 1 Hag. Adm. 85; 166 E. R. 31.

*Annotation:—As to (2) Reftd. The Pol' form, [1922] 1 A. C. 292.*

56. — *By conjoint expedition.*—LA ESPERANZA, No. 55, *ante*.

57. — *What amounts to roadstead.*—THE REBECKAH, No. 43, *ante*.

58. — *—*—THE MARIA FRANCOISE, No. 11, *ante*.

*Legality of capture in port.*—See Part IV., Sect. 4, sub-sect. 3, *post*.

SUB-SECT. 3.—CAPTURE BY NON-COMMISSIONED PERSONS.

59. *Commission other than by the King.*—WALTON v. HANBURY (1707), 2 Vern. 592; 23 E. R. 985.

*Annotation:—Mentd. Adamson v. Jarvis (1827), 4 Bing. 66.*

60. *Crew.*—THE DICKENSON (1776), Marr. 1; 165 E. R. 1.

61. *Land force.*—THE REBECKAH, No. 43, *ante*.

62. — *—*—Enemy property seized as prize by the military forces of the Crown constitutes a droit of Admty., & accordingly the proceeds fall to the Exchequer & are not payable into the Naval Prize Fund.—THE ANICHAB, [1921] P. 218; 91 L. J. P. 19.

63. — *Joint capture with naval force.*—In the course of the combined naval & military operations in German East Africa a German steamship was captured in the harbour of Dar-es-Salaam under circumstances which, although they constituted a joint enterprise, in the opinion of the majority of the tribunal, did not constitute a joint capture but a capture by the naval forces alone, & that accordingly the claim put forward on behalf of the military forces to share as joint captors was not established:—*Held*: if the claim of the military forces to share as joint captors had been established, the proceeds of sale of the captured ship would be partly a droit of Admty. & partly a droit of the Crown; the portion allocated to the military forces would be a droit of Admty. &

therefore, payable to the Exchequer to be dealt with by the Crown as it might be advised; & the portion allocated to the naval forces would be a droit of the Crown & payable to the Naval Prize Fund in accordance with the provisions of Naval Prize Act, 1918 (c. 30).—THE FELDMARSHALL, [1920] P. 289; 89 L. J. P. 177; 124 L. T. 637; 36 T. L. R. 407; 15 Asp. M. L. C. 299.

*Annotation:—Apld. The Anichab, [1921] P. 218.*

64. *Tender of ship of war—Attached without authority.*—THE MELOMANE, No. 9, *ante*.

65. — *—*—*Prize interest in virtue of a seizure made by a private ship of war, asserted to be attached as a tender to a King's ship. The fact of her being so attached not made out. Condemnation as droits, the master of the privateer not being on board.*

The claim for the King's ship is given, in virtue of a seizure said to be made by this vessel, as a tender; & in order to support that averment it must be shown, either that there has been some express designation of her in that character by the orders of the Admty., or that there has been a constant employment & occupation, in a manner peculiar to tenders, equivalent to an express designation, & sufficient to impress that character upon her. . . . There is no sufficient foundation to induce the ct. to consider her in the capacity of a tender. She is not so recognised in terms by any authority proceeding from the Admty.; neither is the nature of the service imposed upon her such, as to induce a supposition that she must have been so considered by the Admty. As the master was not on board, the legal interest in the capture will not enure to the private captors under their commission, but it must be condemned as a droit of Admty. taken by non-commissioned captors (SIR WILLIAM SCOTT).—THE CHARLOTTE (1804), 5 Ch. Rob. 280; 165 E. R. 776.

*Annotation:—Consd. The Carl (1855), 2 Ecc. & Ad. 261.*

66. *Customs officer.*—(1) It is perfectly legal for any of Her Majesty's subjects, whether commissioned or not, to seize an enemy's ship; but it does not become the prize of the seizer.

A vessel built in Hanover in 1853, sailed in ballast to Riga, with a crew of Hanoverians. She then sailed, under Russian colours, to Havre, thence to Newcastle, thence to Lisbon. There she took in a cargo, & sailed for London on Apr. 4, under Hanoverian colours. Shortly after her arrival in the London Docks she was seized by a Custom House officer. She was claimed on the ground, that while lying at Newcastle she had been, under a power of attorney given by the owner to the master, sold & transferred to an Hanoverian.

With regard to an enemy's property coming to any part of the kingdom, or being found there . . . it is competent for any person to take possession of such property, unless it had any protection by licence, or some declaration emanating by the authority of the Crown, & to assist the Crown to proceed against it for adjudication. There are many instances in which a capture has been made in port by non-commissioned captors . . . & condemnation has passed to Her Majesty in her office of Admty. (DR. LUSHINGTON).

(2) Such a sale [sale of enemy ship to neutral] . . . is undoubtedly questionable, because . . . there is a mode of carrying on trade without being the actual owner of the vessel, namely, by transferring her to a pretended purchaser. . . . When a transaction of this kind is done under pressure, there always exists a certain degree of suspicion that it is not *bona fide*. With regard to the legality of the sale, assuming it to be *bona fide*, it is not denied that it is competent to neutrals to

purchase the property of enemies to another country, whether consisting of ships or anything else; they have a perfect right to do so, & no belligerent can override it (*per CUR.*).

(3) "Spoliation of papers" has not been accurately defined; the destruction of papers varies with the circumstances under which they are destroyed; amounting sometimes to what is technically called "spoliation," sometimes not.

If at any time during a long voyage the master destroyed papers that had no relevancy to it, relating to a former voyage, the matter would not be put in issue. To say that was a spoliation of papers, would be going the length of saying that nothing in the nature even of a private letter was to be destroyed after the vessel had left her port (*per CUR.*).

In considering the question of spoliation of papers, the time when they were destroyed is of the greatest importance.

If papers are destroyed when the capturing vessel is in sight, or there is a chance of capture, it is the strongest proof that these papers contain some matter which would inure to condemnation; so it is if they are destroyed at the time of capture, & if they are destroyed clandestinely after capture; but if the papers are destroyed a long time antecedently, before there is any probability that they

were destroyed for fraudulent purposes, & there is no evidence that it was for fraudulent purposes, then, though there is spoliation, & though, no doubt, the inference of law is against the act during war, yet the case is of a less stringent nature (*per CUR.*).—THE JOHANNA EMILIE (1854), 1 Ecc. & Ad. 317; Spinks, 12; 23 L. T. O. S. 322; 18 Jur. 703; 2 Eng. Pr. Cas. 252; 164 E. R. 183.

*Annotations* :—As to (1) *Refd.* The Aldworth (Part Cargo Ex) (1914), 31 T. L. R. 36; The Miramiohi (Cargo Ex) (1914), 31 T. L. R. 72; Johnstone v. Pedlar, [1921] 2 A. C. 262. As to (3) *Consd.* The Ophelia, [1915] P. 129. *Generally*, *Mentd.* *lic* Ferdinand (Ex Tsar of Bulgaria), [1921] 1 Ch. 107.

67. —.]—THE ARONEMA, THE HILLEROD, THE FLORIDA, THE ALBANIA, THE ADJUDANT, No. 32, *ante*.

68. Joint capture by commissioned & non-commissioned ships—Right of Admiralty to proportionate share.]—THE TWEE GESUSTER (1785), 2 Ch. Rob. 284, n.; 1 Eng. Pr. Cas. 230, n.; 165 E. R. 317, P. C.

*Annotations* :—*Distd.* The Cape of Good Hope (1799), 2 Ch. Rob. 274. *Consd.* The Feldmarschall, [1920] P. 289. *Refd.* The Robert (1800), 3 Ch. Rob. 194.

69. —.]—LE FRANC (1795), 2 Ch. Rob. 285, n.; 165 E. R. 318.

*Annotations* :—*Distd.* The Cape of Good Hope (1799), 2 Ch. Rob. 274. *Consd.* The Feldmarschall, [1920] P. 289.

## Part III.—Enemy Character.

### SECT. 1.—OF PERSONS.

#### SUB-SECT. 1.—IN GENERAL.

*See, generally*, ALIENS, Vol. II., pp. 139–145, Nos. 144–193; CONFLICT OF LAWS, Vol. XI., pp. 336–340, Nos. 252–289.

70. Factors determining status—Of trader—Place of carrying on trade.]—If a man goes into a belligerent country, & remains there four years, employing himself & his property in French [enemy] trade, it will not be easy to take him out of the description of a merchant of that country, as to his property so employed (SIR WILLIAM SCOTT).—THE TWO BROTHERS (1799), 1 Ch. Rob. 131; 165 E. R. 123.

*Annotation* :—*Consd.* The Johanna Emilio (otherwise Emilia) (1854), Spinks, 12.

71. —.]—(1) The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country, has a reasonable time allowed him for transferring himself & his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of trade, as a subject of the power under whose dominion he carries it on, & as an enemy of those with whom that power is at war.

(2) A temporary occupation of a territory by an enemy's force, does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies.

A ship under Wallachian colours, with a cargo of corn belonging to owners residing at Galatz in Moldavia, was seized for breach of the Black Sea blockade, when coming out of the Sulina mouth of the Danube, then in a state of blockade. At the time of the shipment of the cargo the Russians held possession of Moldavia & Wallachia, but such

holding was with the expressed intention of not changing the national character, or incorporating that country with Russia :—*Held* : the national character of the owner was not changed by the fact of the Russians so occupying the Principalities, & restitution decreed, with costs & damages.

(3) The purpose of the blockade was declared to be for preventing the import of provisions to the enemy in possession of a neutral's country. *Semble* : the fact of a neutral ship bringing out a cargo of corn is not a breach of such blockade.

(4) It is the duty of the captor, as soon as possible, to send a prize to some convenient port in Her Majesty's dominions for adjudication, & to procure the examination in preparatory of the principal officers of the captured vessel, & to deposit in the Admiralty Ct. all papers found on board the prize.

(5) By the rules of law, a ship which has entered a blockaded port before the blockade, is entitled to come out again; & if she has a cargo taken on board before notice of the blockade, she is entitled to bring it out. The blockade of a port is *prima facie* notice of the existence of the blockade to all who are within it, because the inhabitants who see the blockading ships off their coast cannot be well ignorant of the blockade (*per CUR.*).—CREMIDI v. POWELL, THE GERASIMO (1857), 11 Moo. P. C. C. 88; 8 State Tr. N. S. 787; 14 E. R. 628; *sub nom.* THE GERASIMO, THE ASPASIA, THE ACHILLES, 29 L. T. O. S. 269; 5 W. R. 450, P. C.

*Annotations* :—As to (1) *Appld.* The Anglo-Mexican, [1918] A. C. 422. As to (2) *Refd.* Mitsui v. Mumford, [1915] 2 K. B. 27.

—.]—*See* ALIENS, Vol. II., pp. 139–141, Nos. 147–156; CONFLICT OF LAWS, Vol. XI., pp. 336–338, Nos. 255–268.

Trading partnership in neutral country.]—*See* ALIENS, Vol. II., p. 142, Nos. 167, 168.

*Sect. 1.—Of persons: Sub-sects. 2, 3, 4 & 5. Sects. 2 & 3: Sub-sect. 1.]*

**SUB-SECT. 2.—ENEMY SUBJECTS.**

*See, generally, ALIENS, Vol. II., pp. 141, 142, Nos. 157–169.*

**72. Acquiring neutral character—Obtaining burgher's certificate.]—**Parties having claimed to cover an enemy's interest, are not allowed to make further proof of their own property, engaged in the same transaction.

A person born in Holland, & living there till the time of the commencement of this adventure . . . removes to Copenhagen, & goes through the slight formalities of obtaining a burgher's brief. . . . He embarks immediately on an adventure to a Dutch settlement, under an intention, it is said, of returning to Europe; but is at the time of this capture left residing at Batavia. . . . To say that his Dutch character is purged off, by having made one voyage in a Danish ship, & under such circumstances, accompanied with an actual employment in a Dutch settlement, & with an intention of perpetuating his connection with Holland, by returning to end his days there, would be truly ridiculous. A voyage to a Dutch settlement from Copenhagen . . . but with a cargo procured in Holland. I do not say, that a neutral merchant may not very lawfully carry on such a traffic; purchasing articles in Holland, & afterwards employing them as he pleases, when they have become *bond fide* his property, & have been imported into his own country. But certainly it is not too much . . . to observe, that the sending a cargo so purchased, to a Dutch colony, does necessarily afford a strong ground of suspicion, that there are Dutch interests connected with it. . . . Where there has been a suppression of an enemy's interest with a fraudulent view, the party engaged in that fraud shall not be permitted to supply the defects of proof, of his own property mixed up with it (SIR WILLIAM SCOTT).—THE GRAAFF BERNSTORF (1800), 3 Ch. Rob. 109; 165 E. R. 404.

—*See ALIENS, Vol. II., p. 141, No. 158.*

**73. Residing in neutral country—Trading with enemy.]—**THE INDIANA (1800), cited in 3 Ch. Rob. at p. 44; 165 E. R. 379, P. C.

*Annotation:—Consd. The Portland (1800), 3 Ch. Rob. 41.*

—*See ALIENS, Vol. II., p. 142, No. 164.*

**Partnership.]—See ALIENS, Vol. II., p. 142, Nos. 167, 168.**

**74. Subjects in rebellion—Under independent government.]—**THE HAPPY COUPLE (1808), cited Edw. at p. 1; 165 E. R. 1011.

*Annotation:—Refd. Cremid v. Powell, The Gerasimo (1857), 8 State Tr. N. S. 787.*

**SUB-SECT. 3.—NEUTRALS.**

*See, generally, ALIENS, Vol. II., pp. 142–144, Nos. 170–183.*

**75. Residing in neutral country—Bound by character of trade.]—**THE TWEE FRIENDEN, FREMEAUX'S CASE (1784), cited in 3 Ch. Rob. at p. 29; 165 E. R. 374.

*Annotation:—Consd. The Indian Chief (1800), 3 Ch. Rob. 22.*

**76. ———.]—**A vessel with a neutral flag was seized on suspicion of being the property of the enemy. On her papers being examined, it was found that the claimant, who professed to be the subject of a neutral state, was not the sole owner, but that one of the subjects of the

enemy's country had also an interest in the vessel:—*Held*: the sentence of the Ct. of Admty. condemning the vessel must be affirmed, & the application on the part of claimant to be allowed to produce further proof must be refused.

It does not follow . . . that because [a person] might have been born of Austrian [neutral] parents, that he might have been resident at Castrena [neutral country] . . . he would be entitled to come before the ct. & claim restitution in an Austrian character. He must be bound by the character of that place where he was resident & carrying on his trade & to which the transaction properly belongs (DR. LUSHINGTON).—THE NINA (1856), Spinks, 345; 8 L. T. 92; 4 W. R. 319; 2 Eng. Pr. Cas. 570; 164 E. R. 475, P. C.

**77. ——— Member of enemy firm.]—**THE RACHAEL MOBARECK (1792), cited in 3 Ch. Rob. at p. 30; 165 E. R. 374, P. C.

*Annotation:—Consd. The Indian Chief (1800), 3 Ch. Rob. 22.*

**78. Residing & trading in enemy country.]—**(1) I understand the rule to be, that further proof by affidavits to be exhibited on the part of the captor is only admissible under the special direction of the ct. It is a proper control over the rash or light manner with which the claimant may attempt to pick up something like proof by affidavit. But it is not to be exercised except on special grounds; & only with leave of the ct. (*per CUR.*).

(2) The transactions of neutrals, resident in France, are, from the very nature of their situations, liable to great suspicions. They are exposed to great temptations from French merchants, who lying under an inability to export their own produce, will assail them with great inducements to cover & protect their trade. The opportunities & facilities of doing it, when parties are on the spot, are innumerable (SIR WILLIAM SCOTT).—THE ADRIANA (1799), 1 Ch. Rob. 313; 165 E. R. 189.

**79. ——— Agent.]—**THE RENDSBORG, No. 221, *post*.

**80. ——— Naturalised neutral.]—**Before the outbreak of war between the United Kingdom & Turkey a ship flying Turkish colours entered a British port. A few days later she hoisted neutral colours, it being alleged that the owner was naturalised in a neutral state, but she was documented as a Turkish vessel. The owner was born a Turkish subject, & resided & carried on business in Turkey. He had a few years before been naturalised as a neutral subject, but continued to reside in Turkey & carry on business there. On the outbreak of war the ship was seized & condemned as lawful prize:—*Held*: the ship could only be recognised as an enemy ship, & was rightly condemned.—*ATYCHIDES v. SECRETARY OF STATE FOR INDIA, THE KARA DENIZ* (1922), 91 L. J. P. C. 195; 128 L. T. 11; 16 Asp. M. L. C. 41, P. C.

**Effect of intention to depart from trading residence.]—See CONFLICT OF LAWS, Vol. XI., p. 340, No. 285.**

**Merchants acting as consuls.]—See Sub-sect. 5, *post*.**

**SUB-SECT. 4.—BRITISH SUBJECTS.**

*See, generally, ALIENS, Vol. II., pp. 144, 145, Nos. 184–193.*

**81. Intention to depart from trading residence.]—**THE SNELLE ZEYLDER (1783), cited 3 Ch. Rob. at p. 21; 165 E. R. 371, H. L.

*Annotation:—Apld. The Indian Chief (1801), 3 Ch. Rob. 12.*

**Settlement in foreign colony during British occupation.]—See ALIENS, Vol. II., p. 192, No. 539.**

## SUB-SECT. 5.—MERCHANTS ACTING AS CONSULS.

**82. General rule.]**—THE *PIGOU* (1797), cited 3 Ch. Rob. at p. 27; 165 E. R. 373, H. L.  
*Annotation:*—*Consd.* The *Indian Chief* (1801), 3 Ch. Rob. 21.

—.]—*See* CONFLICT OF LAWS, Vol. XI., p. 339, Nos. 274–276.

**83. Residence in enemy country—Neutral character not retained.]**—IL SANTO CRUCIFIXO, NRA SRA DELLA MISERICORDIA, IL SANTO NICOLA (1764), Burrell, 160; 167 E. R. 519.

**84. ———.]**—THE *ORION* (1797), cited 3 Ch. Rob. at p. 27; 165 E. R. 373.

*Annotation:*—*Consd.* The *Indian Chief* (1801), 3 Ch. Rob. 21.

— ———.]—*See* CONFLICT OF LAWS, Vol. XI., p. 339, Nos. 277–279.

## SECT. 2.—OF COMPANIES.

*See, generally,* ALIENS, Vol. II., pp. 145, 146, Nos. 194–199.

**85. Neutral company—Agent resident in enemy country.]**—THE *RENDSBORG*, No. 221, *post*.

**86. Company registered in England—Shares held by alien enemies—Whether capable of owning British ship.]**—Goods consigned to a duly incorporated British co. to which the property has passed, are not confiscable as prize by reason of the fact that all the directors & shareholders of the co. are enemy subjects, or domiciled in an enemy country.

*Qu.*: whether a British co., composed entirely of alien enemies, can own a British ship.—THE *POONA* (1915), 84 L. J. P. 150; 112 L. T. 782; 31 T. L. R. 411; 59 Sol. Jo. 511; 13 Asp. M. L. C. 57.

— — — — **Whether property liable to condemnation.]**—*See* Sect. 3, sub-sect. 2, A.; Sect. 4, sub-sect. 2, A., *post*.

## SECT. 3.—OF SHIPS.

## SUB-SECT. 1.—FLAG OR PASS.

**87. General rule—Ship takes character of flag or pass.]**—(1) An enemy's vessel ostensibly transferred with false papers & continuing in the enemy's trade, is liable to condemnation.

In my apprehension, unless it could be maintained as a rule, without any exception whatever, that the domicile of the proprietor constitutes the national character of the vessel, this ship must be condemned. . . . Where there is nothing particular or special in the conduct of the vessel itself, the national character is determined by the residence of the owners; but there may be circumstances arising from that conduct, which will lead to a contrary conclusion. It is a known & established rule with respect to a vessel, that if she is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails; she makes a part of its navigation, & is in every respect liable to be considered as a vessel of that country. In like manner, & upon similar principles, if a vessel purchased in the enemy's country is, by constant & habitual occupation, continually employed in the trade of that country, commencing with the war, continuing during the war, & evidently on account of the war, on what ground is it to be asserted that vessel is not to be

deemed a ship of the country from which she is so navigating? (SIR WILLIAM SCOTT).

(2) Between . . . the depositions & the documents, there is a repugnance; & it is argued, that therefore the conviction of the ct. must be kept in *equilibrium* till it can receive farther proof: I admit this is a general rule of the ct. of Admty., but it is a rule by no means inflexible; it is liable to many exceptions; the exceptions may sometimes be in favour of depositions & sometimes, though more rarely, on the side of the documentary evidence. . . . Suppose there is a war, or the apprehension of a war, when the documents are composed . . . they become subject to some suspicions *in limine*: which suspicion may be increased by their having passed through the enemy's hands. The suspicions will be still further increased, if the property to which they relate has continued under the management & direction of the enemy. If, in addition to all this, they carry such contradictions or difficulties on the face of them as cannot be explained, admitting the matter to be a fair transaction, all or any of these circumstances must divest the papers of their natural credit . . . They are papers composed during a war, on the very spur of the occasion; & they purport that a ship belonging to the enemy was at that time transferred; but the management of her concerns still continued in the hands of the former owner; she sailed from a Dutch port, where she had been confined for want of employment, with an intention of returning to that . . . port only; the Dutch master continued in command, & the crew were picked up in the harbour of the enemy (SIR WILLIAM SCOTT).—THE *VIGILANTIA* (1798), 1 Ch. Rob. 1; 1 Eng. Pr. Cas. 31; 165 E. R. 74.

*Annotations:*—*As to* (1) *Consd.* The *Anglo Mexican*, [1918] A. C. 422. *Refd.* *R. v. Bjornsen* (1865), L. & C. 645; The *Marie Glaeser*, [1914] P. 218. *As to* (2) *Refd.* The *Manningtry*, [1916] P. 329.

**88. ———.]**—A vessel sailing under the colours & pass of a nation is to be considered as clothed with the national character of that country. With goods it may be otherwise, but ships have a peculiar character impressed upon them by the special nature of their documents, & have always been held to the character with which they are so invested, to the exclusion of any claims of interest that persons living in neutral countries may actually have in them (SIR WILLIAM SCOTT).—THE *VROW ELIZABETH* (1803), 5 Ch. Rob. 2; 165 E. R. 676.

*Annotations:*—*Fold.* The *Industrie* (1854), 1 Eco. & Ad. 444. *Consd.* The *Primus* (1854), 24 L. T. O. S. 15. *Refd.* The *Marie Glaeser*, [1914] P. 218.

**89. ———.]**—Contract of certain neutral merchants for Batavian produce to be brought to Amsterdam, & there sold by the East India co. before the war pronounced not invalid.

The produce of a person's own plantation, in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, & is to be taken as a part of that country, in that particular transaction, independent of his own personal residence & occupation. . . . The flag & pass of a nation, taken up in war or peace, binds the vessel almost without exception. So, in the case of a strict exclusive colonial trade from the colony to the mother country, where the trade is limited to native subjects by the fundamental regulations of the state, & the national character is required to be established by oath, as in the case of the Spanish register ships. There, whoever asserts himself



*Sect. 3.—Of ships: Sub-sects. 1 & 2, A. & B. (a).]*

to be the proprietor, by the solemn averments of an oath, takes the fortunes of the community as to that property. These are all cases independent of times of peace or war, though generally it cannot be denied that the circumstance of peace or war, or the contemplation of those events will form a very material distinction in the considerations by which the national character of the transaction is to be judged. . . . A much greater latitude is allowed in peace than in war . . . because there are no rights of a third party concerned, there is no fraud to be guarded against. . . . When war comes, it is necessary to shut up some of the avenues of commerce, because otherwise the belligerent rights could not be protected (SIR WILLIAM SCOTT).—THE VROW ANNA CATHARINA (1804), 5 Ch. Rob. 161; 165 E. R. 733.

*Annotations:—*Refd. The Roland (Part Cargo Ex) (1915), 31 T. L. R. 357; The Asturian, [1916] P. 150; The Düsseldorf, [1920] A. C. 1034; The Valeria, [1920] P. 81; The Pellworm, [1922] 1 A. C. 292.

90. ———.—]—THE VREEDE SCHOLTYS (1804), 5 Ch. Rob. 5, n.; 165 E. R. 677.

91. ———.—]—A vessel takes its national character from its flag & pass.

The period of the adoption of the flag & pass, whether before or after the outbreak of hostilities, makes no difference.

In the case of a ship under a neutral flag, captors may prove that all the property is not neutral, but that part belongs to the enemy; but the converse of the proposition is not true, that where a vessel is sailing under a hostile flag, a neutral can claim any part of the property under such flag.

A vessel under Russian colours, with a Russian pass, & whose papers disclosed only Russian owners, being captured, a claim was made by the master, as being a neutral, & the lawful owner of one-fourth part thereof:—*Held*: the claim could not be sustained, as the enemy's flag & pass imprinted a hostile character on the whole.—THE INDUSTRIE (1854), 1 Ecc. & Ad. 444; Spinks, 54; 2 Eng. Pr. Cas. 297; 18 Jur. 1005; 164 E. R. 256.

*Annotation:—*Refd. The Marie Glaeser, [1914] P. 218.

92. ———.—]—THE TOMMI, THE ROTHERSAND, No. 119, *post*.

93. Nationality of flag not conclusive.—THE HAMBORN, No. 112, *post*.

94. ———.—]—By art. 57 of the Declaration of London, "subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly." The Declaration of London was adopted by an Order in Council of October 29, 1914, subject to modification which did not affect art. 57.

In May, 1915, a vessel on a Greek register & entitled to fly the Greek flag was seized & was claimed by her registered owner, a naturalised Greek subject. The Prize Ct. in Egypt in Feb. 1916, condemned the vessel, finding that claimant was not the owner, but that the vessel was owned & controlled by the German Govt. The claimant appealed:—*Held*: the Order in Council of Oct. 29, 1914, so far as it adopted art. 57 of the Declaration of London, was not binding upon the Prize Ct. under the rule in *The Zamora*, No. 1071, *post*, since it prescribed & altered the law to be administered in a Prize Ct. by confining the test of neutral or enemy character to a single circumstance; further, a waiver of the Crown's belligerent rights could not be inferred from the terms of the

Order, especially in a case of fraud; therefore the true facts as to the ownership had to be inquired into; &, upon the evidence, without casting any doubt upon the further findings of the Prize Ct., applt. was not the owner & consequently could not maintain the appeal.—THE PROTON, [1918] A. C. 578; 87 L. J. P. C. 114; 118 L. T. 519; 34 T. L. R. 309; 14 Asp. M. L. C. 268, P. C.

*Annotations:—*Refd. The Kronprinzessin Cecilie, [1919] A. C. 964; The Kronprinzessin Victoria, [1919] A. C. 261.

95. Enemy flag—General rule.]—THE INDUSTRIE, No. 91, *ante*.

96. ———.—Removal of British goods—Special order.]—THE UNDERNEEMING (1803), 5 Ch. Rob. 7, n.; 165 E. R. 678.

*Annotations:—*Consd. The Industrie (1854), 1 Ecc. & Ad. 444. *Distd.* The Primus (1854), 24 L. T. O. S. 15. *Refd.* The Hare (1815), 1 Dods. 471.

97. ———.—Ship purchased on account of British subject.]—A vessel under a Dutch flag, with a Dutch pass, & bound from the Cape of Good Hope to St. Helena, America, Amsterdam, or London, as the supercargo should consider most eligible, but originally purchased by a merchant residing at the Cape for the account of British merchants desirous of removing their property to their own country, by means of which purchase by a domiciled Dutch merchant the vessel acquired all the advantages of Dutch character. Ship condemned.—THE GOEDE HOOP (1811), 2 Act. 32; 12 E. R. 168, P. C.

———.—Part ownership of neutral.]—See Sub-sect. 2, A., *post*.

98. Neutral flag.]—THE INDUSTRIE, No. 91, *ante*.

———.—British ownership.]—See Sub-sect. 2, A., *post*.

99. British flag.]—The status of the Ionian Islands, & their relation to Great Britain, are regulated exclusively by the Treaty of Paris of Nov. 5, 1815. That constituted them a free & independent state, under the exclusive protection of Great Britain. The protecting sovereign has the right of making peace or war for them. But the intention to place them in a state of war must be clearly expressed, as they do not become so *ex necessitate* from Great Britain being at war. Great Britain had not declared war for them against Russia. Their trade, therefore, with Russia was not illegal, because they were neither British subjects nor allies in the war, nor enemies of Russia.

It is not a substantial objection to the interpretation of the treaty that anomalies arise therefrom.

The words "British vessels" mean, first, all vessels properly so called according to our municipal law. Secondly, all vessels under the British flag, though perhaps not strictly entitled thereto, because, by the Law of Nations, the carrying of the British flag stamps on them, as to other nations, the British national character, & thirdly, such words may mean vessels under neutral flags, but owned by British subjects (DR. LUSHINGTON).—THE IONIAN SHIPS (1855), 2 Ecc. & Ad. 212; Spinks, 193; 164 E. R. 394; *sub nom.* THE LEUCADE, 8 State Tr. N. S. 434; 25 L. T. O. S. 312; 1 Jur. N. S. 549.

*Annotation:—*Mentd. R. v. Crewe, *Ex p.* Sekgone, [1910] 2 K. B. 576.

100. False pass.]—THE HOOP (1799), 1 Ch. Rob. 129; 165 E. R. 122.

101. ———.—]—THE CITADE DE LISBOA (1806), 6 Ch. Rob. 358; 165 E. R. 961.

102. ———.—]—THE EENDRAUGHT (1806), 6 Ch. Rob. 358, n.; 165 E. R. 961.



## SUB-SECT. 2.—NATIONALITY OF OWNER.

## A. In General.

**103. Enemy ownership.]—THE TWEET FRIENDEN, FREMEAUX'S CASE (1784),** cited in 3 Ch. Rob. at p. 29; 165 E. R. 374.

*Annotation:—***Consd.** The Indian Chief (1801), 3 Ch. Rob. 12.

**104. —.]—THE PROTON, No. 94, ante.**

**105. Part ownership by enemy.]—THE SUSA (1799),** 2 Ch. Rob. 251; 165 E. R. 306.

**106. —.]—THE CLARISSA (1800),** cited in 5 Ch. Rob. at p. 4; 165 E. R. 677.

*Annotation:—***Distd.** The Vrow Elizabeth (1803), 5 Ch. Rob. 3.

**107. —.]—A neutral's share in a ship sailing under the flag & pass of an enemy is liable to condemnation. The cargo shipped under a charterparty restored to the neutral charterers.**

Whoever embarks his property in shares of a ship is bound by the character of that ship, whatever it may happen to be (DR. LUSHINGTON).—**THE PRIMUS (1854),** 1 Ecc. & Ad. 353; 2 Eng. Pr. Cas. 290; Spinks, 48; 24 L. T. O. S. 15; 18 Jur. 934; 164 E. R. 203.

*Annotations:—***Refd.** The Industrie (1854), Spinks, 54; The Marie Glauser, [1914] P. 218.

**108. —.]—THE INDUSTRIE, No. 91, ante.**

**109. British ownership—Ship sailing under neutral flag—Subsequent hostilities with neutral country.]—THE DIANA (1806),** 5 Ch. Rob. App. Note II.; 165 E. R. 826, P. C.

*Annotation:—***Apld.** The Industrie (1854), 1 Ecc. & Ad. 444.

**110. —.]—THE IONIAN SHIPS, No. 99, ante.**

**111. Ownership by company registered in England—Shares held by alien enemies.]—A steamship registered as a British ship, which before the war was used as a tender at Southampton for the vessels of the Hamburg-American Line, was nominally owned by a British co. The directors of the British co., who paid nothing for their qualification shares, were appointed by the Hamburg-American Line, which took from them an agreement to conform to its instructions, received the profits, & through its nominees owned the entire share capital issued by the British co. After the outbreak of hostilities between this country & Germany the steamship, which meanwhile had been chartered to the Admty., was seized as prize on the ground that she was enemy property or the property of a co. controlled by the enemy:—**Held:** the Prize Ct. was bound to look beyond the nominal ownership, & the real owners being the Hamburg-American Line, the vessel was enemy property, & must be treated like any other enemy merchant ship actually in port at the outbreak of hostilities.—**THE ST. TUDNO, [1916] P. 291; 86 L. J. P. 1; 115 L. T. 634; 13 Asp. M. L. C. 516; subsequent proceedings, [1918] P. 174.****

**112. Ownership by neutral company—Shares held by alien enemies.]—A ship was on a neutral register of shipping & lawfully flying a neutral flag, & was owned by a co. duly incorporated in a neutral country, of which all the directors & shareholders were alien enemies, was managed by two alien enemies, residing in the neutral country, & was employed in the import trade of an enemy country, her neutral ownership & local management being merely for the purposes of convenience:—**Held:** the whole effective control of the ship being in an enemy country, she was rightly condemned as prize.—**THE HAMBORN,****

[1919] A. C. 993; 88 L. J. P. 174; 121 L. T. 463; 35 T. L. R. 726; 14 Asp. M. L. C. 461, P. C.

*Annotation:—***Distd.** The Kronprinsessan Margareta, The Parana, etc., [1921] 1 A. C. 486.

**113. Ownership by enemy naturalised in neutral country—Trading continued in enemy country.]—ATYCHIDES v. SECRETARY OF STATE FOR INDIA, THE KARA DENIZ, No. 80, ante.**

## B. Transfer of Ownership.

## (a) Before Hostilities.

**114. Transfer shortly before war—Validity of purchase by neutral.]—BATTEN v. R., THE MARIA (1857),** 11 Moo. P. C. C. 271; 5 W. R. 825; 14 E. R. 698, P. C.

*Annotation:—***Refd.** The Annie Johnson, The Kronprinsessan Margareta, [1918] P. 154.

**115. —Ships other than ships of war.]—(1) A Russian vessel was sold, *bonâ fide* & absolutely, by an enemy to a neutral when the war between Russia & Great Britain was imminent. The vessel was at the time of the sale in the prosecution of a voyage from Libau, an enemy's port, to Copenhagen, a neutral port, where she arrived & was taken possession of by the purchaser:—**Held:** the sale, though *in transitu*, was valid, as the *transitus* had ceased when the vessel had come into possession of the purchaser, which took place before the seizure.**

(2) A neutral while a war is imminent, or even after it has commenced, is at liberty to purchase either goods or ships, not being ships of war, from either belligerent, & the purchase is valid whether the subject of it be lying in a neutral or an enemy's port (*per Cur.*).

(3) During a time of peace without prospect of war, any transfer which is sufficient to transfer the property between the vendor & the vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, & it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors as long as the ship or goods remain *in transitu* (*per Cur.*).—**SORENSEN v. R., THE BALTICA (1858),** 11 Moo. P. C. C. 141; 2 Eng. Pr. Cas. 628; 30 L. T. O. S. 342; 6 W. R. 308; 14 E. R. 648, P. C.; *reversg.* (1855), Spinks, 264.

*Annotations:—***As to (1) Consd.** The Vesta, [1921] 1 A. C. 774. **Refd.** The Benedict (1855), Spinks, 314. **As to (2) Consd.** The Tommi. The Rothersand, [1914] P. 251; The Dirigo, The Hallingdal, [1919] P. 204. **Apld.** The Edna, [1921] 1 A. C. 735. **Refd.** The Noordam (No. 2), [1919] P. 255. **As to (3) Consd.** The Tommi. The Rothersand, [1914] P. 251; The Southfield (1915), 85 L. J. P. 78; The Kronprinsessan Margareta, The Parana, etc., [1921] 1 A. C. 486. **Refd.** Baltazzi v. Ryder, The Panaghia Rhomba (1858), 12 Moo. P. C. C. 168; The United States, [1917] P. 30; The Vesta, [1921] 1 A. C. 774.

**116. —Necessity for proof of bona fides.]—(1) A purchase purporting to be made just antecedent to the war by the master, who had before sailed in the ship as a Russian subject, can only be upheld by indisputable proof that the transfer was *bonâ fide*, that the money was paid, & that the purchaser was a neutral subject.**

(2) It is the custom of the ct. where information has been acquired in one case to use it in others (DR. LUSHINGTON).—**THE RAPID (1854),** Spinks, 80; 2 Eng. Pr. Cas. 317; 164 E. R. 424.

**117. —Onus of proof.]—(1) Sale of enemy's ship shortly before the war. The onus**

## PART III. SECT. 3, SUB-SECT. 2.—A.

**1081. Enemy ownership.]—THE DART (1812),** Stewart, 301.

## PART III. SECT. 3, SUB-SECT. 2.—

## B. (a).

d. Agreement to purchase prior to war

—Subsequent completion after commencement of hostilities—Detention ordered.]—**THE BELLAS (1914),** 20 D. L. R. 989.

*Sect. 3.—Of ships: Sub-sect. 2, B. (a) & (b) i. & ii.]* of giving complete & satisfactory proof thereof lies on claimant; without it the ct. cannot restore.

A neutral merchant, engaging for the sake of extraordinary profit in such suspicious transactions as the purchase of an enemy's vessel shortly before the war, is bound to give the clearest proof of the *bona fides* of the transfer.

(2) Though the ct., in condemning an enemy ship, cannot recognise a lien as against the captor, yet the ct. cannot restore to claimants when it appears that others who have not claimed have a lien or interest in the ship.

If A. claims a ship as his property, & it should turn out that he is a trustee for shares in that ship belonging to another person, I cannot restore that ship to A. . . . certainly not unless the *cestui que trust* is himself entitled to restitution. There ought in such cases to be a claim for a person equitably interested (DR. LUSHINGTON).—THE ERNST MERCK (1854), 2 Ecc. & Ad. 87; Spinks, 98; 24 L. T. O. S. 303; 1 Jur. N. S. 119; 164 E. R. 322.

118. — Transfer in transitu — Possession taken before seizure.]—SORENSEN v. R., THE BALTICA, No. 115, *ante*.

119. — —.]—On the day war was declared between Germany & Russia, Aug. 1, 1914, an English co. wired to a German co. accepting an offer to sell to the English co. two vessels belonging to the German co. then on the high seas, & flying the German flag. On Aug. 3, war was declared between England & Germany, & on the next day, the vessels were detained as prizes by collectors of customs in English ports:—*Held*: (1) the nationality of a vessel is determined by the flag she is entitled to fly, & at the time of seizure that flag was German; (2) the alleged transfer *in transitu* was invalid, as mere communications, which may suffice to bind the parties, are insufficient to change the ownership of the property as against captors, whether imminent or actual belligerents.—THE TOMMI, THE ROTHERSAND, [1914] P. 251; 84 L. J. P. 35; 112 L. T. 257; 31 T. L. R. 15; 59 Sol. Jo. 26; 13 Asp. M. L. C. 5.

*Annotations:—As to (2) Refd.* Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co., Same v. Tilling, [1915] 1 K. B. 893; The Poona (1915), 84 L. J. P. 150.

120. Transfer in contemplation of war—Validity —When absolute & *bona fide*.]—(1) E., a Russian subject, shortly before & in contemplation of war between Russia & England, sold a ship *bona fide* & absolutely to S., a neutral, taking one-third of the price down, it being agreed that E. was to be paid the residue out of the earnings of the ship. Before all the price was paid, the ship was seized as prize, whereupon S. claimed restoration:—*Held*: S. was entitled to restoration.

(2) A sale of a ship absolute & *bona fide*, though in contemplation of war, or even *flagrante bello*, is not illegal, but if there is any secret understanding that the ship is to be restored in the event of no war breaking out, or of a speedy peace, etc., the sale is held void in a prize ct.

(3) Liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral's ship, are equally disregarded in a ct. of prize.

(4) There seems to be no positive rule that war cannot be said to be imminent, unless there be an embargo or some similar act on the part of the country about to be belligerent.—SORENSEN v. R.,

THE ARIEL (1857), 11 Moo. P. C. O. 119; 2 Eng. Pr. Cas. 600; 29 L. T. O. S. 133; 5 W. R. 427 14 E. R. 640, P. C.

*Annotations:—As to (1) Follid.* The Baltica (1858), 6 W. R. 308. *Apld.* The Edna, [1921] 1 A. C. 735. *Consd.* The Vesta, [1921] 1 A. C. 774. *Refd.* The Miramichi, [1915] P. 71. *As to (2) Refd.* The Kronprinzessin Margareta, The Parana, etc., [1921] 1 A. C. 486. *As to (3) Apld.* The Odessa, The Woolston, [1916] 1 A. C. 145. *Refd.* The Marie Glaeser, [1914] P. 218; The Palm Branch, [1919] A. C. 272. *As to (4) Refd.* The Teutonia (1871), L. R. 3 A. & E. 394.

121. — Fictitious transfer to enemy subject—To avoid capture by enemy.]—A British ship fictitiously transferred to Russian merchants to prevent her seizure by the Russian authorities, while lying icebound in a Russian port at the outbreak of the war, but seized as Russian property by the officers of the customs on her arrival at Leith, restored to the British owners on payment of the seizer's expenses.—THE OCEAN BRIDE (1854), Spinks, 66; 2 Ecc. & Ad. 8; 24 L. T. O. S. 99; 18 Jur. 1031; 164 E. R. 277.

122. Circumstances arousing suspicion — Continuance in enemy trade.]—THE JUFFROUW ELBRECHT (1799), 1 Ch. Rob. 127; 165 E. R. 121.

123. — —.]—A purchase shortly before the war by the master of the ship, which continues in the same trade, is of the most suspicious character, & would require stringent proof of the actual payment of the money. When it appears that the money has not been paid, & that there was no bill of sale on board, further proof cannot be allowed.—THE CHRISTINE (1854), Spinks, 82; 2 Ecc. & Ad. 24; 164 E. R. 286.

*Annotation:—Consd.* The Ariel (1857), 29 L. T. O. S. 133.

124. — — Ship's papers fraudulently obtained.]—THE JUFFROUW ELBRECHT (1799), 1 Ch. Rob. 127; 165 E. R. 121.

125. — Non-payment of purchase-money.]—THE CHRISTINE, No. 123, *ante*.

126. — —.]—THE RAPID, No. 116, *ante*.

127. — —.]—SORENSEN v. R., THE ARIEL, No. 120, *ante*.

128. — Agreement for restoration.]—SORENSEN v. R., THE ARIEL, No. 120, *ante*.

#### (b) During Hostilities.

##### i. Validity.

129. Transfer of enemy ship to neutral.]—The purchase of vessels in the enemy's country is allowed by England, but a bill of sale must be produced.

It is permitted to neutrals by this country to purchase ships in the enemy's country (SIR WILLIAM SCOTT).—THE WELVAART (1799), 1 Ch. Rob. 122; 165 E. R. 119.

130. —.]—SORENSEN v. R., THE BALTICA, No. 115, *ante*.

131. — Necessity for bona fides.]—This is the case of a ship asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants. . . .

Property so transferred must be *bona fide* & absolutely transferred (SIR WILLIAM SCOTT).—THE SECHS GESCHWISTERN (1801), 4 Ch. Rob. 101; 165 E. R. 549.

*Annotations:—Distd.* The Clio (*alias* The William Pitt) (1805), 6 Ch. Rob. 87. *Consd.* The Baltica (1855), Spinks, 264. *Apld.* The Ariel (1857), 29 L. T. O. S. 133. *Consd.* The Naxos (1920), 133 L. T. 556. *Refd.* The Vesta, [1921] 1 A. C. 774.

132. — —.]—THE JOHANNA EMILIE, No. 66, *ante*.

#### PART III. SECT. 3, SUB-SECT. 2.— B. (b) 1.

129 i. Transfer of enemy ship to

neutral.]—Vessel & cargo purchased from the enemy in the name of a neutral, but really for a British sub-

ject:—*Held*: liable to confiscation.—THE GUSTAVA (1813), Stewart, 541.

133. ———.]—A vessel under Monte Videan colours was seized at Liverpool as Russian. The ct. allowed the Monte Videan consul to bring in an affidavit as to certain points before it proceeded to condemn the ship. The affidavit not being sufficient, the ct. refused to grant further time to bring in the claim, & condemned the vessel.—THE RAPIDA (1855), Spinks, 172; 164 E. R. 427.

134. ———.]—SORENSEN v. R., THE ARIEL, No. 120, *ante*.

135. ———.]—Ship awaiting convoy in neutral port.]—THE NIEUWE VRIENDSCHAP (1786), 6 Ch. Rob. 399, n.; 165 E. R. 977, P. C.

*Annotation* :—*Refd.* The Minerva (1807), 6 Ch. Rob. 396.

136. ———.]—Necessity for absolute transfer.]—A sale made by an enemy to neutrals in time of war must be an absolute unconditional sale (*per cur.*).—THE NOYDT GEDACHT (1799), 2 Ch. Rob. 137, n.; 165 E. R. 266.

137. ———.]—THE SECHS GESCHWISTERN, No. 131, *ante*.

138. ———.]—SORENSEN v. R., THE ARIEL, No. 120, *ante*.

139. ———.]—In blockaded port.]—THE VIGILANTIA, No. 729, *post*.

140. ———.]—Ship of war.]—Purchase of a ship of war from the enemy whilst lying in a neutral port to which it had fled for refuge, etc., invalid.—THE MINERVA (1807), 6 Ch. Rob. 396; 165 E. R. 975.

*Annotation* :—*Refd.* The Edna, [1921] 1 A. C. 735.

141. ———.]—Voluntary transfer from father to son—As advance of portion.]—(1) The voluntary transfer of a ship by a father, an enemy, to his son, a neutral, as an advance of a portion of his inheritance is valid if made *bond fide*.

(2) I am yet to be informed that the single circumstance of having a master of a hostile character to command a vessel will destroy a claimant's right to restitution, if he be otherwise so entitled (*Dr. LUSHINGTON*).—THE BENEDICT (1855), Spinks, 314; 4 W. R. 165; 164 E. R. 456.

142. Transfer to enemy—Fictitious transfer to avoid capture.]—THE SALLY (1800), 3 Ch. Rob. 179; 165 E. R. 428.

143. ———.]—Part of purchase-money not paid.]—(1) Lien, on freight, & parcel of goods pledged for the payment of the purchase-money of the ship, not sufficient to found a claim in a prize ct.

This ship appears to have been originally an American vessel sold to a Spanish merchant at Buenos Ayres, & seized on a voyage to this country, documented as belonging to a Spanish merchant, & sailing under the flag & pass of Spain. A claim is given on behalf of the former American proprietor, in virtue of a lien which he is said to have retained on the property, for the payment of the purchase-money; but such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a ct. of prize (*SIR WILLIAM SCOTT*).

(2) As to the title of property in the goods, which are said to have been going, as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt, will not alter the property. There must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding, that he who holds the bill of lading is to bear the risk of the goods, as to the voyage, & as to the market to which they are consigned, otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property (*SIR WILLIAM SCOTT*).

(3) It is said that a part of the purchase-money

had not been paid. That objection can have little weight, since it is a matter solely for the consideration of the person who sells, to judge what mode of payment he will accept (*SIR WILLIAM SCOTT*).—THE MARIANNA (1805), 6 Ch. Rob. 24; 1 Eng. Pr. Cas. 518; 165 E. R. 837.

*Annotations* :—*As to* (1) *Refd.* The Ariel (1857), 11 Moo. P. C. C. 119. *As to* (2) *Refd.* The Ida (1854), Spinks, 26. *As to* (3) *Distd.* The Christine (1854), Spinks, 82. *Refd.* The Ariel (1857), 11 Moo. P. C. C. 119. *Generally, Refd.* The Marie Glaeser, [1914] P. 218. *Mentd.* The Odessa, The Woolston, [1916] 1 A. C. 145.

144. Transfer to British subject—Under licence—Bond to restore at end of war.]—Licence to purchase a vessel out of the hands of an enemy merchant, with a view to recovering a bad debt. If vitiated by a bond to restore at the conclusion of the war as given by the agent in Antwerp.—THE CLIO (1805), 6 Ch. Rob. 67; 165 E. R. 852.

145. Transfer between neutrals—In blockaded port.]—THE VIGILANTIA, No. 87, *ante*.

146. ———.]—Former enemy ship—Previous sale false.]—THE LISETTE (1856), 7 L. T. 398.

#### ii. Circumstances arousing Suspicion.

147. Employment in enemy trade—Under control of former owner.]—THE BERNON, No. 159, *post*.

148. ———.]—With enemy officers & crew.]—THE VIGILANTIA, No. 87, *ante*.

149. ———.]—This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which, if the ct. had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade, & under the management of the former owner. Wherever that fact appears, the ct. will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered & pretended transfer. The presumption is so strong, that scarcely any proof can avail against it. It is a rule which the ct. finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, & yet retain the management of it, as a neutral vessel, it would be impossible for the ct. to protect itself against frauds. . . . The inadequacy of the price, & the chasms appearing in the correspondence, are circumstances inconsistent with the probability of ownership; the course of trade has been entirely French, without interruption, excepting in one voyage to Barcelona; but even in that instance, the vessel returned again to a French port. . . . I have no hesitation in condemning this vessel (*SIR WILLIAM SCOTT*).—THE JEMMY (1801), 4 Ch. Rob. 31; 165 E. R. 525.

150. ———.]—THE OMNIBUS (1805), 6 Ch. Rob. 71; 165 E. R. 853.

151. ———.]—Neutral country having no sea port.]—Where a ship is transferred from an enemy, & continues habitually in the enemy's trade, the neutral is not specially entitled to carry on that trade, merely because his own country has no seaport.

Though he had no seaport of his own, the ports of other neutral countries were open to him; & if he confines his vessel exclusively to the enemy's navigation, he is liable to be considered as an enemy, with respect to the concerns of such a vessel (*SIR WILLIAM SCOTT*).—THE ENDRAUGHT (1798), 1 Ch. Rob. 19; 165 E. R. 81.

152. Residence of purchaser in enemy country.]—THE BERNON, No. 159, *post*.

153. Transfer with false papers.]—THE VIGILANTIA, No. 87, *ante*.

*Sect. 3.—Of ships: Sub-sect. 2, B. (b) ii.; sub-sect. 3. Sect. 4: Sub-sects. 1 & 2, A.]*

**154. Concealment of interest of purchaser.]—**It is clear . . . that there had been such a fraudulent suppression, & concealment of his interest, as must preclude the parties implicated in it, either by their own acts, or the acts of their agents, from giving further proof of their interests engaged in that transaction (*per CUR.*).—*THE GRAAFF BERNSTORFF* (1801), 3 Ch. Rob. 111, n.; 165 E. R. 404.

**155. Inadequacy of price.]—THE JEMMY, No. 149, ante.**

**156. Non-payment of purchase-money.]—**(1) A vessel belonging to a Russian, said to have been transferred by virtue of a power of attorney to a Dane at Messina, then resold by virtue of another power of attorney to her master while at Copenhagen in the course of her voyage, condemned as never having been *bond fide* transferred.

The ct. looks rather for the natural evidence of a transaction, such as correspondence, than for formal documents.

(2) The ct. can restore to the claimant only in the character in which he claims, & the *onus* of full & complete proof lies upon such claimant.—*THE SOGLASIE* (1854), 2 Ecc. & Ad. 101; Spinks, 104; 1 Jur. N. S. 47; 164 E. R. 3.

*Annotations:—As to (1) Expld. The Otto & Olaf* (1855), Spinks, 257. *As to (2) Distd. The Odessa* (1855), Spinks, 208.

**157. —.]—**A ship sailing under neutral colours, & with neutral papers from a Russian to a British port, with a cargo, within the time granted to Russian vessels by the Order in Council, was seized by the custom house officers, & claimed by the master as the *bond fide* purchaser & a neutral:—*Held*: (1) the neutral character was not established; (2) the transfer to the master was merely colourable, there being no proof of payment, & the price being beyond that of the purchaser, a master mariner.—*THE JOHANN CHRISTOPH* (1854), 2 Ecc. & Ad. 2; Spinks, 60; 24 L. T. O. S. 52; 164 E. R. 274.

*Annotation:—As to (2) Refd. The Soglasie* (1854), Spinks, 104.

**158. Circumstances indicating fraud—Cargo & ship in same ownership.]—THE FLORA** (1807), 6 Ch. Rob. 360; 165 E. R. 962.

#### SUB-SECT. 3.—EMPLOYMENT OF SHIP.

**159. General rule.]—**(1) The purchase of an enemy's vessel in time of war is liable to great suspicion, that suspicion is increased when the asserted neutral purchaser appears to be personally residing in the enemy's country at the time of sale.

Still greater suspicion will arise, if the ship so purchased immediately engages in the commerce of [the enemy], & continues in the hands of the [enemy] proprietors (*SIR WILLIAM SCOTT*).

(2) The employment of a vessel is, *in limine*, a point very proper for inquiry; for it may impress a national character. Wherever it appears that the purchaser was in [an enemy country], he must explain the circumstances of his residence there; the presumption arising from his residence is, that he is there *animo manendi*, & it lies on him to explain it (*SIR WILLIAM SCOTT*).

(3) Shall I order further proof? It is enough to have permitted it once; the party having had a full opportunity of proving his claim, & having failed to satisfy the ct., it is time to shut the door

(*SIR WILLIAM SCOTT*).—*THE BERNON* (1798), 1 Ch. Rob. 102; 165 E. R. 112.

*Annotations:—As to (2) Refd. Esposito v. Bowden* (1857), 7 E. & B. 763; *The Mannigtry*, [1916] P. 329.

**160. Trade between neutral country & colonies of enemy.]—**Trade from the colonies of the enemy. Produce of Vera Cruz, going from that settlement to Hamburg, the property of neutral merchants, restored.—*THE PROVIDENTIA* (1799), 2 Ch. Rob. 142; 165 E. R. 268.

**161. Trading between enemy country & her colonies — False destination.]—**Colonial trade. Voyage from a French colony with false destination to Altona, actually to France or Spain. Ship & cargo condemned.

A neutral vessel carrying on the trade between the colonies & the mother country, under a false & colourable destination will be subject to condemnation (*SIR WILLIAM SCOTT*).—*THE PHOENIX* (1800), 3 Ch. Rob. 186; 165 E. R. 431.

*Annotation:—Mentd. Forbes v. Forbes* (1854), Kay, 341.

**162. —.]—**A voyage as asserted from Marseilles to Tranquebar, but actually to the Isle of France, under pretext of distress, which was not sufficiently established:—*Held*: a voyage originally destined from Marseilles to the Isle of France, & as such not entitled to a more favourable construction than that applied to the coasting trade of the enemy under false papers.—*THE TWO BROTHERS* (1811), 2 Act. 38; 12 E. R. 171, P. C.

**163. Delivery of cargo in enemy port.]—THE JONGE JEROEM** (1804), cited in 5 Ch. Rob. at p. 283; 165 E. R. 777.

*Annotation:—Distd. The Liesbet Van den Toll* (1804), 5 Ch. Rob. 283.

**164. Innocent shipment of enemy goods.]—**(1) Proof of joint property with the enemy in a shipment, subjects such to condemnation.

(2) If the shipment [of enemy property] be innocent it does not affect the ship.—*THE ZULEMA* (1809), 1 Act. 14; 12 E. R. 6, P. C.

**Trading with enemy.]—See, generally, ALIENS, Vol. II., pp. 162–188, Nos. 330–512.**

#### SECT. 4.—OF GOODS.

##### SUB-SECT. 1.—FLAG OR PASS.

**165. Whether conclusive of nationality.]—**The property of British merchants, even shipped before the war, yet if in a Spanish character, & in a trade so exclusively peculiar to Spanish subjects as that no foreign name could appear in it, must take the consequences of that character & be considered as Spanish property (*SIR WILLIAM SCOTT*).—*THE PRINCESSA* (1799), 2 Ch. Rob. 49; 165 E. R. 235.

**166. —.]—THE VROW ELIZABETH, No. 88, ante.**

**167. —.]—THE VREEDE SCHOLTYS** (1804), 5 Ch. Rob. 5, n.; 165 E. R. 677.

**168. — Enemy goods on British ship.]—THE ALDWORTH (PART CARGO EX), No. 328, post.**

**169. —.]—THE MIRAMICHI, No. 190, post.**

**170. — Enemy goods on neutral ship — Transhipped from enemy vessel.]—**Before the outbreak of war some cases of tea were shipped at a Chinese port on a German vessel bound to Hamburg. The tea was consigned to a firm at Bremen. War having broken out after the vessel sailed, she put into the Dutch port of Padang for refuge, where she remained. In May, 1910, the Bremen firm sold the tea, which was still lying in the German vessel, to a firm of Dutch merchants at Amsterdam who paid for the tea, & it was transhipped into a Dutch vessel for carriage to London,

*Annotation* :—As to (1) **Consd.** The Vesta, etc., [1921] 1 A. C. 774.

### A. In General.

172. ———.]—THE RACHAEL MOBARECK (1792), cited in 3 Ch. Rob. at p. 30 ; 165 E. R. 374, P. C.

173. ———.]—The property of an English merchant resident in Holland condemned.

175. How ownership determined.—According to prize law—Not municipal law.]—THE POSTEIRO, No. 251, *post.*

*Annotations*:—*Mentd.* The Vesta, etc. [1921] 1 A. C. 774;  
Hansson v. Hamel & Horley, [1922] 2 A. C. 36.

(2) The ct. of prize looks to the equitable title as well as the legal title to property.—THE ABO

*Annotation:—As to (2) Consd. The Miramichi, [1915] P. 71.*

179. Goods shipped in name of enemy subject.]  
—THE PRINCESSA. No. 165. *ante*.

181. Ultimate risk in British shipper.]—This is a claim of a peculiar nature for goods sent by British subjects to Spain, shipped before hostilities, during the time of that situation of the two countries, of which it was unknown, even to our govt., what would be the issue, between them (SIR WILLIAM SCOTT).

*Annotations* :— *Distd.* The Abo (1854), 1 *Ecc. & Ad.* 347.  
*Reid.* The Miramichi, [1915] P. 71; The Louisiana, The  
Nordic, The Tomsk, The Joseph W. Fordney (1916), 32  
T. L. R. 619.

183. Owner resident in country under control of enemy.]—I think it is clearly the intention of

Annotation:—**Reid**. *Cremidi v. Powell, The Gerasimo* (1857), 8 State Tr. N. S. 787.

185. Joint property with enemy.]—THE ZULEMA,  
No. 164. *ante.*

187. Owner carrying on business in enemy country.]—The commercial domicile of a neutral in an enemy country imposes enemy character upon his property or interest in the business which he there carries on. If upon the outbreak of war he wishes to avoid the consequences of that domicile

*Sec. 4.—Of goods: Sub-sect. 2, A. & B. (a) i. & ii., & (b).]*

he must within a reasonable interval discontinue or dissociate himself from the business. If goods are captured at sea before a reasonable interval from the outbreak of war has elapsed the Prize Ct. in a proper case will take notice of a discontinuance or a dissociation after the capture & will even adjourn the proceedings to give an opportunity for a discontinuance or dissociation. A shipment of goods after the outbreak of war amounts to an election to continue unless it is made without the privity of the claimant or as a step in discontinuing business or dissociating himself from it.—*THE ANGLO-MEXICAN*, [1918] A. C. 422; 87 L. J. P. 33; 118 L. T. 260; 34 T. L. R. 149; 14 Asp. M. L. C. 227, P. C.; *revsg.*, [1916] P. 112.

*Annotations:—Reid. The Asturian*, [1916] P. 150; *The Lutzow*, [1918] A. C. 435.

**188. Goods not enemy property at seizure—Transfer to enemy prior to writ claiming condemnation.]—**Goods which at the date of their seizure in prize are not enemy property cannot be condemned as enemy goods, although the property in them has passed to an enemy before the issue of the writ claiming condemnation.—*THE ORTERIC*, [1920] A. C. 724; 89 L. J. P. 209; 123 L. T. 448; 15 Asp. M. L. C. 10, P. C.

*B. Transfer of Ownership.*

*(a) Before Hostilities.*

*i. In General.*

**189. General rule.]—***SORENSEN v. R., THE BALTICA*, No. 115, *ante*.

**190. Passing of property the test.]—**(1) A cargo shipped under c.i.f. contract by a neutral to a German buyer on a British vessel before the declaration of, or imminence of, war between Great Britain & Germany held, not to be subject to seizure & condemnation by the Prize Ct., the property in the goods not having passed to the enemy subject, nor the documents representing the goods taken up by him, & money having been advanced to the neutral seller on the faith of the documents by a neutral banker.

(2) Enemy cargo shipped without any anticipation of imminent war, & taken as prize in port or at sea after war has intervened, does not escape condemnation because it is in a British vessel.—*THE MIRAMICHI*, [1915] P. 71; 84 L. J. P. 105; 112 L. T. 349; 31 T. L. R. 72; 59 Sol. Jo. 107; 13 Asp. M. L. C. 21; 1 P. Cas. 137.

*Annotations:—As to (1) Consd. The Odessa, The Cape Corso*, [1915] P. 52. *Distd. The Louisiana, The Nordic, The Tomsk, The Joseph W. Fordney* (1915), 32 T. L. R. 619; *The Annie Johnson, The Kronprinzessin Margareta*, [1918] P. 154. *Reid. The Flamenco, The Orduna* (1915), 32 T. L. R. 53; *The Hypatia*, [1917] P. 36; *The Kronprinzessin Margareta, The Thal*, [1917] P. 114; *The Parchim*, [1918] A. C. 157; *Re Certain Craft Captured on the Victoria Nyanza*, [1919] P. 83; *The Palm Branch*, [1919] A. C. 272; *The Orteric*, [1920] A. C. 724. *As to (2) Apprvd. The Roumanian*, [1916] 1 A. C. 124.

**191. —.]—***THE TREGURNO*, [1916] W. N. 126.

**192. —.]—***THE GOTHLAND*, [1916] P. 239, n.; 2 P. Cas. 293, n.

*Annotation:—Distd. The Palm Branch*, [1916] P. 239.

**193. —.]—**Applts., an American co., made an agreement with a German co., whereby the latter were to act as applts., "selling agents," the agreement providing that applts. were to be paid not what their goods realised on being sold by the German co., but an arranged price. Under this

agreement applts. shipped a quantity of pig lead to the German co., & it was seized as prize:—*Held: before the seizure applts. had parted with the property in the goods to the German co., & therefore the goods must be condemned.—THE KRONPRINZESSIN CECILIE (PART CARGO EX)* (1917), 33 T. L. R. 292, P. C.

**194. How passing of property tested—By English law—Under Sale of Goods Act, 1893 (c. 71).]**—(1) The Prize Ct. in determining who is the owner of goods shipped under a contract of sale & seized as prize, should do so in accordance with the municipal law of England as codified in above Act, that law being based upon the mercantile usages common in their general operation to all nations. If the parties contracted with reference to a municipal law which is proved to differ from the English law, that fact is material in considering the intention of the parties as to the passing of the property.

(2) Although property, & not risk, is the test of enemy character of goods, the incidence of the risk as between buyer & seller is very strong indication as to which of them owns the property.

(3) The property in goods shipped under a contract of sale made before the outbreak of war can pass from the enemy seller to the neutral buyer while the goods are in transit after the outbreak of war.—*THE PARCHIM*, [1918] A. C. 157; 87 L. J. P. 18; 117 L. T. 738; 34 T. L. R. 53; 14 Asp. M. L. C. 196, P. C.

*Annotations:—As to (1) Consd. The Annie Johnson, The Kronprinzessin Margareta*, [1918] P. 154. *Reid. Ertel Bieber v. Ido Tinto Co., Dynamit Act. v. Same, Vereinigte Königs & Laurahütte Act. v. Same*, [1918] A. C. 260; *The Drigo, The Hallingdal, etc.*, [1919] P. 204; *The Kronprinzessin Margareta, The Parana, etc.*, [1921] 1 A. C. 486. *As to (2) Exptd. The Kronprinzessin Margareta, The Parana, etc.*, [1921] 1 A. C. 486. *Reid. The Dorflinger (No. 2)* (1918), 87 L. J. P. C. 195; *The Palm Branch*, [1919] A. C. 272. *As to (3) Distd. The Annie Johnson, The Kronprinzessin Margareta*, [1918] P. 154. *Generally, Mentd. Eastwood & Holt v. Studer* (1926), 31 Com. Cas. 251.

**195. — When foreign law regarded.]—***THE PARCHIM*, No. 194, *ante*.

**196. — Matter for consideration—Delivery of bill of lading.]—***THE PRINZ ADALBERT*, No. 1134, *post*.

**197. — — Intention of parties.]—***THE PRINZ ADALBERT*, No. 1134, *post*.

**198. — —.]—**Where goods consigned to a neutral consignee are captured on board an enemy ship, the question is whether the property has passed to the neutral, which must be determined by the intention of the parties to the contract.

It appeared that it was the intention of the parties that the property should not pass until a draft drawn by the enemy consignors upon the neutral consignees had been accepted by them, & the seizure took place before such acceptance:—*Held: the goods were rightfully condemned as enemy goods.—THE DERFFLINGER (No. 2)* (1918), 87 L. J. P. C. 195; 118 L. T. 521; 14 Asp. M. L. C. 267, P. C.

**199. — — Incidence of risk.]—***THE PARCHIM*, No. 194, *ante*.

**200. Sale to enemy by neutral—Stoppage in transitu.]—***Semble: the failure of an alien enemy firm to meet their acceptances given for the price of goods shipped to such alien enemy firm by a neutral in a British ship does not constitute insolvency, so as to give the neutral a right of stoppage in transitu. It is very doubtful whether the act of declining to pay an acceptance through*

PART III. SECT. 4, SUB-SECT. 2.—B. (a) 1.

190 i. *Passing of property the test.]—Re THE RAFFENFELS (CARGO EX)* (1914), 1 L. R. 42 Calo. 334.

bankers because of the outbreak of war could be interpreted as ceasing to pay debts in the ordinary course of business, so as to give the right to say that the firm could be "deemed to be insolvent" within Sale of Goods Act, 1893 (c. 71), s. 62 (3).—THE FELICIANA (1915), 59 Sol. Jo. 546.

#### ii. *Transfer in transitu.*

201. In time of peace.]—THE VROW MARGARETHA, No. 211, *post*.

202. —.]—A contract in contemplation of war, for the transfer of colonial property, *in transitu*, held illegal.

A change of property *in transitu*, by the transfer of the bills of lading, where it is done without any view of accommodation to relieve the seller from the pressure or prospect of war [is legal]. . . . But in time of war it is a vicious contract, being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading those rights beyond the possibility of detection. . . . If the contemplation of war leads immediately to the transfer, & becomes the foundation of a contract that would not otherwise be entered into on the part of the seller; & this is known to be so done, in the understanding of the purchaser, though on his part there may be other concurrent motives . . . such a contract cannot be held good, on the same principle that applies to invalidate a transfer *in transitu* in time of actual war. . . . The same fraud is committed against the belligerent, not indeed as an actual belligerent, but as one who was, in the clear expectation of both the contracting parties, likely to become a belligerent, before the arrival of the property, which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war—not, indeed, in either case, from capture at the present moment when the contract is made, but from the danger of capture, when it was likely to occur. . . . Both contracts are framed with the same *animus fraudandi*, & are justly subject to the same rule (SIR WILLIAM SCOTT).—THE JAN FREDERICK (1804), 5 Ch. Rob. 128; 1 Eng. Pr. Cas. 434; 165 E. R. 721.

*Annotations*:—*Apld.* The Baltica (1855), Splinks, 264; The Tomini, The Rothersand, [1914] P. 251. *Consd.* The Bawean, [1918] P. 58. *Refd.* Janson v. Driestonlein Consolidated Mines, [1902] A. C. 484; The Vesta, etc., [1921] 1 A. C. 774.

203. —.]—SORENSEN v. R., THE BALTICA, No. 115, *ante*.

204. —.]—THE SOUTHFIELD, No. 6, *ante*.

205. In contemplation of war.]—THE JAN FREDERICK, No. 202, *ante*.

206. — War must be with captor.]—THE DAKSA, No. 207, *post*.

207. — Transfer in pursuance of pre-existing contract.]—A transfer of goods at sea induced by the transferor's apprehension of hostilities between the state to which he owes allegiance & another state is deemed to be in fraud of the belligerent rights of that other state only; it is not invalid as against a capture by a belligerent state allied thereto unless it is proved, or to be presumed, that it was made in apprehension of war with that allied state.

A presumption arises from the existence at the time of the transfer of a general apprehension of war with the state of the captors, but can be discharged by showing that the transfer was made pursuant to a pre-existing contract.—THE DAKSA, [1917] A. C. 386; 86 L. J. P. C. 130; 116 L. T.

364; 33 T. L. R. 281; 61 Sol. Jo. 431; 13 Asp. M. L. C. 591, P. C.

*Annotations*:—*Refd.* The Parohim, [1918] A. C. 157; The Kronprinsessan Margareta, The Parana, etc., [1921] 1 A. C. 486.

#### (b) *During Hostilities.*

208. General rule.]—SORENSEN v. R., THE BALTICA, No. 115, *ante*.

209. Absolute transfer—Necessity for delivery.]—THE VESTA, ETC., No. 219, *post*.

210. Transfer *in transitu*—General rule.]—THE YONG VROW ADRIANA (1761), Burrell, 178; 1 Eng. Pr. Cas. 8; 167 E. R. 528, P. C.

211. —.]—Brandies transferred *in transitu* from a Spanish merchant to a neutral, before the breaking out of hostilities, restored.

A mere delivering of the bill of lading . . . transfers only the right of delivery; but a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, & all others. . . . When war intervenes, another rule is set up by the Cts. of Admty., which interferes with the ordinary practice. In a state of war, existing or imminent, the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in an enemy's country, would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*; & in that sense I recognise it as a rule of this Ct. This . . . arises out of a state of war, which creates new rights in other parties, & cannot be applied to transactions originating in a time of peace (SIR WILLIAM SCOTT).—THE VROW MARGARETHA (1799), 1 Ch. Rob. 336; 1 Eng. Pr. Cas. 149; 165 E. R. 197.

*Annotations*:—*Apld.* Sorensen v. R., The Baltica (1857), 11 Moo. P. C. C. 141. *Consd.* The Southfield (1915), 85 L. J. P. 78; The Bawean, [1918] P. 58; The Kronprinsessan Margareta, The Parana, etc., [1921] 1 A. C. 486; The Vesta, etc., [1921] 1 A. C. 774. *Refd.* The Sogliaso (1854), 2 Eccl. & Ad. 101; The Miramichi, [1915] P. 71; The United States, [1917] P. 30.

212. —.]—THE TWENDE VENNER (1807), 6 Ch. Rob. 329; 165 E. R. 951.

213. —.]—SORENSEN v. R., THE BALTICA, No. 115, *ante*.

214. — Goods shipped under f.o.b. contract—Payment made & documents handed over at port of loading—Ship chartered by neutral.]—A quantity of goods of a contraband character, namely foodstuffs & cattle feeding stuffs, were shipped by the American branch of a Frankfort firm on neutral vessels consigned to neutral firms in Scandinavia. It was alleged on behalf of the Crown: (a) that art. 2 of the Declaration of Paris was intended only to benefit neutrals & therefore an enemy could not claim its protection for his goods, or, alternatively, that the art. did not cover goods of a contraband nature even if they had not an enemy destination, & that such goods therefore were subject to condemnation; (b) that the doctrine of prize law, that property cannot pass from an enemy to a neutral during transit, applied, & that the goods still remained enemy property & therefore were liable to condemnation under (a), or, alternatively, to detention until the conclusion of peace or further order under the Reprisals Order in Council of Mar. 11, 1915:—*Held*: (1) art. 2 of the Declaration of Paris does not merely enure for the benefit of neutrals so that in effect only the neutral shipowner has the right



*Sect. 4.—Of goods: Sub-sect. 2, B. (b); sub-sects. 3 & 4, A. & B.]*

to complain of the interference with the voyage of his vessel by reason of the seizure of the goods laden on board; the art. protects the enemy goods themselves.

(2) In the following classes of cases the doctrine that property cannot pass from an enemy to a neutral during transit does not apply:—(a) where the goods are shipped under an f.o.b. contract on a vessel chartered by the neutral buyer, payment to be made against documents at the port of lading, & payment is made & all the documents handed over before the vessel sails; (b) where the goods are shipped on a general ship, not chartered by the buyer, under an f.o.b. contract including freight & insurance, or c.i.f. payment against documents at the port of loading, & payment is made & documents handed over before the ship sails; (c) where the same conditions exist, but payment is not made & the documents are not handed over till after the ship sails owing to the accidents of business & not because there is an intention to reserve the *jus disponendi*.

(3) There is no general principle that where goods seized as prize are sold, & an order for release is subsequently made, the successful claimants are entitled to interest upon the money because the Crown has had the use of it.

(4) *Qu.*: whether, in the present state of the authorities, a neutral vessel is confiscable for carrying a cargo, a substantial portion of which is contraband, without knowledge on the part of the shipowner of the nature of the cargo.—*THE DIRIGO, THE HALLINGDAL, ETC.*, [1919] P. 204; 88 L. J. P. 192; 121 L. T. 477; 35 T. L. R. 533; 14 Asp. M. L. C. 467.

*Annotations*:—As to (3) *Apprvd.* *The Falk, etc.*, [1921] 1 A. C. 787. *Reid.* *The Drottning Sophia*, [1920] P. 200. As to (4) *Consd.* *The Kim, The Björnstjerne, Björnson, The Alfred Nobel*, [1920] P. 319.

215. ——— *General ship.*—*THE DIRIGO, THE HALLINGDAL, ETC.*, No. 214, *ante*.

216. ——— *Payment not made owing to accidents of business.*—*THE DIRIGO, THE HALLINGDAL, ETC.*, No. 214, *ante*.

217. *Transfer in accordance with contract made before war—Payment made in ordinary course of business.*—*THE CATHAY* (1916), 51 L. Jo. 485.

218. *Sale of enemy goods by pledgees.*—A British steamship, before the outbreak of war between Great Britain & Germany, left Hankow with sundry packages of tallow, shipped by a German, & consigned to a British firm. On arrival at Liverpool, after the outbreak of war, the consignees declined to take delivery of the goods from enemy subjects. Thereupon a Japanese bank, which, at the time of shipment, had made advances in respect of which the shippers were in default, exercised, as indorsees & holders of the bill of lading, their power of sale, by entering into a contract to sell the goods to a British firm. On the seizure of the tallow by the customs authorities as prize:—*Held*: the goods must be released to the purchasers, for, when the contract of sale was made, the enemy pledgors lost their right to redeem, & thereby ceased to be owners. The goods were, therefore, not subject to seizure as enemy property.—*THE NINGHOW*, [1916] P. 221; 115 L. T. 554; 31 T. L. R. 470; 13 Asp. M. L. C. 509.

219. *Termination of transitus—Delivery of possession.*—A German ship bound to Rotterdam

with a non-contraband cargo belonging to a co. of enemy character took refuge at the outbreak of war in the then neutral port of Lisbon. The cargo was landed on the quay, & on Portugal entering into the war the ship was requisitioned by the Portuguese Govt. Subsequently the cargo was sold to a neutral co. who shipped it in neutral ships for Amsterdam, sending their managing director there for the purpose. A clause in the contract of sale gave the purchasers a right to reject the goods if they found them unsuited to their manufacturing business. The goods were captured on the voyage to Amsterdam:—*Held*: the clause in the contract did not render the sale ineffective as a transfer of the goods to the purchasers, & as they had taken actual delivery at Lisbon they were entitled to the release of the goods; the delivery of possession under the contract, but not the requisitioning of the German ship, terminated the original *transitus* & the belligerent right of capture.—*THE VESTA, ETC.*, [1921] 1 A. C. 774; 90 L. J. P. 250; 125 L. T. 261; 37 T. L. R. 505; 15 Asp. M. L. C. 194, P. C.

220. *Sale to neutral by enemy—After seizure in prize—Detention under Order in Council.*—Under the Reprisals Order in Council of Mar. 11, 1915, non-contraband goods which were enemy property might be detained or sold, & if sold the proceeds were to remain in ct. until the conclusion of peace or further order. By the Treaty of Peace, art. 297 (b), signed at Versailles, the German Govt. ceded the right to retain & liquidate property in British or Allied territory which at the coming into force of the Treaty belonged to German nationals:—*Held*: goods which after their seizure in prize had been purchased by a neutral from their German owner, & which were ordered to be detained under the Order in Council, were not liable to be retained under the Treaty of Peace, & the neutral purchaser was entitled to an order for the payment out to him of money which he had deposited as a condition to their release.—*THE OSCAR II.* (No. 2), [1921] 1 A. C. 467; 90 L. J. P. 193; 125 L. T. 429; 37 T. L. R. 313; 15 Asp. M. L. C. 215 3 P. Cas. 860, P. C.

SUB-SECT. 3.—PRODUCE OF ENEMY COUNTRY OR COLONY.

221. *General rule.*—[Where a contract between an enemy and neutral is entered into] if the motive is disclosed . . . the duties of neutrality may, on the disclosure of such a motive, create some new obligations on the neutral purchaser, arising from his relation to the other belligerent; the grand fundamental duty of neutrality being, that he is not to relieve one belligerent from the infliction of his adversaries' force, knowing the situation of affairs upon which the interposition of his act would have such a consequence. Neutrals may not be bound to inquire very accurately; but if it is clearly declared, either by the fact itself, or a *fortiori*, by express acknowledgments, they are bound to take notice of it, & regulate their conduct accordingly.

Suppose . . . a merchant should, at the beginning of a war, contract with a belligerent for the whole produce of a colony during the war, that must be held to be an illegal contract; because done evidently with the intention & consequence of placing that part of the belligerent's dominions,

PART III. SECT. 4, SUB-SECT. 3.

• *Shipment of enemy's produce—Pretended transfer to neutral—Shipment condemned.*—*THE HOPE* (1809), C. R. 3 A. C. 328.

as to its productions, out of the reach of war & in a state of perfect security, in fraud of the rights of the other belligerents.

A residence of agents in the enemy's country has not been held generally to impress the character of that country upon the transactions of principals resident in a neutral country, where the transaction itself has been in other respects perfectly neutral. The neutrality of the trade shall prevail against the effect of that circumstance. But where the trade itself cannot claim to be so considered, & is carried on from the enemy's country, by agents representing the principals therein, the mere personal residence of the principals elsewhere, would hardly protect such a trade, so conducted, from being considered as the trade of any enemy (SIR WILLIAM SCOTT).—THE RENDSBORG (1802), 4 Ch. Rob. 121; 165 E. R. 557.

*Annotations*:—*Consd.* Sorenson v. R., The Ariel (1857), 11 Moo. P. C. C. 119. *Reid.* The Jan Frederick (1804), 5 Ch. Rob. 128; The Tommi, The Rothersand (1914), 84 L. J. P. 35.

222. —[—]—Produce of claimants' estate, in the colonies of the enemy, is subject to condemnation, though it be *bond fide* the property of claimants personally domiciled in neutral countries.—THE PHENIX (1803), 5 Ch. Rob. 20; 165 E. R. 683.

*Annotations*:—*Apld.* The Asturian, [1916] P. 150. *Mentd.* Forbes v. Forbes (1854), 2 Eq. Rep. 178.

223. —[—]—THE VROW ANNA CATHARINA, No. 89, *ante*.

224. —[—]—Condemnation of a shipment of the enemy's colonial produce, though colourably transferred to a neutral merchant, & bills given for the amount.—THE HOPE (1809), 1 Act. 43; 12 E. R. 17.

225. —[—]—Prior to the outbreak of war between Great Britain & Turkey the Banque d'Orient a Greek co. having a head office at Athens & a branch at Smyrna, shipped on board the British steamship "Asturian" at Smyrna a quantity of sultanas in boxes, which were consigned to their order at Liverpool. The sultanas were the produce of a vineyard owned by the Banque d'Orient at Magnessia, near Smyrna. After the declaration of hostilities the sultanas were seized at Liverpool as prize:—*Held*: questions of commercial domicile, & the effect of the Turkish Capitulations, & their alleged abolition before the war by the Sublime Porte, were immaterial, & the goods, being the produce of land situate in an enemy country, must be confiscated as enemy property, although shipped before war.—THE ASTURIAN, [1916] P. 150; 85 L. J. P. 220; 114 L. T. 1136; 13 Asp. M. L. C. 375.

#### SUB-SECT. 4.—PROPERTY IN TRANSIT TO OR FROM ENEMY COUNTRY.

##### A. Before Hostilities.

226. Goods in transit from enemy country—Property of British subject.]—THE VICTORIA (1781), 1 Ch. Rob. 205, n.; 165 E. R. 149, P. C. *Annotation*:—*Reid.* The Hoop (1799), 1 Ch. Rob. 196.

227. —[—]—THE ABO, No. 177, *ante*.

228. — Validly sold to neutrals.]—THE VROW ANNA CATHARINA, No. 89, *ante*.

Valid transfer in transit.]—See Part III., Sect. 4, sub-sect. 2, B. (a) ii., *ante*.

229. Goods in transit to enemy country—Pro-

perty of British subject under contract of sale.]—THE PACKET DE BILBOA, No. 181, *ante*.

230. —[—]—(1) It is not every act of disguise-ment, nor every deviation from truth, in the formal papers, that preclude the parties from farther proof (SIR WILLIAM SCOTT).

(2) This cargo was going in time of war to the port of a belligerent, there to become the property of the belligerent immediately on arrival, & the legal consequence of condemnation would on that ground alone attach upon it (SIR WILLIAM SCOTT).—THE ANNA CATHARINA (1802), 4 Ch. Rob. 107; 165 E. R. 552.

##### B. During Hostilities.

231. General rule.]—A number of parcel post packages were seized under the Reprisals Orders in Council of Mar. 11, 1915, from the parcels mail of a Danish steamship bound from Copenhagen to New York as being goods of enemy origin & also as enemy property. The goods, which were manufactured in Germany & left the factories after the date of the Reprisals Order, had been ordered, & payment made, by various firms in America before the date of the Order, & in some cases before the outbreak of war. It was contended on behalf of these firms that the goods when seized were neutral goods as the property passed to the purchasers when the goods left the factories:—*Held*: in time of war goods shipped from an enemy country to a neutral country, or from a neutral to an enemy country, are regarded as enemy property, *qua* the rights of belligerent captors until delivery, & it makes no material difference that at the one end or the other there is a transit by land.—THE UNITED STATES, [1917] P. 30; 86 L. J. P. 52; 116 L. T. 19; 33 T. L. R. 134; 13 Asp. M. L. C. 568; 2 P. Cas. 390.

*Annotations*:—*Consd.* The United States (No. 2) (1917), 2 P. Cas. 525; The Noordam (No. 2), [1919] P. 255. *Reid.* The Vesta, etc., [1921] 1 A. C. 774. *Mentd.* The United States, [1920] P. 430.

232. Goods in transit from enemy country.]—THE ST. LOUIS (*alias* EL ALLESSANDRO) (1781), cited in 1 Ch. Rob. at p. 204; 165 E. R. 149, H. L. *Annotation*:—*Reid.* The Hoop (1799), 1 Ch. Rob. 196.

233. —[—]—THE AURORA (1802), 4 Ch. Rob. 218; 165 E. R. 591.

234. —[—]—THE POSTEIRO, No. 251, *post*.

235. — Enemy colony.]—ESCOTT v. CAPTOR (1781), 1 Bos. & P. 349, n.; 126 E. R. 945, P. C.

236. —[—]—THE PROVIDENTIA, No. 160, *ante*.

237. — — — Capitulation before capture.]—THE NEGOTIE EN ZEEVAART (1782), cited in 1 Ch. Rob. at p. 111; 165 E. R. 115, H. L.

*Annotations*:—*Foll.* The Dankebaas African (1798), 1 Ch. Rob. 108. *Consd.* The Horstelder (1799), 1 Ch. Rob. 113; Sorenson v. R., The Baltica (1858), 11 Moo. P. C. C. 141. *Reid.* The Hiding (1920), 37 T. L. R. 189; The Kronprinsessan Margareta, The Parana, etc., [1921] 1 A. C. 486.

238. — — —[—]—Property sent from a hostile colony cannot change its character in transit although the owners become British subjects by capitulation before capture.—THE DANCKEBAAR AFRICAAN (1798), 1 Ch. Rob. 107; 1 Eng. Pr. Cas. 74; 165 E. R. 114.

*Annotations*:—*Consd.* The Horstelder (1799), 1 Ch. Rob. 114; Sorenson v. R., The Baltica (1858), 11 Moo. P. C. C. 141; The Naxos (1920), 123 L. T. 566. *Reid.* The Carl Walter (1802), 4 Ch. Rob. 207; The Soglasie (1854), 2 Eco. & Ad. 101; The Hiding (1920), 37 T. L. R. 189; The Kronprinsessan Margareta, The Parana, etc., [1921] 1 A. C. 486; The Vesta, etc., [1921] 1 A. C. 774.

#### PART III. SECT. 4, SUB-SECT. 4.—B.

2321. Goods in transit from enemy country.]—Where goods were brought

in a neutral ship from a port belonging to the enemy to a British port for the purpose of being sold at the latter port on behalf of the enemy:—*Held*:

the goods should be condemned.—STORES FROM LUDERITZBUCHT, [1916] J. D. R. 171.

*Sect. 4.—Of goods: Sub-sect. 4, B. Part IV.*  
*Sect. 1.]*

239. — *To enemy colony.*—(1) *The Gazette* is the only authority of this species admitted & respected by the ct. for reasons too obvious to require a particular notice (SIR WILLIAM SCOTT).

(2) It would be an extension of this rule of infection not justified by any former application of it to say, that after the contraband was actually withdrawn, a mortal taint stuck to the goods with which it had once travelled, & rendered them liable to confiscation even after the contraband itself was out of its reach (SIR WILLIAM SCOTT).

(3) I am not authorised . . . to restore goods, although neutral property, passing in direct voyages between the mother country of the enemy & its colonies (SIR WILLIAM SCOTT).—THE IMMANUEL (1799), 2 Ch. Rob. 186; 1 Eng. Pr. Cas. 217; 165 E. R. 284.

240. — — — — — THE ANNE (1801), 3 Ch. Rob. 91, n.; 165 E. R. 397, H. L.

241. — — — — — *Effect of touching at intermediate port.*—THE ESSEX (1805), cited in 5 Ch. Rob. at p. 368; 165 E. R. 808, P. C.

*Annotations:—*Consd. *The Maria* (1805), 5 Ch. Rob. 365; *The William* (1806), 5 Ch. Rob. 385.

242. — *To colony of another enemy.*—THE ROSE (1799), 2 Ch. Rob. 206; 165 E. R. 291.

243. — *Bullion sent in payment of goods.*—Silver going from a French port to Hamburg; proof required that it was for cargoes already received.

What the ct. must require is to be satisfied that it was going in payment for cargoes already received in France. For it is pretty notorious that the French have been in such bad credit during this war, as to be obliged to remit bullion for their purchases beforehand. If that was to appear to have been the case in this instance, the silver must be condemned as French property (*per* CUR.).—THE CAROLINA (1799), 1 Ch. Rob. 305; 165 E. R. 186.

244. — *Freight & earnings accounted for.*—Sentence of condemnation reversed in consequence of the shipper in the enemy's country fairly accounting to the neutral owner for the whole freight & earnings of the vessel.—THE TITUS (1809), 1 Act. 18; 12 E. R. 7, P. C.

245. — *Loaded before outbreak of war.*—Cargo belonging & consigned to claimants, a firm carrying on business in Chile, was laden on board a neutral vessel at Hamburg before the outbreak of war. The vessel sailed after the outbreak of war. She had to put into a Norwegian port for repairs, where she remained until Mar. 23, 1915. She then resumed her voyage to Chile. On Apr. 5, she was stopped by a British patrol vessel & sent into a British port, where the cargo was ordered to be discharged under art. IV. of the Reprisals Order in Council of Mar. 11, 1915, as being cargo of enemy origin laden on board a vessel which sailed from a port other than a German port after Mar. 1, 1915. The ct. ordered the goods to be released on the ground that the vessel must be dealt with by reference not to art. IV., but to art. II. of the Order, which provides that no vessel which sailed from a German port after Mar. 1, 1915, shall be allowed to proceed on her voyage with any goods on board laden at such port; & that, as she sailed from a German port before Mar. 1, she was immune from the obligation to discharge her cargo. The cargo owners claimed damages & costs on the ground that the seizure & detention of their goods was unlawful:—*Held*: the claim must be disallowed. The legal question at issue was of importance & not easy to decide, & the obligation to pay damages

& costs should not be imposed upon the Crown as a consequence of the mistaken construction placed upon the Order in Council.—THE SIGURD, [1917] P. 250; 87 L. J. P. 14; 117 L. T. 639; 34 T. L. R. 16; 62 Sol. Jo. 36; 14 Asp. M. L. C. 153.

246. — *Export through neutral port.*—Goods belonging to a firm having its principal place of business in the United States & a branch in Germany were sent by the German branch to Copenhagen & thence dispatched by parcels post to the New York house. They were subsequently seized on board the Danish ship *United States* & discharged in a British port under the "Reprisals" Order in Council of Mar. 11, 1915. On behalf of the New York house it was contended that at the time of "shipment," that is, when put on board ship at Copenhagen, the property had passed to them & therefore was in a neutral firm:—*Held*: transit begins where the goods commence their journey & not at the place where they are first placed on board ship; & according to the well established principle of prize law governing the passing of property while *in transitu* the goods were not merely of enemy origin, but remained the property of the enemy branch, & as such must be ordered to be sold & the proceeds paid into ct., there to be detained to be dealt with at the conclusion of peace.—THE UNITED STATES (No. 2) (1917), 2 P. Cas. 525.

*Annotation:—*Consd. *The Dirigo* (1919), 88 L. J. P. 192.

247. — *Transshipment into neutral vessel.*—THE BAWEAN, No. 170, *ante*.

248. *Goods in transit to enemy country.—For delivery to enemy.*—Property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is enemy's property (*per* CUR.).—THE SALLY (1795), 3 Ch. Rob. 300, n.; 165 E. R. 471, P. C.

*Annotations:—*Fold. *The Atlas* (1801), 3 Ch. Rob. 300. *Apld.* *The Anna Catharina* (1802), 4 Ch. Rob. 107. *Refd.* *The Atalanta* (1808), 6 Ch. Rob. 440; *The Miramichi*, [1915] P. 71; *The Louisiana*, *The Nordic*, *The Tomsk*, *The Joseph W. Fordney* (1916), 32 T. L. R. 619.

249. — — — — — THE ANNA CATHARINA, No. 230, *ante*.

250. — — — — — THE UNITED STATES, No. 231, *ante*.

251. — — — — — (1) The question of the ownership of goods carried by sea in time of war must be determined in accordance with doctrines of prize law & not of municipal law. The same rules for determining ownership must be applied when the doctrine of contagion or infection is invoked.

(2) It is an established rule of prize law that goods seized *in transitu* during war & contracted to become on delivery the property of the enemy, are to be regarded as enemy property, even though the shippers, who have the strict legal ownership according to municipal law, are admittedly neutrals. Conversely, goods shipped by an enemy to a neutral are regarded as enemy property until actual delivery.

(3) A partner in a house of trade in an enemy country is, as to the concerns & trade of that house, deemed to be an enemy, & his share in such trade is liable to confiscation notwithstanding his own residence in a neutral country.

(4) Where a person has interests in both an enemy & a neutral house of trade, & the transactions of the two are mixed up, the ct. will not unravel the tangle. The duty of so doing rests on the claimants, & if they fail they must suffer the consequences.—THE POSTREIRO (1917), 3 P. Cas. 275.

*Annotations:—*As to (1) Fold. *The Antwerpen*, [1919] P. 252, n.; *The Farana*, [1919] P. 249.

252. —.]—Under contracts of sale c. & f. Gothenburg net cash against documents on arrival at Gothenburg & subject to the opening of a confirmed credit by the buyers through a Swedish bank, a number of bags of coffee, marked with the initials of the buyers, a Gothenburg firm, were shipped at Santos on two neutral vessels to be delivered according to the bills of lading, which were in the buyer's name at Gothenburg. The letter confirming credit was sent by the Swedish bankers to the nominal shippers at Santos, the real shippers being the Santos branch of a Hamburg firm, the credits to be available on the shippers' sight drafts on the bank accompanied by bills of lading & invoices. The insurances were effected by the buyers, the drafts & documents were forwarded from Santos & presented to the Swedish bank for payment, but in each case this was effected after the date of the seizure of the goods as prize. The buyers alleged that the property had passed to them on shipment:—*Held*: according to prize law, if the real shippers were to be regarded as enemy traders, the goods would be treated as enemy goods during transit, & if as neutral traders & the goods were destined for the use of, or to be at the disposal of, the Hamburg firm on arrival in Sweden, they would be treated as enemy goods whether the legal property according to municipal law remained in the shippers or not.—*THE ANNIE JOHNSON*, *THE KRONPRINSESSAN MARGARETA*, [1918] P. 154; 87 L. J. P. 127; 118 L. T. 721; 14 Asp. M. L. C. 301.

253. — From enemy colony—False destination.]—Colonial trade, on the part of neutral merchants, on a destination between the colony & the mother country, pronounced illegal. Cargo condemned.

If it should appear that this cargo was actually going from the colony to the mother country, on a real destination to Amsterdam, I shall hold myself bound to pronounce this cargo subject to condemnation . . . the trade between the colony & the mother country in Europe, being opened by the enemy for his own relief under the pressure of war, cannot innocently be undertaken by a neutral; nor without the hazard of rendering him liable to be considered as giving immediate aid & adherence to that belligerent, to the unjust disadvantage of his adversary (*SIR WILLIAM SCOTT*).—*THE NANCY* (1800), 3 Ch. Rob. 82; 165 E. R. 394; *affd.* (1803), 6 Ch. Rob. p. ix, P. C.

254. —.]—*THE PHOENIX*, No. 161, *ante*.

255. —.]—It is certainly true that a continued voyage from the colony of the enemy to

the mother country, or to any other ports but those of the country to which the vessel belongs, will subject the cargo to confiscation; & the only point which the ct. has to decide is, whether the voyage in question is to be considered as a continued voyage or not. It is a question in its nature subject to very considerable difficulties in particular cases; & one on which the ct. must exercise its judgment with great caution on the special circumstances which compose the substance of each case, & with great care not to attribute more weight to any particular fact than what it justly demands (*SIR WILLIAM SCOTT*).—*THE MARIA* (1805), 5 Ch. Rob. 364; 1 Eng. Pr. Cas. 495; 165 E. R. 806.

256. — From colony of another enemy.]—Colonial trade from the colony to the mother country. Diversions by capture of a French privateer towards a French port. Such compulsory diversion will not defeat the illegality of the original voyage.

This deviation being to a French port, it would be a voyage from the colony of one enemy to the mother country of an allied enemy . . . which is attended with undistinguishable consequences as to the cargo (*SIR WILLIAM SCOTT*).

In cases of contraband, the offence of carrying the cargo is in its own nature as great as the offence of sending it: but yet a relaxation has in ordinary cases been introduced in favour of the ship where the cargo is not the property of the same owner. Here the ship & cargo belong to the same person, & the offence being equally known, it would be impossible to find any distinction in principle, why the same penalty would not attach on both (*SIR WILLIAM SCOTT*).—*THE MINERVA* (1801), 3 Ch. Rob. 229; 1 Eng. Pr. Cas. 301; 165 E. R. 446.

*Annotation*:—*Reid*. *The Vrow Henrica* (1803), 4 Ch. Rob. 343.

257. — On enemy ship.]—(1) A captor is not entitled to freight from the owners of cargo which has been brought before the Prize Ct. & released, unless the cargo has been carried to its port of destination according to the intent of the contracting parties.

(2) According to prize law, goods on an enemy vessel consigned to an enemy port are *prima facie* enemy goods, & the *onus* is on claimants who allege that the goods belong to them, as neutrals, to satisfy the ct. with clear evidence.—*THE ROLAND* (1915), 84 L. J. P. 127; 31 T. L. R. 357.

*Transfer of ownership in transitu*.]—*See* Sub-sect. 2, B. (a) ii., *ante*.

*Trading with the enemy*.]—*See, generally*, *ALIENS*, Vol. II., pp. 162–188, Nos. 330–512.

## Part IV.—Capture.

### SECT. 1.—IN GENERAL.

258. Who may capture—Non-commissioned ship.]—Non-commissioned captor rewarded.—*THE HAASE* (1799), 1 Ch. Rob. 286; 165 E. R. 179.

—.]—*See* Part II., Sect. 4, sub-sect. 3, *ante*.

259. — Any subject of the Crown.]—*THE JOHANNA EMILIE*, No. 66, *ante*.

260. — Any authorised ship.]—(1) During the contest, destruction is necessary & lawful; but it is contrary to every principle of the law of nations, that, after the contest has ceased, hostile & destructive force should still be continued (*SIR WILLIAM SCOTT*).

(2) They [a King's ship & a privateer] both represent the public force of the country, & are both armed with public authority. The privateer coming up first had a right to take possession, & if resistance had been offered by the French captain it would have justified any violent consequences that might have ensued. The enemy has not a liberty of choosing to whom he will surrender; when the surrender is once compelled, he is bound to submit to the first armed cruiser that comes up (*SIR WILLIAM SCOTT*).—*THE MARIAMNE* (1803), 5 Ch. Rob. 9; 165 E. R. 679.

261. — Convoying ship.]—A convoying ship may make a prize as well as any other of His

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Majesty's ships, provided the capture can be effected without deserting the care of the convoy; & there is no more objection in the case of a conveying ship to constructive than to actual capture.—*THE GALEN* (1814), 1 Dods. 429; 2 Eng. Pr. Cas. 199; 165 E. R. 1366.

**262. — Prize manned by prize crew.]—**The detaching a prize crew after capture to take charge of & to bring a prize & its native crew of prisoners of war safely to a port of the captors, is essentially a warlike naval operation. A merchantman, on lawful capture by a belligerent vessel, & whilst held by a naval prize crew detached from that vessel, is in the actual possession of the Govt. of her captors. Her prize crew are still part of the crew of the belligerent vessel, share in capture made by that vessel, & may make lawful captures whilst on board the prize. The prize, therefore, ceases to be a merchantman, & becomes a vessel engaged in the naval operations of her captors. A British steamtug was sent by her owners, Her Majesty being neutral, to tow such a vessel from British waters to the waters of her captors, the tug owners knowing that she was a prize; the tug performed the towage service:—*Held*: the towing was assisting in a warlike naval operation, & that the sending the tug for that purpose was a despatching for the purpose of taking part in the naval service of a belligerent within the meaning of the Foreign Enlistment Act, 1870 (c. 90), s. 8 (4), & the tug was therefore forfeited to the Crown.—*THE GAUNTLET, DYKE v. ELLIOTT* (1872), 1 L. R. 4 P. C. 184; 8 Moo. P. C. C. N. S. 428; 41 L. J. Adm. 65; 26 L. T. 45; 20 W. R. 197; 1 Asp. M. L. C. 211; 17 E. R. 373, P. C.

*Annotation*:—*Mentd.* *Palmer v. Hutchinson* (1881), 6 App. Cas. 619.

**263. — Priority of right—In first comer.]—***THE MARIAMNE*, No. 260, *ante*.

**264. Title of captor—Relation back to time of seizure.]—**(1) Where a neutral ship carrying contraband of war, insured against perils of the sea, "warranted" however "free from capture, seizure, & detention," was captured by a belligerent cruiser wrecked in her captor's hands & subsequently condemned by a Prize Ct.:—*Held*: there was a total loss by capture & the captor's title related back to the time of seizure.

(2) Enemy vessels stand in some respects on a different footing from neutral vessels in regard to the laws of prize. Carriage of contraband to a belligerent port does not impart an enemy character to a neutral ship. She cannot lawfully be destroyed nor her crew treated as prisoners of war. Carriage of contraband is not unlawful, as is aiding an enemy in an expedition. It is only an adventure which the offended belligerent may, if he can visit with the penalty of capture & condemnation by a Court of Prize (LORD LORE-BURN, C.).—*ANDERSEN v. MARTEN*, [1908] A. C. 334; 77 L. J. K. B. 950; 99 L. T. 254; 24 T. L. R. 775; 52 Sol Jo. 680; 11 Asp. M. L. C. 85; 13 Com. Cas. 321, H. L.

*Annotations*:—*As to* (1) *Refd.* *Polurrian S.S. Co. v. Young*, [1915] 1 K. B. 922; *Roura & Forgas v. Townsend*, [1919] 1 K. B. 189. *Generally*, *Mentd.* *Leyland Shipping Co. v. Norwich Union Insee. Soc.*, [1918] A. C. 350; *Britain S.S. Co. v. R.*, *Green v. British India Steam Navigation Co.*, *British India Steam Navigation Co. v. Liverpool & London War Risks Insee. Assoon.*, [1921] 1 A. C. 99.

**265. Seizure on suspicion—Release without judicial record of seizure—Subsequent seizure.]—**A ship under neutral colours sailed from a Russian port, bound with a cargo to Hull within the time granted to Russian vessels to sail, was seized on her arrival at Hull on suspicion of being Russian,

was immediately released as protected by the Order in Council, remained at Hull six months after the discharge of her cargo, & was then again seized:—*Held*: the seizure not having been judicially recorded was no bar to the second.—*THE ODESSA* (1855), Spinks, 208; 2 Eng. Pr. Cas. 462; 164 E. R. 428.

*Annotation*:—*Refd.* *The Leucade* (1855), 2 Eco. & Ad. 228.

**SECT. 2.—WHAT AMOUNTS TO CAPTURE.**

**266. General rule.]—**Capture consists in compelling the vessel captured to submit to the will of the captor. Hauling down the flag by a merchant ship, even in conjunction with stopping her engines as ordered, is not an unequivocal act of submission. Four German ships were captured in Dutch territorial waters, the violation of neutrality being inadvertent. The ships were requisitioned for the use of the Crown under an order of the Prize Ct. made under Prize Ct. Rules, 1914, Ord. 29, upon the usual undertaking to pay the appraised values into the Prize Ct. Two of the ships while so requisitioned were sunk by German submarines. By the Treaty of Versailles, made at the conclusion of the war, Holland not being a party thereto, Germany recognised the validity of orders of the Prize Ct., & made to the Allied & Associated Powers certain cessions of ships & of other property of German nationals in the territories of those powers. On a claim by the Dutch Govt. for restoration of the ships to Dutch waters, or for their appraised values, with compensation for their user:—*Held*: (1) the Dutch Govt. was entitled to have the two ships which remained afloat returned to Dutch waters, free of expense, & to receive the appraised values of the two sunken ships, but not compensation for user of the ships; & the above stated rights of the Dutch Govt. in the Prize Ct. were not affected by the provisions of the treaty. (2) A requisition order, unlike a decree for condemnation, is not a judgment *in rem*; it does not purport to affect the property in the ship or goods.—*THE PELLWORM*, [1922] 1 A. C. 292; 91 L. J. P. 102; 126 L. T. 780; 38 T. L. R. 338; 15 Asp. M. L. C. 470; 3 P. Cas. 1053, P. C.; *varying*, [1920] P. 347.

*Annotation*:—*Generally*, *Refd.* *The Dusseldorf*, [1920] A. C. 1034.

**267. Taking possession—With knowledge of enemy ownership of goods—Animus capendi presumed.]—**Possession is taken by British subjects on information that it was French property, & it must therefore be presumed to have been done with a complete *animus capendi* (SIR WILLIAM SCOTT).—*THE AMOR PARENTUM* (1799), 1 Ch. Rob. 303; 165 E. R. 185.

**268. — Not essential to capture.]—***LA ESPE-RANZA*, No. 55, *ante*.

**269. — Without formal notice of seizure.]—***NETHERLANDS AMERICAN STEAM NAVIGATION CO. v. PROCURATOR GENERAL*, No. 1014, *post*.

**270. Boarding by whole crew of stranded frigate.]—***THE JONGE JACOBUS BAUMANN* (1799), 1 Ch. Rob. 243; 165 E. R. 164.

**271. Boarding by prize master only—Voluntary promise to enter British port.]—***THE RESOLUTION* (1805), 6 Ch. Rob. 13; 165 E. R. 833.

**272. Constructive capture—Letter from customs officials—Informing master of detention.]—***THE ROUMANIAN*, No. 291, *post*.

**273. — Agreement to hold vessels at disposal of Prize Court.]—**A German co. carried on at Port Said the business of coaling steamers, &

for that purpose owned lighters, tugs, & motor boats. The tugs were capable of open sea voyages, but were used exclusively in harbour; none of the other craft were capable of taking the open sea. Prior to Apr. 1916, the co. had carried on the business under licence. In that month the General Officer Commanding revoked the licence, & appointed a liquidator of the business, who thereafter had possession of the craft so far as they were not in use by the naval & military authorities. In July, 1916, the Procurator, intending to take proceedings in prize, informed the liquidator that he should apply for an order for substituted service on the liquidator. It was agreed between them that upon proceedings being taken the liquidator should continue to hold the craft at the disposal of the Crown & the Prize Ct. The craft were all in the Suez Canal or its ports. A writ claiming condemnation was issued, & by order was served on the liquidator. No objection was raised at the trial or upon resp's. case upon the appeal that there had not been a seizure:—*Held*: (1) there had been a sufficient seizure to give the Prize Ct. jurisdiction; (2) the seizure was not a breach of art. 4 of the Suez Canal Convention, & had it been so the seizure would not have been bad.—*PROCURATOR IN EGYPT v. DEUTSCHES KOHLEN DEPOT GESELLSCHAFT*, [1919] A. C. 291; 88 L. J. P. C. 37; 120 L. T. 102; 35 T. L. R. 159; 14 Asp. M. L. C. 384; 3 P. Cas. 264, P. C.

*Annotations*:—As to (1) *Reid*, *The Ororio*, [1920] A. C. 724. *Generally*, *Reid*, *Re The Anichab*, [1919] P. 329; *The Blonde*, [1922] 1 A. C. 313.

274. *Hauling down flag*—& stopping engines.]—*THE PELLWORM*, No. 266, *ante*.

### SECT. 3.—TIME OF CAPTURE.

275. *Before declaration of hostilities*—*Retroactive force of declaration*.]—Hostilities against the Dutch were declared on Sept. 15, 1795, but were applied retrospectively to property taken during the doubtful state of things that preceded the declaration.

Actual hostilities are not to be reckoned only from the date of the declaration; but the declaration has been applied with a retroactive force (*SIR WILLIAM SCOTT*).—*THE HERSTELDER* (1799), 1 Ch. Rob. 114; 165 E. R. 116.

*Annotations*:—*Consd.* *Driefontein Consolidated Gold Mines v. Janson, West Island Central Gold Mines-Co. v. De Rougemont*, [1900] 2 Q. B. 339. *Reid*, *The Soglasie* (1854), 2 Ecc. & Ad. 101.

276. ———.]—The claim is given for several persons as inhabitants of Demarara, not settling there during the time of British possession, nor averring an intention of retiring when that possession ceased. They are therefore to be treated under this general view as Dutch subjects, unless it can be shown that there are any other circumstances by which they are protected. It is contended that there are such circumstances & that they are these: that the property was taken in a state of peace, & that the proprietors are now become British subjects, & consequently that this property could not be considered as the property of an enemy, either at the time of capture or adjudication. . . . That alone would not protect them, because the ct. has, without any exception, condemned all other property of Dutchmen taken before the war. . . . That the declaration had a retroactive effect, applying to all property previously detained, & rendering it liable to be considered as the property of enemies taken in

time of war (*SIR WILLIAM SCOTT*).—*THE BOEDDES LUST* (1804), 5 Ch. Rob. 233; 165 E. R. 759.

*Annotations*:—*Consd.* *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484. *Reid*, *The Teutonia* (1871), L. R. 3 A. & E. 394; *Horlock v. Beal* (1916), 114 L. T. 193.

277. *After cessation of hostilities*.]—*THE ADOLPHUS FREDERICK* (1748), cited in 5 Ch. Rob. at p. 190; 165 E. R. 744.

*Annotation*:—*Reid*, *Ex p. Lynch* (1815), 1 Madd. 15.

278. — *Recapture*.]—A British ship & cargo, taken by an American privateer within the time allowed for hostile capture by the treaty of peace & re-taken after the expiration of that period, restored to the American captors.—*THE SOMERSET* (1815), 2 Dods. 50; 165 E. R. 1414.

279. *After cession of territory to enemy*.]—*THE BOLLETTA* (1809), Edw. 171; 165 E. R. 1071.

*Annotation*:—*Consd.* *Cremaldi v. Powell, The Gerasimo* (1857), 11 Moo. P. C. C. 88.

### SECT. 4.—PLACE OF CAPTURE.

#### SUB-SECT. 1.—IN GENERAL.

280. *On land*.]—The Commissions of privateers do not extend to the capture of private property upon land: that is a right which is not granted even to the King's ships (*SIR WILLIAM SCOTT*).—*THE THORSHAVEN* (1809), Edw. 102; 165 E. R. 1047.

281. ———.]—About six months after the military forces of the Crown had occupied certain ports in German South West Africa, German owned vessels & craft were seized at two places which were respectively one hundred & forty-eight & three hundred & ten miles inland. The vessels & craft had been sent by rail to those places from the ports by the owners, under the authority of a German officer, in order to prevent them falling into the hands of the British forces:—*Held*: the vessels & craft not being taken in pursuit were not the subject of maritime prize.—*THE ANICHAB*, [1922] 1 A. C. 235; 91 L. J. P. C. 60; 126 L. T. 433; 38 T. L. R. 183; 15 Asp. M. L. C. 441; 3 P. Cas. 993, P. C.

282. *Suez Canal*.]—(1) The Suez Canal Convention, 1888, which provides that the Canal shall remain open in time of war as a free passage even to belligerent ships, & that no act of hostility shall be committed in the Canal or its ports of access or within three miles thereof has no application to enemy ships which are using one of its ports of access, not for the purpose of passage through the Canal, but as a port of refuge in which to seclude themselves in order to defeat belligerents' rights of capture.

(2) In view of the fact that reliance was placed on immunities alleged to be claimable under international conventions, no objection has been raised, such as was raised in *The Mûve*, No. 289, *post*, to the presence of enemy owners to be heard before their Lordships on appeal (*per CUR.*).—*THE PINDOS, THE HELGOLAND, THE ROSTOCK*, [1916] 2 A. C. 193; 85 L. J. P. C. 209; 114 L. T. 960; 32 T. L. R. 489; 13 Asp. M. L. C. 353; 2 P. Cas. 146, P. C.

*Annotations*:—As to (1) *Reid*, *Procurator in Egypt v. Deutsches Kohlen Depot Gesellschaft*, [1919] A. C. 291. As to (2) *Reid*, *Rodriguez v. Speyer*, [1919] A. C. 59.

283. *Inland waters*.]—Captures on inland waters are not excluded from the operation of the law of maritime prize, & enemy craft captured on an inland lake, the Victoria Nyanza, by His Majesty's



Sect. 4.—Place of capture: Sub-sects. 1, 2 & 3.]

armed ships are subject to condemnation as prize.—*Re CERTAIN CRAFT CAPTURED ON THE VICTORIA NYANZA*, [1919] P. 83; 88 L. J. P. 43; 120 L. T. 446; 35 T. L. R. 117; 14 Asp. M. L. C. 440; 3 P. Cas. 295.

*Annotation*:—*Reid*, *The Anichab*, [1921] P. 218.

## SUB-SECT. 2.—ON OPEN SEA.

284. Whether lawful—Vessel sailing from neutral port—For purpose of effecting capture.][—*THE TWEE GEBROEDERS*, No. 309, *post*.

285. ————] — (1) Captors must understand that they are not to station themselves in the mouth of a neutral river for the purpose of exercising the rights of war from that river, much less in the very river itself (*SIR WILLIAM SCOTT*).

(2) The rule of law on this subject is *terre dominium finitur, ubi finitur armorum vis*, & since the introduction of firearms, that distance has usually been recognised to be about three miles from the shore. But it so happens in this case that a question arises as to what is to be deemed the shore, since there are a number of little mud islands comprised of earth & trees drifted down by the river which form a kind of portico to the mainland. . . . I think that the protection of territory is to be reckoned from these islands, & that they are the natural appendages of the coast on which they border, & from which, indeed, they are formed (*SIR WILLIAM SCOTT*).

(3) The actual capture took place within the distance of three miles from the islands & at the very threshold of the river. It is said that the act of capture is to be carried back to the commencement of the pursuit, & if a contest begins before, it is lawful for a belligerent cruiser to follow & seize his prize within the territory of a neutral state. . . . If nothing objectionable had appeared in the conduct of the captors before, the mere following to such a place as this is, would I think not invalidate a seizure otherwise just & lawful (*SIR WILLIAM SCOTT*).

(4) Captors must understand that it is not the value of the cargo, but the want of proof, & the appearance of circumstances as to the property that should induce a seizure, & that their conduct in this respect should not be influenced merely by the splendour of a large sum of money appearing in their sight. In such a case it would be falling short of the justice done to the individuals who have sustained injury by such misconduct if I did not follow up the restitution . . . with a decree of costs & damages (*SIR WILLIAM SCOTT*).

(5) The seizure was made . . . "because there was not any clearance or register on board." These are defects which may certainly, if unexplained, justify a seizure (*SIR WILLIAM SCOTT*).

(6) The ship with this cargo on board was brought to England for adjudication; & it lies on the captor to exonerate himself from the unpropriety of this act; because, though the instructions to cruisers give something of a discretion to captors as to the port to which they are to bring their prize, "to some convenient port," it is a discretion which must be cautiously exercised (*SIR WILLIAM SCOTT*).—*THE ANNA* (1805), 5 Ch. Rob. 373; 1 Eng. Pr. Cas. 499; 165 E. R. 809.

*Annotations*:—*As to* (2) *Consol. Secretary of State for India v. Sri Rajah Chelkani Rama Rao* (1916), 85 L. J. P. C.

222. *Reid*, *The Düsseldorf*, [1920] A. C. 1034. *As to* (3) *Consol. The Pellworm*, [1922] 1 A. C. 292. *As to* (4) *Reid*, *The Düsseldorf*, [1920] A. C. 1034.

286. ———— Vessel accidentally lying in neutral port.][—*THE VROW ANNA CATHARINA*, No. 297, *post*.

287. ———— Neutral waters crossed to effect capture.][—*THE TWEE GEBROEDERS* (1801), 3 Ch. Rob. 336; 1 Eng. Pr. Cas. 323; 165 E. R. 485.

*Annotation*:—*Consol. R. v. Keyn* (1876), 2 Ex. D. 63.

288. ———— Enemy goods on British ship.][—*THE ROUMANIAN*, No. 291, *post*.

289. What constitutes capture at sea—Capture in Firth of Forth.][—(1) The question whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise, is not a matter of international law, but of the practice of the ct., & as by Prize Ct. Rules, 1914, Ord. 45, in cases not provided for by the Rules, "the practice of the late High Ct. of Admty. of England in prize proceedings shall be followed, or such other practice as the President may direct":—*Held*: the practice of the ct. shall be, that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as claimant, & to argue his claim before this ct., the grounds of his claim being stated in the affidavit to lead to appearance required to be filed under Prize Ct. Rules, 1914, Ord. 3, r. 5.

(2) Shortly after the declaration of war between Great Britain & Germany, a German merchant sailing vessel, owned by her master, a German subject, was captured in the Firth of Forth by one of His Majesty's cruisers & taken into Leith. It was contended on behalf of the Crown that the vessel was captured "at sea." On the other hand, it was urged that the vessel was seized within the Port of Leith, & alternatively that she was taken within territorial waters, & not "on the high seas," & therefore, was not confiscable, but only liable to detention:—*Held*: the vessel was captured "at sea" & liable to condemnation as lawful prize, for the word "port," as used in the Hague Conventions, does not mean the "fiscal" port, which may cover a considerable area & include other ports, but must be construed in its usual & limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking, & therefore, the vessel was not seized in any "port" so, as to limit the right of the captor to detention only, & the question whether the vessel was in territorial waters at the time of the seizure was not material.—*THE MOWE*, [1915] P. 1; 84 L. J. P. 57; 112 L. T. 281; 31 T. L. R. 46; 59 Sol. Jo. 76; 13 Asp. M. L. C. 17.

*Annotations*:—*As to* (1) *Reid*, *The Pindos*, *The Helgoland*, *The Rostock*, [1916] 2 A. C. 193; *Rodríguez v. Speyer*, [1919] A. C. 59; *The Vesta*, etc., [1921] 1 A. C. 774. *As to* (2) *Reid*, *The Belgia* (1915), 31 T. L. R. 490. *Generally*, *Reid*, *The Blonde*, [1922] 1 A. C. 313.

## SUB-SECT. 3.—IN PORT.

290. Whether lawful—On capitulation.][—*SHIPS TAKEN AT GENOA* (1803), 4 Ch. Rob. 388; 165 E. R. 650.

*Annotation*:—*Reid*, *The Abonema*, *The Hillerod*, *The Florida*, *The Albania*, *The Adjutant*, [1919] P. 41.



**291. — Goods on British ship.]**—A cargo of oil belonging to an enemy as a British ship, brought into a British port & pumped for safe custody into tanks on shore, may be lawfully seized as prize in such tanks, & the delivery of a letter from the Customs House authorities, addressed to the master, stating that the cargo is placed under detention is an effectual seizure.

A cargo of petroleum oil in bulk, owned by a German co., was shipped at a neutral port on board a British vessel bound for Hamburg. The vessel reached the English Channel after the outbreak of hostilities between Great Britain & Germany & was diverted by her owners to Purfleet, where, under their orders she proceeded to discharge the oil into tanks on shore. When the larger part of the oil had been so discharged the whole cargo was seized as prize. It was subsequently condemned as lawful prize & as droits of Admty.:—*Held*: (1) the cargo was not immune from condemnation by reason of having been shipped in a British vessel before the outbreak of hostilities; (2) the jurisdiction of the Prize Ct. extended to the oil seized while in the tanks, since that jurisdiction depended not upon the situation of the oil when seized, but upon the fact that it was seized as prize; (3) the whole cargo having become liable to seizure & condemnation upon the outbreak of hostilities, the oil discharged into the tanks did not cease to be so liable by reason of the discharge, & this was the case whether or not the tanks formed part of the port.—*THE ROUMANIAN*, [1916] 1 A. C. 124; 85 L. J. P. C. 33; 114 L. T. 3; 32 T. L. R. 98; 60 Sol. Jo. 58; 13 Asp. M. L. C. 208; 1 P. Cas. 536, P. C.; *affy.*, [1915] P. 26.

*Annotations*:—*As to* (1) *Refd.* The *Odessa*, The *Woolston*, [1916] 1 A. C. 145; The *Oriele*, [1920] A. C. 724. *As to* (2) *Consd.* Netherlands American Steam Navigation Co. v. H. M. Procurator General, [1926] 1 K. B. 84. *Refd.* The *Achilles*, [1919] P. 310; The *Anichab*, etc., [1922] 1 A. C. 235. *As to* (3) *Apld.* The *Eden Hall*, [1916] P. 78; The *Schlesien*, [1916] P. 225; The *Achilles*, [1917] P. 218. *Refd.* The *Batavier II.*, [1918] P. 66, n.; The *Anichab*, etc., [1922] 1 A. C. 235. *Generally, Refd.* Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co., [1915] 1 K. B. 893; The *Poonia* (1915), 84 L. J. P. 150; The *Abnema*, The *Hillierod*, The *Florida*, The *Albania*, The *Adjutant*, [1919] P. 41; *Re* Certain Craft Captured on the *Victoria Nyanza*, [1919] P. 83; The *Vesta*, etc., [1921] 1 A. C. 774. *Mentd.* Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain), [1916] 2 A. C. 307.

**292. — Goods stowed ashore for safe custody — Oil pumped into tanks.]**—*THE ROUMANIAN*, No. 291, *ante*.

**293. — — — In bonded warehouse.]**—Before the outbreak of war between Great Britain & Turkey twelve bales of tobacco, the property of a Turkish merchant in Smyrna, were landed in the Port of London, *ex* a British ship & were stored in a bonded warehouse in the port. After the outbreak of war with Turkey the goods were seized as prize & droits of Admty.:—*Held*: on the principles laid down in *The Roumanian*, No. 291, *ante*, the goods were the subject of seizure as maritime prize & must be condemned.

These goods were put in that warehouse & remained there as the goods of a Turkish subject up to the time of seizure, & they must be condemned to the Crown as prize & droits of Admiralty (SIR SAMUEL EVANS).—*THE EDEN HALL*, [1916] P. 78; 85 L. J. P. 119; 114 L. T. 566; 60 Sol. Jo. 418; 13 Asp. M. L. C. 306; 2 Br. & Col. Pr. Cas. 84.

*Annotation*:—*Refd.* The *Batavier II.*, [1918] P. 66, n.

**294. — — —.]**—After the outbreak of war a quantity of hides were shipped on a British vessel by the Bangkok branch of an Austrian co.

consigned to the co.'s branch in Manchester. The hides were landed in Liverpool & stored in a warehouse in Argyle Street, Liverpool, where they were seized as prize.

By para. 6 of the Trading with the Enemy Proclamation (No. 2) of Sept. 9, 1914, "where an enemy has a branch locally situated in British, allied, or neutral territory, not being neutral territory in Europe, transactions by or with such branch shall not be treated as transactions by or with an enemy."

It was contended (a) that this para. &/or certain correspondence between the manager of the Manchester branch & the Trading with the Enemy Committee constituted a licence to the Manchester & Bangkok branches of the enemy co. to trade; (b) that the warehouse in Argyle Street was outside the limits of the port of Liverpool, & that on these grounds the goods were immune from confiscation:—*Held*: (1) para. 6 of the Trading with the Enemy Proclamation (No. 2) gave no protection to the goods. It afforded protection to a person acting within it from being convicted of the offence of trading with the enemy, but it had no application to the case of the transfer of goods belonging to an enemy from one branch house to another so as to affect the property in the goods, & could not be construed as taking away the right to seize enemy goods on a British ship or in a British port; (2) a licence from the Crown must be strictly construed & proved, & the Trading with the Enemy Committee neither had the authority to give a licence which would defeat the rights of captors, nor purported to give such licence; (3) the warehouse was a warehouse of the port of Liverpool, & on that ground, therefore, & on the broader ground that goods which had been subject to capture as enemy property while afloat remained subject to seizure when landed, the hides were confiscable as prize.—*THE ACHILLES*, [1917] P. 218; 86 L. J. P. 170; 117 L. T. 414; 14 Asp. M. L. C. 151; 2 Br. & Col. Pr. Cas. 544.

**295. — — —.]**—These enemy goods, discharged from various vessels, were warehoused at the time of the outbreak of war at various wharves, & according to the decisions in *The Roumanian*, No. 291, *ante*, & *The Eden Hall*, No. 293, *ante*, they are subject to seizure as droits of Admty. The only question which arises is whether the goods, which have been brought in on *The Batavier II.* & *The Batavier VI.*—which were two neutral vessels—are protected by the Declaration of Paris. I am not bound by the case of *The Dandolo* & *The Cubota* in the colonial Prize Ct. of Colombo, Ceylon, but I have pleasure in saying that I think those cases were properly decided. The two Arts. of the Declaration of Paris which affect this matter are Arts. 2 & 3, & they read as follows:—Art. 2: "The neutral flag covers enemy's goods, with the exception of contraband"; & Art. 3, "Neutral goods, except contraband of war, are not liable to capture under the enemy's flag." These goods, no doubt, had been under the neutral flag, but they were no longer under the neutral flag at the time of seizure, nor at the outbreak of war, as I understand, & therefore no difficulty arises, in my opinion, under the Declaration of Paris.

I declare that they were properly seized, & I condemn the proceeds accordingly as droits of Admty. (SIR SAMUEL EVANS).—*THE BATAVIER II.*, [1918] P. 66, n.; 2 Br. & Col. Pr. Cas. 432.

— **Enemy property in port at outbreak of war.]**—*Sec* Sect. 5, sub-sect. 2, *post*.

*Sect. 4.—Place of capture: Sub-sect. 4, A., B. & C.*  
*Sect. 5: Sub-sect. 1.]*

SUB-SECT. 4.—IN TERRITORIAL WATERS OF  
 NEUTRAL STATE.

A. In General.

296. Whether lawful — General rule.] — DE  
 FORTUYN (1760), Burrell, 175; 167 E. R. 526.

*Annotation:—Consd. The Valeria, [1921] 1 A. C. 477.*

297. ———.]—The sanctity of a claim of  
 territory is . . . very high. . . . When the fact  
 is established, it overrules every other considera-  
 tion. The capture is done away; the property  
 must be restored, notwithstanding that it may  
 actually belong to the enemy, & if the captor  
 should appear to have erred wilfully, & not merely  
 through ignorance, he would be subject to further  
 punishment . . . .

The claim of territory is a matter *stricti juris*,  
 & must be made out by clear & unimpeached  
 evidence. The right of seizing the property of the  
 enemy is a right which extends, generally speaking,  
 universally, wherever that property is found.  
 The protection of neutral territory is an exception  
 to the general rule only. . . . If the fact had been  
 that [a] privateer had made this capture in a  
 neutral port, or whilst lying in harbour with a  
 view of making that harbour an habitual station  
 for captures, I should have concurred in repro-  
 bating the practice in the strongest terms, but if,  
 whilst a privateer is accidentally lying there, she  
 sees an enemy approaching, she may go out &  
 capture, without any violation of the peace or  
 immunity of the neutral port, provided this is  
 done beyond the limits of the port. . . .

I have never understood that the rule against  
 the admission of claims, which stand in entire  
 opposition to the papers & to the preparatory  
 examinations, was applicable to cases arising  
 before the war (SIR WILLIAM SCOTT).—THE VROW  
 ANNA CATHARINA (1803), 5 Ch. Rob. 15; 165  
 E. R. 681.

*Annotations:—Consd. The Düsseldorf, [1920] A. C. 1034;  
 The Valeria, [1920] P. 81; The Pellworm, [1922] 1 A. C.*

298. ———.]—THE ANNA, No. 285, *ante*.

299. ——— After pursuit from open sea.]—THE  
 ANNA, No. 285, *ante*.

300. ———.]—A number of enemy vessels  
 were met by a British squadron on the high seas.  
 The vessels immediately hauled down their flags  
 & afterwards stopped their engines when ordered  
 to do so. They refused, however, to steam astern  
 or to steer in a westerly direction according to  
 orders, & eventually drifted into Dutch territorial  
 waters. They were then boarded & taken into  
 a British port:—*Held*: (1) the capture of the  
 vessels was not complete until the boarding parties  
 took possession; (2) consequently there had been  
 a violation of Dutch neutrality & there must be  
 an order for release.

(3) I do not think that there was any deliberate  
 intention so to violate it [Dutch neutrality], &  
 I do not find in this case any of those circumstances  
 which are necessary to subject the Crown to a  
 liability for damages or costs (LORD STERN-  
 DALE, P.).—THE PELLWORM, [1920] P. 347; 90  
 L. J. P. 7; 121 L. T. 488; 35 T. L. R. 719; 14  
 Asp. M. L. C. 490; *affd.*, [1922] 1 A. C. 292,  
 P. C.

*Annotation:—Refd. The Düsseldorf, [1920] A. C. 1034.*

301. What are territorial waters—Waters within  
 three miles—Islands natural appendages of coast.]—  
 THE ANNA, No. 285, *ante*.

302. ——— Bay measured from headland  
 to headland.]—The ct. held on the facts that the  
 capture of a ship & all the operations immediately

leading to it took place outside the territorial  
 waters of Norway & that the ship & cargo must be  
 condemned on the ground that the cargo was  
 absolute contraband going to Germany.

It was contended that the place where the ship  
 was captured was near a bay or inclosed waters  
 & that the limit was to be taken from the line  
 marking the seaward edge of the bay. . . .  
 Assuming that these waters formed a bay the  
 ct. thought that the headlands ought to be taken  
 to be the Naze Light on the east & on the west the  
 head of the mainland. . . . The line being thus  
 fixed the questions of fact remained to be deter-  
 mined whether at the material times, either the  
 capturing or captured vessel was within or outside  
 three nautical miles of it (EVANS, P.).—THE  
 LOEKKEN (1918), 34 T. L. R. 594.

*Annotations:—Refd. The Düsseldorf, [1920] A. C. 1034;  
 The Pellworm, [1922] 1 A. C. 292.*

B Claim for Violation of Neutrality.

303. By whom made—Neutral state.]—THE  
 TWEE GEBROEDERS (1801), 3 Ch. Rob. 336;  
 1 Eng. Pr. Cas. 323; 165 E. R. 485.

*Annotation:—Refd. R. v. Keyn (1876), 2 Ex. D. 63.*

304. ———.]—THE VROW ANNA CATHARINA,  
 No. 297, *ante*.

305. ——— Not by enemy.]—(1) A claim  
 has been given by the Swedish consul for these  
 ships & cargoes, as having been taken within the  
 territories of the King of Sweden, & in violation  
 of his territorial rights. This claim could not  
 have been given by the Americans themselves,  
 for it is the privilege, not of the enemy, but of  
 the neutral country, which has a right to see that  
 no act of violence is committed within its juris-  
 diction (SIR WILLIAM SCOTT).

(2) Where two countries are separated from each  
 other by a very narrow space, it does not follow  
 that one of them may not exercise the rights of  
 war within the limits of that space, merely because  
 it may occasion some inconvenience to its neigh-  
 bour (SIR WILLIAM SCOTT).—THE ELIZA ANN  
 (1813), 1 Dods. 244; 2 Eng. Pr. Cas. 162; 165  
 E. R. 1298.

*Annotation:—Generally, Mentd. The Teutonia (1871), L. R.  
 3 A. & E. 394.*

306. ———.]—Assuming that Con-  
 vention XIII. of the Hague Conference, 1907,  
 respecting the rights & duties of neutral powers  
 in maritime war, is a binding convention, it has  
 not modified the well established rule of inter-  
 national law that neither an enemy, nor a neutral  
 acting the part of an enemy, can claim the restitu-  
 tion of captured property on the sole ground that  
 the capture took place within neutral territorial  
 waters; it is only by the neutral state whose  
 neutrality has been violated that the validity of  
 the capture can be questioned.—THE BANGOR,  
 [1916] P. 181; 85 L. J. P. 218; 114 L. T. 1212;  
 32 T. L. R. 590; 13 Asp. M. L. C. 397.

*Annotations:—Refd. The Pellworm, [1920] P. 347; The  
 Valeria, [1920] P. 81.*

307. Necessity for clear evidence.]—THE TWEE  
 GEBROEDERS (1801), 3 Ch. Rob. 336; 1 Eng. Pr.  
 Cas. 323; 165 E. R. 485.

*Annotation:—Refd. R. v. Keyn (1876), 2 Ex. D. 63.*

308. ———.]—THE VROW ANNA CATHARINA,  
 No. 297, *ante*.

C. Remedies for Violation of Neutrality.

309. Unintentional violation — Restitution —  
 Without costs.]—(1) Such an act as this, that a  
 ship should station herself on neutral territory  
 & send her boats on hostile enterprises, is an act  
 of hostility much too immediate to be permitted  
 (SIR WILLIAM SCOTT).

(2) This capture cannot be maintained, & I direct these vessels to be restored. . . . The situation in which the vessels were stationed was too dubious to affect the parties with any intentional violation of neutral rights. . . . There is no sufficient reason to induce me to give costs & damages against the captors (SIR WILLIAM SCOTT).—THE THREE GEBROEDERS (1800), 3 Ch. Rob. 162; 165 B. R. 422.

*Annotations*.—As to (2) *Föld*. The Valeria, [1920] P. 81. *Reid*. The Düsseldorf, [1920] A. C. 1034; The Pellworm, [1920] P. 347.

**310.** ———.—[In proceedings in prize for the condemnation of an enemy ship captured by a British cruiser a claim for her release was made on behalf of the Norwegian govt. on the ground that the capture had been effected in Norwegian territorial waters. The Prize Ct. ordered a release to claimant upon that ground, but, finding that the violation of territorial waters was unintentional & the result merely of an error of judgment, rejected a claim to damages & costs. Claimant appealed:—*Held*: on the principle of *restitutio in integrum*, claimant should recover such expenses of removing the ship to Norwegian, or other neutral waters, as would fall upon the Norwegian govt.; but the costs & fees payable to the Marshal of the Prize Ct. were not recoverable by claimant, nor any sum for the use of the ship under requisition by the Admty.—THE DUSSELDORF, [1920] A. C. 1034; 89 L. J. P. 248; 123 L. T. 732; 36 T. L. R. 885; 15 Asp. M. L. C. 84, P. C.

*Annotations*.—*Distd*. The Valeria, [1921] 1 A. C. 477. *Apld*. The Pellworm, [1922] 1 A. C. 292. *Mentd*. The Cairnmore, The Gunda, [1921] 1 A. C. 439; The Falk, [1921] 1 A. C. 787.

**311.** ———.—**Enemy ship.**—THE VROW ANNA CATHARINA, No. 297, *ante*.

**312.** ———.—[THE PELLWORM, No. 266, *ante*.

**313.** ———.—**Damages—Where ship lost.**—A German vessel was captured by a British armed trawler within Norwegian territorial waters. The capture was made in the *bonâ fide* belief that the vessel was outside the three mile limit of territorial waters. In bringing the prize back to a British port it became necessary to abandon her owing to bad weather, & she was accordingly sunk by gunfire. The Norwegian govt. claimed the restitution of her value, damages, & costs:—*Held*: although the vessel would have had to be restored to claimants had she been afloat, inasmuch as the capture was made in good faith claimants were merely entitled to a decree that the capture was made in territorial waters & not to an order for restitution in value or for damages or costs.—THE VALERIA, [1920] P. 81; 89 L. J. P. 187; 122 L. T. 751; 36 T. L. R. 201; 15 Asp. M. L. C. 55; *affd.*, [1921] 1 A. C. 477.

*Annotations*.—*Apld*. The Pellworm, [1922] 1 A. C. 292. *Reid*. The Düsseldorf, [1920] A. C. 1034.

**314.** ———.—[THE PELLWORM, No. 266, *ante*.

**315.** ———.—**Expenses of removing ship.**—THE DUSSELDORF, No. 310, *ante*.

**316.** ———.—[THE PELLWORM, No. 266, *ante*.

**317.** ———.—**Compensation for user.**—THE DUSSELDORF, No. 310, *ante*.

**318.** ———.—[THE PELLWORM, No. 266, *ante*.

**319. Wilful violation.**—THE VROW ANNA CATHARINA, No. 297, *ante*.

## SECT. 5.—PROPERTY SUBJECT TO CAPTURE.

### SUB-SECT. 1.—IN GENERAL.

**320. Property of neutral.**—WALTON v. HANBURY (1707), 2 Vern. 592; 23 E. R. 985.

*Annotation*.—*Mentd*. Adamson v. Jarvis (1827), 4 Bing. 66.

**321. Signalling apparatus leased to ship-owners.**—A submarine signalling apparatus, fixed partly in the forehold & partly in the chart room of an enemy's ship, was claimed by a neutral co. who, as they alleged, leased the apparatus to the owners of the ship on terms which provided that rent should be paid & that the apparatus should remain the sole & exclusive property of the co.:—*Held*: the apparatus was not "neutral goods" under enemy's flag within art. 3 of the Declaration of Paris, 1856, as "goods" there meant merchandise, which this was not; & this apparatus being part of the ship, must in the Prize Ct. be condemned with the ship.—THE SCHLESSEN (1914), 84 L. J. P. 33; 112 L. T. 353; 31 T. L. R. 89; 59 Sol. Jo. 163; 13 Asp. M. L. C. 26; 1 Br. & Col. Pr. Cas. 13; *subsequent proceedings*, [1916] P. 225.

**322. Enemy goods on British ships—On board at commencement of hostilities.**—THE ROUMANIAN, No. 291, *ante*.

**323.** ———.—**Embarked during hostilities.**—THE ROUMANIAN, No. 291, *ante*.

**324. Oil cargo brought to British port—Pumped into tanks—Seizure while in tanks.**—THE ROUMANIAN, No. 291, *ante*.

**325. Proceeds of enemy goods—Discharged in port.**—THE GLENROY, No. 932, *post*.

**326.** ———.—**After outbreak of war.**—THE AJAX, CONSIGNMENTS TO ALOIS SCHWEIGER & CO. (1924), 19 Lloyd, L. R. 10.

**327. Goods of enemy origin—Coal from country in occupation of enemy.**—An Order in Council of Feb. 16, 1917, after reciting that a German Memorandum of Feb. 1, 1917 (aimed at preventing all sea traffic with Great Britain & her Allies) rendered it necessary for further measures to be adopted to prevent commodities of any kind reaching or leaving enemy countries, provided that vessels encountered at sea on their way to or from ports in neutral countries affording access to enemy territory would, until the contrary was established, be deemed to be carrying goods with an enemy destination or of enemy origin, & that such goods would be subject to condemnation. The vessels carrying them would also be subject to condemnation, provided that in the case of a vessel which called at an appointed British or Allied port for examination of her cargo, condemnation under the Order should not be pronounced. No port or ports were appointed under the Order.

A Dutch steamship bound direct from Rotterdam to Stockholm with a cargo of coal, the produce of Belgian collieries in German occupation, was seized as prize off the Dutch coast under the authority of the above Order, & ship & cargo were condemned. The coal had been won, sold, & shipped as part of a German Govt. trade, carried on for the benefit of the enemy in prosecuting the war:—*Held*: (1) the Order was not contrary to the law of nations; &, upon the evidence, was not

### PART IV. SECT. 5, SUB-SECT. 1.

**f. Ignorance of hostilities—Whether ship detained.**—A German ship which entered the port of Cape Town in ignorance of the existence of war between Britain & Germany, ordered

to be detained pending further order of ct.—THE STURMVOGEL, [1914] W. R. 819.

**g.** ———.—[A German ship, ignorant of the outbreak of hostilities, captured on the high seas, is lawful prize.—THE

RUFIDJI, [1914] W. R. 784.

**h.** ———.—[THE HAMM, [1914] W. R. 785.

**k.** ———.—[THE BISMARCK, [1914] W. R. 810.

**l.** ———.—[When the master of an  
q q 2

**Sect. 5.—Property subject to capture: Sub-sects. 1, 2, 3, 4, 5 & 6.]**

invalid as subjecting neutrals to unreasonable inconvenience, having regard to the circumstances; (2) the coal was of "enemy origin"; & accordingly the ship & cargo were properly condemned.—**THE LEONORA**, [1919] A. C. 974; 88 L. J. P. 180; 121 L. T. 527; 35 T. L. R. 719; 63 Sol. Jo. 800; 14 Asp. M. L. C. 500, P. C.; *affg.*, [1918] P. 182.

*Annotations*:—*As to* (1) **Reid**, *The Stigstad*, [1919] A. C. 279; *The Bernisse, The Elve*, [1921] 1 A. C. 458. *As to* (2) **Reid**, *The Noordam* (No. 2), [1919] P. 255.

**What is deemed enemy property.**—See Part III., Sects. 3, 4, *ante*.

**Property of person trading with the enemy.**—See **ALIENS**, Vol. II., pp. 162–188, Nos. 330–512.

**SUB-SECT. 2.—ENEMY PROPERTY IN PORT AT OUTBREAK OF WAR.**

**328. Subject to seizure.**—Austrian cargo seized on a British ship in port at the outbreak of hostilities was allowed by the Procurator General to be resold by the original vendors thereof to an English firm, on the moneys being paid into ct.:—**Held**: (1) the proceeds of sale were droict of Admty. & proper prize.

(2) Enemy cargo in English ships in port at the outbreak of hostilities is subject to capture as lawful prize of war.—**THE ALDWORTH (PART CARGO EX)** (1914), 31 T. L. R. 36; 59 Sol. Jo. 75.

**329. — Wrongful seizure before declaration of war — Subsequent rightful seizure.**—**THE SCHLESSEN**, No. 967, *pos.*

**330. — Merchant ships.**—**THE MARIE LEONHARDT**, No. 960, *post*.

**SUB-SECT. 3.—FISHING VESSELS.**

**331. Whether exempt from capture.**—F forbearance towards common fishing boats has been a matter of comity in former wars. In this they have been proceeded against & condemned.—**THE YOUNG JACOB & JOHANNA** (1798), 1 Ch. Rob. 20; 165 E. R. 81.

*Annotation*:—**Reid**, *The Berlin*, [1914] P. 265.

**332. —**—National character from occupation in the fishing trade of Holland.—**THE LIESBET VAN DEN TOLL** (1804), 5 Ch. Rob. 283; 1 Eng. Pr. Cas. 479; 165 E. R. 777.

*Annotation*:—**Reid**, *The Berlin*, [1914] P. 265.

**333. — Order in council—Voyage commenced before publication of order.**—If the fact be that there is danger of an intermixture of Danish interests in this trade, it must be prohibited by a specific regulation, & that is now done by the Order of May 9; but as this vessel sailed from Hamburg before that Order in Council was issued, the voyage was open to her, & I shall, therefore, restore the ship & cargo, allowing the captors their expenses.—**THE JOHAN** (1810), 1 Edw. 275; 165 E. R. 1107.

**334. — Deep sea fishing vessel—Engaged in enemy trade.**—By Art. 3 of the Hague Convention, No. XI., 1907, relative to certain restrictions on the exercise of the right of capture in maritime war, "vessels employed exclusively in coast fisheries . . . together with their appliances,

rigging, tackle, & cargo, are exempt from capture"; but, apart from the question whether, in the existing war between Great Britain & Germany, the latter power can rely upon the Convention, this immunity from capture will not extend to a German deep sea fishing vessel engaged in a commercial enterprise forming part of the trade of the enemy country. Under Prize Ct. Rules, 1914, Ord. XV., a prize ct. is not bound to require the best official evidence of a capture, but may in its discretion make use of other information.

The commander of one of His Majesty's ships who cannot take a captured vessel into port, or put a prize crew on board, ought to enter the time & place of capture in the vessel's log, or make a declaration in the presence of the vessel's master, so as to provide direct legal evidence thereof.—**THE BERLIN**, [1914] P. 265; 84 L. J. P. 42; 112 L. T. 259; 31 T. L. R. 38; 59 Sol. Jo. 59; 12 Asp. M. L. C. 607.

**SUB-SECT. 4.—SHIPS EMPLOYED IN COASTAL TRADE.**

**335. Neutral ship—Trading from one enemy port to another—Ordinance against neutrals engaging in such trade—Evidence of adoption.**—Coasting trade of France expressly forbidden to neutrals by French ordinance.

This is the case of a [neutral] ship taken on a voyage from one French port to another, which is certainly a sufficient justification of the capture, because the very circumstance of being engaged in conducting the trade of the enemy from one port to another, will justly subject the vessel to inquiry; & perhaps in some future case, the ct. may have occasion to consider how far the regulations . . . may not make such a trade liable to be considered as a case of adoption. . . . Although captors may have made a justifiable seizure, yet they may still forfeit that title by subsequent misconduct (**SIR WILLIAM SCOTT**).—**THE SPECULATION** (1799), 2 Ch. Rob. 293; 1 Eng. Pr. Cas. 237; 165 E. R. 321. *Annotation*:—**Mentz**, *The Ostsee* (1855), 2 Ecc. & Ad. 170.

**336. — Not contrary to peace time regulations of state.**—**THE ALLEGORIA** (1802), 4 Ch. Rob. 202, n.; 165 E. R. 585.

**337. — Declaration of legality of trade.**—**THE EBENEZER**, No. 340, *post*.

**338. — Trading between ports denied to British flag—Effect of Order in Council.**—Trade between Prussian ports illegal under the Order in Council, Jan. 7, 1807.

This is the case of a Prussian ship & cargo, captured on a voyage from Stettin to Koningsburg, both Prussian ports; & I am of opinion that, under the Order in Council prohibiting vessels to trade between ports from which the British flag is excluded, this voyage is illegal. It is true that, by a subsequent Order in Council, of Nov. 25, 1807, Prussian ships are permitted to trade between neutral port & neutral port; but I think this Order is controlled as well by its own import as by the former Order of Jan. 7, so far as respects the trade from one Prussian port to another, from both of which the British flag is now excluded. Because ports so interdicted to the commerce of this country, in compliance with the wishes & policy of the enemy, cannot be brought within the description of ports strictly neutral, though the

enemy ship seized in time of war failed to discharge the *onus* of proving his ignorance of the outbreak of hostilities when entering a British port, the ct. condemned the ship as a

lawful prize.—**THE BIRKENFELS**, [1914] W. R. 819.

**PART IV. SECT. 5, SUB-SECT. 2.**

**328 I. Subject to seizure.**—Goods

discharged from a ship on to land can, everything else being in order entitling the Admiralty to condemnation, be seized.—**PRIZE COURT**, [1916] J. D. 11. 437.

country of which they form a part may not be at war with this country, & may have a general character of neutrality. The ports themselves are in effect hostile; they derive a character of hostility from the exclusion of the British flag, in the same manner, & under the same penalties of prohibition, as would be applied in ports directly hostile. A part of this cargo, it has been suggested, is entitled to peculiar consideration, as it is represented to be the property of the King of Prussia himself; & certainly, if it could be shown that these were articles going for the private accommodation of the sovereign, it would be proper, conformably to that comity which is observed in such cases by *cts.* of prize, to restore it; but in this instance, the property in question consists of a considerable quantity of salt, evidently not intended for the private consumption of the sovereign, but for the purposes of trade or revenue, & therefore it cannot be so favourably distinguished. Ship & cargo condemned (SIR WILLIAM SCOTT).—THE SPECULATION (1810), Edw. 184; 165 E. R. 1076.

*Annotation* :—*Reid*. The Leonora, [1918] P. 182.

**339. — Under false papers.**—Coasting trade of the enemy with false papers; cause of condemnation.

The carrying on the coasting trade with false papers is a ground of condemnation, according to the established doctrine of this *ct.* (SIR WILLIAM SCOTT).—THE JOHANNA THOLEN (1805), 6 Ch. Rob. 72; 1 Eng. Pr. Cas. 531; 165 E. R. 854.

**340. —**—The carrying on the coasting trade of the enemy with false papers is cause of condemnation, & whatever may be the declarations of France, as holding out assurances, that foreign vessels shall be admitted into the coasting trade of that country, as a permanent regulation that shall continue a century, this *ct.* will certainly not act upon the credit of such declarations, but will adhere to its own principle, that the carrying on the coasting trade of the enemy with false papers, subjects the property to confiscation (SIR WILLIAM SCOTT).—THE EBENEZER (1806), 6 Ch. Rob. 250; 165 E. R. 920.

**341. Enemy ships—Harbour craft in Suez Canal.**—*PROCURATOR IN EGYPT v. DEUTSCHES KOHLEN DEPOT GESELLSCHAFT*, No. 273, *ante*.

#### SUB-SECT. 5.—CARTEL SHIPS.

**342. Nature of cartel.**—The privileges & immunities of cartel ships are of a very sacred nature, & are to be received with great respect, inasmuch as they tend very beneficially to mitigate the miseries of war, & to facilitate the return of peace, by the removal of those obstructions, which put a stop to the intercourse of nations. With respect to the general character of contracts of this description, I am disposed to hold, that the actual existence of a war is not essentially necessary to give effect to them, but that it will be sufficient, if they are entered into prospectively, & in expectation of approaching war (SIR WILLIAM SCOTT).—THE CAROLINA (1807), 6 Ch. Rob. 336; 165 E. R. 953.

**343. Immunity from capture—Though not strictly provided with documents of cartel.**—Privileges of cartel allowed to a ship employed in carrying from Martinique to France, certain

French prisoners taken at St. Lucie, agreeable to the understanding of the commanding officer of the British forces at St. Lucie, though not strictly provided with the formal documents of cartel, etc.

If, under such a representation of the agreement, made to this man, the French officers had taken up this vessel, it would, I think, be straining matters to a degree, not quite discreet or legal, to object against the validity of such a protection, that it was not strictly in the form of cartel unless it could be shown that such pretensions had been brought forward from some unfair or fraudulent motive (SIR WILLIAM SCOTT).—LA GLOIRE (1804), 5 Ch. Rob. 193; 165 E. R. 745.

**344. When immunity commences—Whether protected by prospective employment.**—Cartel ships going from the Texel to Flushing, to take exchanged prisoners on board to bring them to England, restored.

I must lay it down as clear, that ships are to be protected in this office, *ad eundem et redeundum*, both in carrying prisoners, & returning from that service. . . . It is the employment, & not the future intention, that protects; they ask protection therefore beyond the reach of the strict principle, which allows it only *eundo & redeundo*. I think, however, that the protection may be not improperly extended, if it appears that they had in any manner entered upon their functions, by being put into a state of actual preparation, & equipment for their employment. . . . The passage of ships from one of their own ports to another is liable to more suspicion. . . . A ship going to be employed as a cartel ship is not protected by mere intention on her way from one port to another of her own country, for the purpose of taking on herself that character, when she arrives at the latter port (SIR WILLIAM SCOTT).—THE DAIFJIE (1800), 3 Ch. Rob. 139; 165 E. R. 414.

*Annotation* :—*Reid*. La Gloire (1804), 5 Ch. Rob. 192.

**345. Duration of immunity—Eundo & redeundo.**—THE DAIFJIE, No. 344, *ante*.

**346. Effect of user for trade.**—THE BEAVER (1760), Burrell, 165; 167 E. R. 522.

**347. —**—A cartel ship is not at liberty to trade, or take in a cargo. Penalty of confiscation.

Cartel ships are subject to a double obligation, to both countries, not to trade. To engage in trade may be disadvantageous to the enemy, or to their own country; both countries are mutually engaged to permit no trade to be carried on under a fraudulent use of this intercourse; all trade must, therefore, be held to be prohibited, & it is not without the consent of both govts. that vessels engaged on that service can be permitted to take in any goods whatever (SIR WILLIAM SCOTT).—THE VENUS (1803), 4 Ch. Rob. 355; 165 E. R. 638.

**348. — Contraband goods on board.**—Tin plates for canister shot, put on board a cartel ship by a British manufacturer at Dover condemned as *droit* of Admty.—LA ROSINE (1800), 2 Ch. Rob. 373; 165 E. R. 348.

#### SUB-SECT. 6.—HOSPITAL SHIPS.

**349. Protection forfeited by hostile action—Wireless messages in secret code—Duty to keep record.**—Art. 8 of Convention X. of the Hague Conference, 1907, provides that the protection to

PART IV. SECT. 5, SUB-SECT. 5.  
m. Ship carrying fugitives from enemy port—Whether "employed on a philanthropic mission."—An enemy ship

carrying women & children fugitives from a naval & military base of the enemy, a blockade of which is expected, is not "employed on a philanthropic mission" within the meaning of article

4 of Convention No. 11 of the Second Hague Peace Conference, 1907, so as to exempt it from capture.—THE PAKLAT (1915), 10 Hong Kong L. R. 19.

*Sect. 5.—Property subject to capture: Sub-sects. 6, 7, & 8. Sect. 6: Sub-sect. 1, A. & B.]*

which hospital ships are entitled under Art. 1 ceases if they are used to commit acts harmful to the enemy, but that the presence of wireless telegraphy apparatus on board is not a sufficient reason for withdrawing protection:—*Held*: without laying down an absolute rule that the mere sending by a hospital ship of a wireless message in secret code will of itself forfeit her right to protection & subject her to capture & condemnation, it may certainly be laid down that if such messages are sent a clear & satisfactory record of them must be kept, so that when the right of search is exercised there may be reasonable evidence of the messages & of the necessity, if there can be any such necessity on the part of a hospital ship, for sending them in a secret code.

An appeal from the Prize Ct. on facts must be treated as a rehearing in the same way as an appeal to the Ct. of Appeal from a judge sitting without a jury in the High Ct. There is jurisdiction to review the findings of the judge, but the Appeal Ct. attaches great weight to the fact that the judge below has heard the witnesses & practically acts on the opinion of the judge as to the credibility of the witnesses before him & the weight to be attached to their evidence.

If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; & even if the document is destroyed by his own act but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer (SIR ARTHUR CHANNELL).—*THE OPHELIA*, [1916] 2 A. C. 206; 85 L. J. P. 169; 114 L. T. 1067; 32 T. L. R. 502; 13 Asp. M. L. C. 377, P. C.

*Annotation*:—*Reid*. Adelaide S.S. Co. v. R. (1922), 127 L. T. 63.

**350. Presumption of improper user—Destruction of papers.**—*THE OPHELIA*, No. 349, *ante*.

**SUB-SECT. 7.—PRIVATE PROPERTY OF OFFICERS AND CREW.**

**351. Whether liable to seizure.**—According to English prize law the private property of enemy officers & crews on a captured enemy ship is liable to confiscation unless the Crown consents to forego its rights thereto.—*THE LIBAU* (1917), 62 Sol. Jo. 106.

**SUB-SECT. 8.—CONTRABAND.**

*See Part VII., post.*

**SECT. 6.—JOINT CAPTURE.**

**SUB-SECT. 1.—ASSOCIATION IN COMMON ENTERPRISE.**

**A. In General.**

**352. General rule.**—The *Vestal* received orders from the Admiralty to join D.; she accordingly did join him, & formed one of the fleet under his command, & received directions from him to

cruise off the Texel, to reconnoitre & obtain intelligence of the Dutch fleet, which she did. D. cruised till the latter end of Sept., & then returned to Yarmouth, ordering T. to sail with two or three vessels to watch the motions of the enemy; & leaving directions for the *Vestal* to put herself under the command of T. The *Vestal* accordingly did join T., & made one of the ships under his command bring part of D.'s fleet, & on falling in with the Dutch fleet, on Oct. 8, was sent by T. to reconnoitre them. On the next day T. gave the *Vestal* a written order to sail immediately for the first port in England, using her utmost endeavours, to fall in with D. on the way, to send an express to the Admiralty, & then to use his best endeavours immediately to fall in with D. wherever he was, & acquaint him with the situation of the Dutch fleet. In pursuance of these orders she sailed to England, landed the dispatches, & again returned, & actually joined D., on Oct. 13. After the *Vestal* was so detached, T., with His Majesty's ships cruising with him, joined D., & never lost sight of the Dutch fleet, from the time the *Vestal* was so detached to the time of the capture of the ship proceeded against. . . . When D. came up with the body of the British fleet, then the chase began & that is in my estimation to be considered as the true point of commencement of actual engagement in this case. . . . the *Vestal* was not in sight at the time of the commencement of the chase & therefore she is not in law entitled to share in the capture (SIR WILLIAM SCOTT).

(2) The principle of mere common enterprise alone will not be sufficient; it is not sufficiently specific; it must be more limited. . . . The being in sight, or seeing the enemy's fleet accidentally a day or two before, will not be sufficient; it must be at the commencement of the engagement, either in the act of chasing or in preparations for chase or afterwards during its continuance (SIR WILLIAM SCOTT).

(3) Capture has been divided into capture *de facto* & capture by construction (SIR WILLIAM SCOTT).

(4) The *onus probandi* lies on those setting up the construction (SIR WILLIAM SCOTT).—*THE VRYHEID* (1799), 2 Ch. Rob. 16; 165 E. R. 223.

*Annotation*:—As to (2) *Reid*. Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**353.** —[—]—*THE RESOLUTION* (1805), 6 Ch. Rob. 14; 165 E. R. 833.

**354.** —[—]—Claim as principle of joint capture rejected. To sustain such claim it is not sufficient to show a general co-operation only or one for purposes distinct from that of capture, but absolutely necessary to prove that the co-operation had a distinct reference to the capture, which capture should be the joint produce of this co-operation, & the object for which the vessels were united.—*THE NORDSTERN* (1809), 1 Act. 128; 12 E. R. 48, P. C.

*Annotations*:—*Consol.* The *Forsigheld* (1809), Edw. 124. *Fold*. The U.B. 17 (1922), 38 T. L. R. 780. *Reid*. Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109; The *Feldmarschall*, [1920] P. 289; *Re Mesopotamia Operations*, 1917, The *Sulman Pak*, etc., [1922] P. 73.

**355.** —[—]—I consider it to be a clear rule of law, that ships engaged in a joint enterprise of this kind, & acting under the orders of the same superior officer, are entitled to share in each other's prizes; & it is certainly for the benefit of the public service that a rule of this sort should prevail, in

**PART IV. SECT. 6, SUB-SECT. 1.—A.**

*n. Right to share*—*Ship driven on shore & seized there.*—Vessels associated for a blockade entitled to share in captures of the enemy's property though driven on shore & seized there.—*The Frigate* (1813) *Staw* at 559

order that the public force of the state may be distributed so as to produce the greatest possible advantage to the country, & the greatest possible annoyance to the enemy (SIR WILLIAM SCOTT).—THE EMPRESS (1814), 1 Dods. 368; 165 E. R. 1344.

*Annotations*.—**Reid**, The Rattlesnake (1815), 2 Dods. 32; Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**356. Actual engagement with prize.**—THE TOULOUSE (1715), cited in Edw. 280; 165 E. R. 1109.

*Annotation*.—**Reid**, La Gloire (1810), Edw. 280.

**357. Assistance in early stages of chase.**—THE RATTLESNAKE, No. 416, *post*.

**358. Antecedent or subsequent services—Absent from engagement by order.**—THE VRYHEID, No. 352, *ante*.

**359. ———.**—*Re* BUENOS AYRES (1811), 1 Dods. 28; 165 E. R. 1221.

*Annotation*.—**Reid**, Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**360. Indirect or remote co-operation—Diversion of prize.**—THE MARS (1760), cited in 2 Ch. Rob. at p. 22; 165 E. R. 225.

*Annotations*.—**Apld**, The Vryheid (1799), 2 Ch. Rob. 16. **Reid**, Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**361. Co-operation of ships in blockading fleet.**—THE HARMONIE (1801), 3 Ch. Rob. 318; 165 E. R. 478.

**362. ———.**—Co-operation in the blockade of Malta; claim of joint capture by ships stationed at different points in support of the blockade, established.—THE GUILLAUME TELL (1808), 1 Edw. 6; 165 E. R. 1013.

*Annotation*.—**Reid**, Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**363. ———.**—When a prize is taken coming out of a blockaded port by one of the blockading squadron stationed off the mouth of the harbour, the other ships of the squadron, although stationed at some distance are entitled to share.—LA HENRIETTE (1815), 2 Dods. 96; 165 E. R. 1426.

*Annotation*.—**Reid**, Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**364. Co-operation of military transport.**—(1) Claim of joint capture, by India ships carrying troops to the Cape of Good Hope, & asserting to have contributed to the capture, by intimidation occasioned by their appearance, not allowed.

I do not see that they can be considered in their original character, as more than transport vessels, liable to be called upon occasionally to act, with alacrity & vigour . . . but not deriving from that circumstance . . . any title to invest them with a military character; for the mere conveyance of troops would have no such effect. At the same time it is true, that a military character might be afterwards impressed upon them, by the nature & course of their subsequent employment. If they had been associated to act, in conjunction with the King's fleet, & did so act, they may acquire an interest, which, on proper application, will be sure to meet with due attention . . . mere association will not do, the plea must go further, & show in what capacity they were associated, & that capacity must be directly military. 'Transports are associated with fleets & armies for various purposes, connected with, as subservient to the military uses of those fleets & armies. But if they are transports merely, & as such are employed simply in the transportation of stores as men, they do not rise above their proper mercantile character in consequence of such an employment. The employment must be that of an immediate application to the purposes of direct military operations, in which they are to take part (SIR WILLIAM SCOTT).

(2) Cases of joint chasing at sea differ so materially from the cases of conjunct operations at land, that they are with great danger of inaccuracy applied to illustrate each other. In joint chasing at sea, there is the overt act of pursuing, by which the design & actual purpose of the party may be ascertained, & much intimidation may be produced; but in cases of conjunct operations at land, it is not the mere intrusion even of a commissioned ship that would entitle parties to share. . . . It would be a very inconvenient doctrine, that private ships of war, by watching an opportunity, & intruding themselves into an expedition, which the public authority in no degree committed to them, should be at liberty to say, "we will co-operate"; & that they should be permitted to derive an interest from such a spontaneous act, to the disadvantage of those to whom the service was originally entrusted (SIR WILLIAM SCOTT).—THE CAPE OF GOOD HOPE (1799), 2 Ch. Rob. 274; 1 Eng. Pr. Cas. 227; 165 E. R. 314; *affd.* (1802), 6 Ch. Rob. 1X.

**365. Co-operation for two separable objects—Attainment of one by part of force—Right of remainder to share.**—THE ISLAND OF TRINIDAD, ETC. (1804), 5 Ch. Rob. 92; 165 E. R. 709.

*Annotation*.—**Reid**, Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**366. Continuance of chase—Association in sight unnecessary.**—If two vessels are associated for the purpose of effecting a capture, the continuance of the chase is sufficient to give the right of joint capture, & sight is under such circumstances unnecessary.—L'ETOILE (1816), 2 Dods. 106; 165 E. R. 1430.

*Annotation*.—**Reid**, Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

#### B. Association in Sight.

**367. General rule.**—THE TRAUTMANSDORF (1795), cited in Edw. at p. 16; 165 E. R. 1017, P. C.

*Annotations*.—**Consd**, The Ittebeckah (1799), 1 Ch. Rob. 227; The Guillaume Tell (1808), Edw. 6.

**368. ———.**—Much more is necessary than a mere being in sight to entitle an army to share jointly with the navy, in the capture of an enemy's fleet. The mere presence, or being in sight of different parties of naval force, is, with few exceptions sufficient to entitle them to be joint captors; because they are always conceived to have that privity of purpose which may constitute a community of interests. But between land & sea forces, acting independently of each other, & for different purposes, there can be no such privity presumed; & therefore, to establish a claim of joint capture between them, there must be a contribution of actual assistance, & the mere presence, or being in sight, will not be sufficient. . . . When there is no preconcert, it must be not a slight service, nor an assistance merely rendering the capture more easy or convenient, but some very material service, that will be deemed necessary to entitle an army to the benefit of joint capture. Where there is preconcert, it is not of so much consequence that the service should be material, because then each party performs the service that is previously assigned to him, & whether that is important or not, it is not so material; the part is performed, & that is all that was expected. But where there is no such privity of design, & where one of the parties is of equal force to the work, & does not ask assistance, it is not the interposing of a slight aid, insignificant perhaps, & not necessary, that will entitle another party to



**Sect. 6.—Joint capture: Sub-sect. 1, B. & C.]**

share. The evidence by which such a claim is supported should be clear & consistent, because it lies on those setting up an interest of joint capture to make out their case. The presumption is on the side of the actual captor (SIR WILLIAM SCOTT).—THE DORDRECHT (1799), 2 Ch. Rob. 55; 1 Eng. Pr. Cas. 187; 165 E. R. 237.

*Annotations*.—**Conad.** Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109; The Feldmarschall, [1920] P. 289.

**369.** —.—.]—Joint capture. Being in sight but sailing in a contrary direction. Fraud in actual captor postponing capture to defeat the sight of another party.

The party setting up a claim of joint capture must make out his case, & the burden of proof lies on him. . . . Where no actual assistance is alleged, the presumption of law leans in favour of the actual captor; & where fraud is suggested against him by the party setting up a constructive claim, the original presumption is still further strengthened; inasmuch as the law always presumes against imputed fraud (SIR WILLIAM SCOTT).

Being in sight generally, & with some few exceptions is sufficient to entitle a party to share as a joint captor (SIR WILLIAM SCOTT).

With respect to the evidence in cases of this nature, . . . great attention will always be paid to the preparatory examinations of persons on the spot, the crew of the captured ship, who are disinterested witnesses, examined while the facts are fresh in their memory, before any disputes have arisen, & before they have had time to embark, either their passions or their interests in the suit (SIR WILLIAM SCOTT).

One witness, is brought forward, from the ship, in whose favour the claim of joint capture is given; & although he has released his interest, it must not be forgotten, that such witnesses usually see with sharp eyes, & recollect with prompt memories in favour of their own ship. . . . There is no case in which the cts. have decided in favour of a joint captor on such evidence alone (SIR WILLIAM SCOTT).—THE ROBERT (1800), 3 Ch. Rob. 194; 165 E. R. 433.

**370.** —.—.]—THE ISLAND OF TRINIDAD, ETC. (1804), 5 Ch. Rob. 92; 165 E. R. 709.

*Annotation*.—**Refd.** Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**371.** —.—.]—(1) Whether in the case of a private ship of war, & a King's ship lying in harbour, & sending-out their boats, to make a capture, the boat of the private ship of war so sent out, but not coming up at the time of capture, can found a title to share in the capture made by the boat of the King's ship, on the mere principle of being in sight? I know of no case that would sustain such a claim (SIR WILLIAM SCOTT).

(2) Where a ship is in sight, she is conceived to co-operate in the proportion of her force. . . . Where no antecedent agreement is proved to have taken place, a vessel lying in harbour cannot be entitled to share in a capture made out of the harbour, by the circumstances of her boat being merely in sight (SIR WILLIAM SCOTT).—THE ODIN (1803), 4 Ch. Rob. 318; 1 Eng. Pr. Cas. 397; 165 E. R. 625.

*Annotation*.—**Refd.** Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**372.** —.—.]—Sight alone is generally sufficient to entitle King's ships to share as joint captors, but there are exceptions to this rule.—THE GALEN (1815), 2 Dods. 19; 165 E. R. 1402.

*Annotations*.—**Apld.** The Societade Feliz (1843), 7 Jur. 956. **Conad.** The Brazil (1856), Sw. 75; Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

**373.** —.—.]—A claim of joint capture may generally be sustained by a King's ship on the ground of sight only; but this rule is liable to exceptions.—THE MELANIE (1816), 2 Dods. 122; 2 Eng. Pr. Cas. 217; 165 E. R. 1435.

*Annotations*.—**Apld.** The Societade Feliz (1842), 1 Wm. Rob. 303; The Brazil (1856), Sw. 75. **Refd.** Re Falkland Islands Battle, *Ex p.* H.M.S. Canopus, [1917] P. 47.

**374.** —.—.]—With respect to the question of sight, the important point always is whether the captured vessel saw or could see the vessel claiming to share (DR. LUSHINGTON).—THE SOCIEDADE FELIZ (1843), 2 Wm. Rob. 155; 2 Notes of Cases, 430; 7 Jur. 956; 166 E. R. 713.

**375. Proof of being in sight—Value of captor's evidence.**—THE NOSTRA SIGNORA DE LOS DOLORES (1810), 1 Act. 262; 12 E. R. 101.

**376.** —.—.]—(1) In questions of joint capture, the *onus probandi* is on claimant, & in favour of the actual captor. The rule, that no claim for joint capture can be established on the sole evidence of the crew claiming, is not so strict in slave cases as in prize of war.

(2) Asserted joint captor must be seen from the prize; proof thereof generally required from other than captors.—THE BRAZIL (1856), Sw. 75; 4 W. R. 375; 166 E. R. 1027.

**377. Presumption of animus capiendi—Rebuttal of presumption.**—(1) Allowing the *Viper* to have been the ship in sight, still when I take into consideration that she had before reconnoitred this vessel, & had actually stood off on another course; . . . I may venture to say, that to pronounce for the interest of such a claim as this would be to carry the interests of joint capture to a greater extent, than has ever yet been done. There is no *animus capiendi* even to be presumed in this instance. . . . this is a case of voluntary & deliberate dereliction (SIR WILLIAM SCOTT).

(2) The burden of proof lies on the party setting up the claim of joint capture (SIR WILLIAM SCOTT).—THE LORD MIDDLETON (1801), 4 Ch. Rob. 153; 165 E. R. 568.

**378.** —.—.]—Being in sight at the time, on behalf of a King's ship, alone is generally sufficient to found a claim of joint capture, & to raise a legal presumption of the *animus persequendi*, which is not so readily attributed to private ships of war. . . . As to King's ships, the presumption may be repelled by contrary circumstances, tending to show that there was either no knowledge of the capture that was going on, or no intention to partake in it; in fact, that there was no active or constructive assistance. . . . The act of steering a contrary course would have the effect of repelling the force of any inference raised on the mere presumption of law; . . . & also if a King's ship was lying in harbour, utterly ignorant of the occurrence, with her men dispersed & sails unset (SIR WILLIAM SCOTT).—THE DRIE GEBROEDERS (1804), 5 Ch. Rob. 339; 165 E. R. 797.

**379.** —.—.]—THE AMITIE, No. 414, *post*.

**380. Revenue cutter.**—In this case a claim of joint capture was set up by a revenue cutter, on the ground of being in sight. There was no act of assistance, & therefore the only question was, whether the revenue cutter, upon the mere fact of sight, must necessarily be presumed to have the *animus capiendi* so as to entitle her to share.—THE BELLONA (1809), Edw. 63; 2 Eng. Pr. Cas. 21; 165 E. R. 1033.

**381. At commencement of engagement.**—THE VRYHEID, No. 352, *ante*.

**382. Search continued after sight lost.**—The ct. held the log of the *Amethyst* to be in-

admissible as evidence, since it went to give a common interest to the parties.

The *Emerald* certainly had no sight, but was left to her own speculation as to what course the enemy would take during the darkness of the night in order to elude her pursuers, & to withdraw herself from the probability of falling in with either of them. Why then, what was the *Emerald* doing at this time? I think cruising merely in search. . . . I know of no case in which it has been held, that a ship beginning a chase, & then discontinuing it, for it is a discontinuance to change a course upon conjecture, is entitled to share as joint captor (SIR WILLIAM SCOTT).—LE NIEMEN (1811), 1 Dods. 9; 165 E. R. 1214.

*Annotations*.—*Distd.* The Union (1813), 1 Dods. 346. *Foll.* The Sociedade Feliz (1842), 1 Wm. Rob. 303. *Consd.* Banda & Kirweo Booty (1866), L. R. 1 A. & E. 109.

**383. — Sight lost through obedience to orders.**—One of two joint chasers being ordered to pick up the boats of the other, & in consequence of the delay occasioned by her obedience to those orders losing sight of the prize, is not entitled to share with a third ship coming up & making the actual capture.—THE FINANCIER (1811), 1 Dods. 61; 165 E. R. 1232.

*Annotation*.—*Distd.* The Sociedade Feliz (1842), 1 Notes of Cases, 286.

**384. At time of capture—Claimant in convoy fleet.**—THE WAKSAMHEID, No. 413, *post*.

**385. —**—Convoying ships precluded from sharing by further elongation from their convoy.—THE FURIE (1799), 3 Ch. Rob. 9; 165 E. R. 367.

*Annotation*.—*Refd.* The Virginia (1848), 6 Notes of Cases, 174.

**386. —**—LE FRANC (1795), 2 Ch. Rob. 285, n.; 165 E. R. 318.

*Annotations*.—*Consd.* The Cape of Good Hope (1799), 2 Ch. Rob. 274. *Refd.* The Feldmarschall, [1920] P. 289.

**387. —**—A ship in sight at the time of capture is entitled to share in the prize from that circumstance alone, & the claim is still stronger in favour of a ship which has joined in the pursuit of the prize.—THE SPARKLER (1813), 1 Dods. 359; 2 Eng. Pr. Cas. 187; 165 E. R. 1341.

**388. Distance from capture excessive.**—THE MARGARET (1746), cited in 2 Dods. at p. 125; 165 E. R. 1436.

*Annotation*.—*Consd.* La Melanie (1816), 2 Dods. 122.

**389. Claimant's refusal to partake in risk.**—On general principles, it seems not equitable, that one, who refused to partake in the risk, should afterwards advance a title to share in the profits . . . it would amount to a renunciation on the part of the master, & it would have the effect of binding those under his command & also the owners for whom the master must be considered to act (SIR WILLIAM SCOTT).—THE WILLIAM & MARY (1803), 4 Ch. Rob. 381; 165 E. R. 648.

**390. Assistance in navigation of captured boats.**—THE NANCY (1803), 4 Ch. Rob. 327, n.; 165 E. R. 629, P. C.

*Annotation*.—*Refd.* The Alwina, [1916] P. 131.

**391. Vessel in harbour—Boat in sight of capture.**—THE ODIN, No. 371, *ante*.

**392. Prize permitted to disappear from sight—Fraudulent delay of captor.**—THE EENDRAUGHT (1788), 3 Ch. Rob. App. XXXV.; 165 E. R. 509, P. C.

**393. —**—THE ROBERT, No. 369, *ante*.

**394. —**—The postponement on the part of the actual captor in taking a prize which might during several hours previously have been reduced into possession by such actual captor, during which the constructive captor, a King's ship, remained in sight, & communicated by

signals with the actual captor, objected to as fraudulent, no intimation having been given of the suspicions entertained of the prize by the actual captor; in consequence of which the other bore away from the prize without affording any co-operation, & was out of sight at the time of capture, which occurred after dark.

Decree pronounced for the exclusive interest of the actual captor, the foregoing circumstances being held insufficient to found a claim to joint capture.—THE MINERVA (1811), 2 Act. 112; 12 E. R. 198.

**395. Visibility affected by darkness.**—That a ship forming part of a blockade & not being in sight in consequence of darkness or fog, or if the ship, out of sight, is in fact engaged on a particular enterprise which results in a capture, does not bar her claim in the prize.—THE FORSIGHEID (1809), Edw. 124; 165 E. R. 1055.

*Annotation*.—*Consd.* The Arthur (1814), 1 Dods. 423.

**396. —**—Ships seen to be in chase of the prize during the day, & continuing the pursuit in a proper direction after night comes on, are entitled to share as joint captors although they are prevented seeing the act of capture by the darkness of the night.—THE UNION (1813), 1 Dods. 346; 2 Eng. Pr. Cas. 180; 165 E. R. 1336.

**Continuance of chase—Necessity for association in sight.**—See No. 386, *ante*.

#### C. Subordinate Vessels.

**397. Ship's boats — Constructive assistance.**—Joint capture, claim of on part of ship lying in the harbour of Corunna, & dispatching her boats in search of a French schooner, denoted by the signal post to be hovering on the coast. Fact of sight not sufficiently proved. Constructive assistance by boats will not entitle the ships to which they belong to share in the prize, claim rejected.—LA BELLE COQUETTE (1811), 1 Dods. 18; 165 E. R. 1217.

**398. — Boats borrowed by military.**—THE CHINSURAH (*circa* 1802), cited in 4 Ch. Rob. at p. 319; 165 E. R. 626.

*Annotation*.—*Refd.* The Odin (1803), 4 Ch. Rob. 318.

**399. Armed tender — Under claimant ship's command—Authority for employment of tender.**—In order to support the claim effectually on behalf of this ship, some orders must be produced to show in what manner the actual captor was attached to the *Sandwich*. If she was attached as a tender, it must have been in consequence of some orders in writing. Unless such orders can be produced, it does not appear that the fact can be properly established, but the fact being averred, I must admit the allegation, leaving it to the party to consider what proof will be necessary to sustain it (*per* CUR.).—THE ANNA MARIA (1800), 3 Ch. Rob. 211; 165 E. R. 439.

**400. —**—THE CHARLOTTE, No. 65, *ante*.

**401. —**—THE ISLAND OF CURACOA & DEPENDENCIES (1805), 5 Ch. Rob. 282, n.; 165 E. R. 777, P. C.

*Annotation*.—*Mentd.* La Flora (1805), 6 Ch. Rob. 1.

**402. —**—A ship of war is entitled to share in all captures made by a tender attached to her, however distant she may have been at the time of capture. To constitute a tender there must have been some express designation by the Admty., or such a constant employment of the vessel in that character as would be equivalent to an express designation.

The tender not being commissioned, the prize would be condemned as a *droit*, unless the capture were considered as made by the vessel to which

*Sect. 6.—Joint capture: Sub-sect. 1, C., D. & E.; sub-sect. 2. Sect. 7: Sub-sects. 1, 2 & 3.]*

the tender is attached.—*THE CARL* (1855), 2 Ecc. & Ad. 261; *Spinks*, 238; 2 Eng. Pr. Cas. 497; 10 L. T. 276; 164 E. R. 422.

**403.** ———.]—In joint captures, only the actual force present shares in the prize; therefore when a tender of one ship was joint captor with another ship, the prize was shared proportionately between the capturing ship & the tender; but the tender's share, under the Order in Council, June 30, 1827, is distributable among the whole of the ship's company.—*THE ZEPHERINA* (1830), 2 Hag. Adm. 317; 166 E. R. 259.

*Annotation:—Reid. R. v. Serva, etc.* (1845), 1 Den. 104.

#### *D. Joint Naval and Military Operations.*

**404. Principles governing claim of joint capture.**—*THE DORDRECHT*, No. 368, *ante*.

**405. Necessity for concert & communication.**—*THE CAPE OF GOOD HOPE*, No. 364, *ante*.

**406.** ———.]—A ship of war being *in itinere* & barely seeing or hearing a firing on the land, is not entitled to share in the beneficial effects of an attack made by a force with which she has no concert or communication.—*Re GENOA & SAVONA* (1815), 2 Dods. 88; 2 Eng. Pr. Cas. 214; 165 E. R. 1424.

**407. Necessity for joint action in particular engagement.**—Claim of joint capture, on the part of ships detached from the capturing squadron, alleged by virtue of the special nature of the service, & the agreements between the Austrian General & Lord Keith not sustained.—*THE STELLA DEL NORTE* (1805), 5 Ch. Rob. 349; 165 E. R. 801.

*Annotations:—Consd. The Feldmarschall*, [1920] P. 289. *Reid. Banda & Kirwee Booty* (1866), L. R. 1 A. & E. 109.

**408.** ———.]—In the course of the advance on Baghdad the Commander-in-Chief of the army in Mesopotamia ordered the naval flotilla, forming part of the naval forces acting in concert with the army, to push on & inflict as much damage as possible. The flotilla advanced up the Tigris, & fought & captured several armed Turkish vessels. The British cavalry were also advancing, but had been held up by a strong Turkish rearguard, & were some miles away & out of reach of the flotilla when the captures were made. On a motion by the officers & crew of the flotilla for prize bounty under the Order in Council of Mar. 2, 1915, whereby, pursuant to the provisions of Naval Prize Act, 1864 (c. 25), s. 42, a sum calculated at the rate of £5 for each person on board the enemy's ship at the beginning of the engagement was distributable among such of the officers & crews of any of His Majesty's ships of war as were actually present at the taking or destroying of any armed ship of the enemy, it was objected that the captures were the result of a joint naval & military operation, & therefore outside the provisions of Naval Prize Act, 1864 (c. 25):—*Held*: the question was not whether on the date in question the flotilla & the troops were engaged in a joint scheme of operations, but whether they were jointly engaged in the capture of the Turkish vessels; the troops in fact took no part in the capture; & the officers & crews of the flotilla were entitled to bounty.—*Re MESOPOTAMIA OPERATIONS*, 1917, *THE SULMAN PAK, ETC.*, [1922] P. 73; 91 L. J. P. 50; 126 L. T. 607; 38 T. L. R. 215; 15 Asp. M. L. C. 504.

*Annotations:—Reid. The U.B. 17* (1922), 38 T. L. R. 780; *Re Naval Operations in Mesopotamia*, 1914–15, [1923] P. 149.

**409. Whether prize money divisible.**—*PARKER v. BARKER* (1769), cited in 7 App. Cas. at p. 620.

*Annotation:—Reid. Kinloch v. Secretary of State for India* (1892), 7 App. Cas. 619.

**410.** ———.]—*THE HOOGSKARPEL* (1786), cited in 2 Dods. at p. 350; 165 E. R. 1510, P. C.

*Annotations:—Reid. La Bellona* (1818), 2 Dods. 343; *Re Genoa* (1820), 2 Dods. 444; *The Feldmarschall*, [1920] P. 289.

**411.** ———.]—*HOME v. CAMDEN* (EARL) (1795), 6 Bro. Parl. Cas. 203; 2 Hy. Bl. 533; 2 E. R. 1028, H. L.; *affg. S. C. sub nom. CAMDEN* (LORD) *v. HOME* (1791), 4 Term Rep. 382.

*Annotations:—Mentd. Gare v. Gapper, Gould v. Same* (1803), 3 East, 472; *Veley v. Burder* (1841), 12 Ad. & El. 265; *Re Appledore Commutation* (1845), 8 Q. B. 139; *Wadsworth v. Queen of Spain* (1851), 17 Q. B. 171; *R. v. Greenwich County Court Judge* (1888), 60 L. T. 248; *The St. Tudno*, [1918] P. 174; *Egyptian Bonded Warehouses Co. v. Yeyasu Goshi Kaisha*, [1922] 1 A. C. 111.

**412.** ———.]—*THE FELDMARSCHALL*, No. 63, *ante*.

#### *E. Abandonment of Prize.*

**413. General rule.**—*The Scorpion* sailed from Cuxhaven, Oct. 2, 1798, in company with the sloop of war the *Fairy* & the brig the *Kite*, having eleven merchantmen under their convoy: on Oct. 24, at daylight, they discovered two sail on the weather bow, which turned out to be the *Serius* & the enemy's ship afterwards captured ahead of her; the *Scorpion* & the *Kite*, two of the convoying ships, were immediately despatched to examine; they sailed on till they came within seven miles of the *Serius*, the Dutch ship being at that time about two miles ahead of her, the *Scorpion* made the usual signal to the *Serius*, & received an answer so as to know her to be the *Serius*, but no signal was made that the ships ahead were enemies, they were therefore concluded to be friends; & accordingly such a signal being made to the *Kite* & *Fairy*, the *Fairy* immediately made a signal to recall the *Scorpion*. . . . On these facts I am of the opinion that the acts of these vessels are not to be considered as a desertion of the convoy . . . their discontinuance of the chase & alteration of the course is not an act of their own, but an act wrongfully occasioned by the neglect or mistake, or wilful omission on the part of the *Serius*, & being so, it would not have the effect which generally would follow upon a discontinuance of chase & alteration of course, before the act of capture took place, for generally a discontinuance & alteration would defeat the interest of a joint captor by destroying the presumption of assistance or intimidation. . . . They must prove that it was the duty of the captain, according to the practice of the Navy to have made the signal of an enemy in sight; & they must also prove that the intimidation on the Dutch was produced from their appearance . . . & that the capture was made within such a distance as would not totally have removed them from the fair limits of their convoy duty (*SIR WILLIAM SCOTT*).—*THE WAAK-SAMHEID* (1799), 3 Ch. Rob. 1; 165 E. R. 364.

**414.** ———.]—(1) It will not be necessary that the joint chaser should actually board the prize; it will be enough if there is an *animus persequendi* sufficiently indicated by the conduct of the vessel, & not discontinued. . . . For if the pursuit is prematurely abandoned, it certainly cannot be deemed a joint chase, at that moment, when the interest of capture is consummated (*SIR WILLIAM SCOTT*).—*THE AMITIE* (1806), 6 Ch. Rob. 261; 165 E. R. 924.

**415.** ———.]—If one party takes a vessel & afterwards abandons her, & then another takes the same vessel, the last seizer is in law the only captor; & the act of a commander in relinquishing that which would otherwise have been good prize to himself & his crew is binding upon the interests

of all under him.—THE DILIGENTIA (1814), 1 Dods. 404; 2 Eng. Pr. Cas. 197; 165 E. R. 1357.

*Annotation* :—*Refd.* The Leucade (1855), 2 Ecc. & Ad. 228.

416. —.]—(1) A claim of joint capture cannot be supported, where the chase has been abandoned before the act of capture is consummated.

(2) When two vessels associate in pursuit of a prize, if either of them ceases from the pursuit, the association ceases at the same time.

(3) A little assistance, rendered by one vessel to another in the early part of a chase, gives no title to share in the prize.—THE RATTLESNAKE (1815), 2 Dods. 32; 165 E. R. 1406.

417. Abandonment due to captor's conduct—Failure to signal.]—THE WAAKSAMHEID, No. 413, *ante*.

418. — Captor flying enemy colours.]—Joint capture. Counter allegation that claimant had sheared off on a contrary route, under the particular circumstances of the case rejected.

[The captor] was in reality continuing the chase, & if there was any falling off, it was only during the time while the privateer was under French colours, which though not done with any view of deceit, might produce an alteration of purpose on the part of the tender, owing to the utter impossibility of accomplishing her design under such circumstances (SIR WILLIAM SCOTT).—LA VIRGINIE (1804), 5 Ch. Rob. 124; 165 E. R. 720.

*Annotations* :—*Mentd.* Aikman v. Aikman (1861), 4 L. T. 374; Udney v. Udney (1869), L. R. 1 Sc. & Div. 441; The Flamenco (Part Cargo Ex.), The Orduna (Part Cargo Ex) (1915), 32 T. L. R. 53; Tingley v. Müller, [1917] 2 Ch. 144.

#### SUB-SECT. 2.—PROOF OF JOINT CAPTURE.

419. Onus on claimant.]—THE VRYHEID, No. 352, *ante*.

420. —.]—THE ROBERT, No. 369, *ante*.

421. —.]—THE LORD MIDDLETON, No. 377, *ante*.

422. —.]—The general course, in cases of this kind, is that the parties setting up a claim of joint capture, are called upon to establish their interest, & to make out their case to the satisfaction of the ct. But it happens in this instance, that the *onus probandi* is shifted, because their is produced, an exhibit, containing as direct an acknowledgment of the fact, on the part of the captain of the privateer, as can be expressed in words. . . . The effect of such an instrument is, I think, conclusive, to put the other party in possession of every legal right, unless it can be set aside & discharged, by being shown to have been obtained under circumstances, that will render it invalid (SIR WILLIAM SCOTT).—THE SAN JOSE (1806), 6 Ch. Rob. 244; 165 E. R. 918.

423. —.]—Asserted joint capture on the part of an associated squadron. *Onus probandi* altogether rests with the party setting up the claim. In the absence of other evidence the ships logs introduced; referred to the Trinity Masters. To impeach their decision necessary to point out obvious neglect, since they must be considered the best judges of such evidence. The general presumption that the actual captor did his duty in making signals when they could be made with effect, etc. Necessary to remove it by positive evidence.—LE BON AVENTURE (1810), 1 Act. 211; 12 E. R. 81, P. C.

*Annotation* :—*Refd.* Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

424. —.]—The burden of proof lies upon the party setting up a claim of joint capture, & the testimony of releasing witnesses if unsupported by other evidence is insufficient to establish such a claim.—THE JOHN (1813), 1 Dods. 363; 2 Eng. Pr. Cas. 190; 165 E. R. 1343.

*Annotations* :—*Consd.* Re Mesopotamia Operations, 1917, The Sulman Pak, etc., [1922] P. 73; The U.B. 17 (1922), 38 T. L. R. 780. *Refd.* Banda & Kirwee Booty (1866), L. R. 1 A. & E. 109.

425. —.]—THE BRAZIL, No. 376, *ante*.

426. — Claimant in convoy fleet.]—THE WAAKSAMHEID, No. 413, *ante*.

427. Presumption in favour of immediate captor.]—THE ROBERT, No. 369, *ante*.

428. —.]—THE BRAZIL, No. 376, *ante*.

429. Evidence of claimant crew.]—THE ROBERT, No. 369, *ante*.

430. —.]—(1) There is a species of evidence to which the ct. is in the habit of paying great attention, the documentary evidence of the log book of the prize (SIR WILLIAM SCOTT).

(2) There is no instance in which a claim of joint capture has been established, on the evidence of the asserted joint-captor alone (SIR WILLIAM SCOTT).—LA FLORE (1804), 5 Ch. Rob. 268; 1 Eng. Pr. Cas. 474; 165 E. R. 772.

*Annotation* :—*Generally, Refd.* Brig (name unknown) (1864), Brown. & Lush. 370.

431. —.]—THE BRAZIL, No. 376, *ante*.

432. Evidence of crew of prize.]—THE ROBERT, No. 369, *ante*.

433. Effect of captor's admission.]—THE SAN JOSE, No. 422, *ante*.

434. Ship's log books—Log of prize.]—LA FLORE, No. 430, *ante*.

435. — Log of ship associated with claimant.]—LE NIEMEN, No. 382, *ante*.

436. — Log of claimant's tender.]—THE ZEPHERINA (1830), 2 Hag. Adm. 317; 166 E. R. 259.

*Annotation* :—*Refd.* R. v. Serva, etc. (1845), 1 Don. 104.

437. — Reference to Trinity Masters.]—LE BON AVENTURE, No. 423, *ante*.

438. Testimony of releasing witnesses.]—THE JOHN, No. 424, *ante*.

### SECT. 7.—GROUNDS FOR CAPTURE.

#### SUB-SECT. 1.—RUNNING BLOCKADE.

See Part VI., *post*.

#### SUB-SECT. 2.—CARRIAGE OF CONTRABAND.

See Part VII., *post*.

#### SUB-SECT. 3.—NEUTRAL SHIP CARRYING SERVANTS OF ENEMY STATE.

439. Vessels conveying persons in naval or military service.]—(1) If an individual is, from his military character, exposed to the operations of war, it is not for them to throw over him, from motives of compassion, as from any other inducement a colourable protection by artifices of this kind (SIR WILLIAM SCOTT).

(2) The simple carrying of dispatches, between the colonies & the mother country of the enemy is a service highly injurious to the other belligerent (SIR WILLIAM SCOTT).

### PART IV. SECT. 7, SUB-SECT. 3.

*o. Stowaway carried with connivance of captain.*—REDERIKAT. v. NEWCOMBE (N. S.) (1926), 51 D. L. R. 426.

**Sect. 7.—Grounds for capture: Sub-sects. 3 & 4, A. & B. (a), (b) & (c).]**

(3) This country . . . inflicting on the ship only a forfeiture of freight in ordinary cases of contraband. But the offence of carrying dispatches is . . . greater. . . There would be no freight dependent on it & therefore the same precise penalty cannot . . . be applied. It becomes absolutely necessary to resort to some other measure of confiscation, which can be no other than that of the vehicle (SIR WILLIAM SCOTT).—THE ATALANTA (1808), 6 Ch. Rob. 440; 1 Eng. Pr. Cas. 607; 165 E. R. 991.

**440. — Duress no excuse.]—**Ship lost in the possession of the captors, by accident & stress of weather, after capture, on the ship's egress from Alexandria, after having served as a transport in conveying the French forces to Egypt. Seizure justifiable. Captors not deemed responsible.

On his [the master's] arrival at Alexandria he applied for payment, & for his discharge, but was put off. . . It is now, however, said that this was an act under duress, & that it is a bygone transaction . . . a man cannot be permitted to aver, that he was an involuntary agent in such a transaction (SIR WILLIAM SCOTT).

She [The Carolina] was remaining under the power of the French military commander as much as ever. She had solicited leave to depart, but could not obtain it; & if the English fleet had not appeared, she might have been employed to carry on the dragoons to some other place, in the same manner as she had been employed before. I can by no means accede to the description given in argument, or consider her as having removed herself from all taint, arising out of the preceding contract (SIR WILLIAM SCOTT).

It is said the captors were in fault, for not proceeding immediately to adjudication. It must be conceded, I think, as a reasonable distinction, that commanders acting in the management of great expeditions, cannot be tied down exactly to the same rules, by which individual cruisers are directed to proceed (SIR WILLIAM SCOTT).—THE CAROLINA (1802), 4 Ch. Rob. 256; 1 Eng. Pr. Cas. 385; 165 E. R. 604.

**Annotations:—***Refd.* The Orozembo (1807), 6 Ch. Rob. 430; The Kim, The Björnstjerne Björnson, The Alfred Nobel, [1920] P. 319.

**441. — Duration of liability.—After termination of service.]—**THE CAROLINA, No. 440, *ante*.

**442. — Number immaterial.]—**Neutral ship, chartered to carry out officer in the military service of the enemy. Number immaterial, etc. Condemned.

A vessel hired by the enemy for the conveyance of military persons is to be considered as a transport subject to condemnation. . . The number of military persons that shall constitute such a case, it may be difficult to define . . . number alone is an insignificant circumstance in the considerations, on which the principle of law on this subject is built . . . it appears to me, on principle, to be but reasonable that, whenever, it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel, that may be let out for a purpose so intimately connected with the hostile operations (SIR WILLIAM SCOTT).

It has been argued, that the master was ignorant of the character of the service on which he was engaged, & that in order to support the penalty it would be necessary that there should be some proof of delinquency in him, or his owner. But I conceive, that is not necessary; it will be suffi-

cient if there is any injury arising to the belligerent from the employment in which the vessel is found. . . In cases of *bonâ fide* ignorance, there may be no actual delinquency, but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation (SIR WILLIAM SCOTT).—THE OROZEMBO (1807), 6 Ch. Rob. 430; 1 Eng. Pr. Cas. 599; 165 E. R. 988.

**Annotation:—***Consd.* The Kim, The Björnstjerne Björnson, The Alfred Nobel, [1920] P. 319.

**443. — Condemnation as enemy transport.]—**Transport vessels are vessels hired by the govt. to do such acts as shall be imposed upon them, in the military service of the country (SIR WILLIAM SCOTT).

This is a case of a vessel letting herself out in a distinct manner, under a contract with the enemy's govt., to convey a number of persons described as being in the service of the enemy, with their military character travelling with them, & to restore them to their own country in that character. I do . . . pronounce this to be a case of a ship engaged in a course of trade, which cannot be considered to be permitted to neutral vessels, & without hesitation pronounce this vessel subject to condemnation (SIR WILLIAM SCOTT).—THE FRIENDSHIP (1807), 6 Ch. Rob. 420; 1 Eng. Pr. Cas. 599; 165 E. R. 985.

**Annotation:—***Refd.* The Kim, The Björnstjerne Björnson, The Alfred Nobel, [1920] P. 319.

**444. — —.]—**THE OROZEMBO, No. 442, *ante*.

**445. — Ignorance no excuse.]—**THE HOPE (1808), 6 Ch. Rob. 463, n.; 165 E. R. 1000.

**446. — —.]—**THE OROZEMBO, No. 442, *ante*.

**447. — Necessity for proof of delinquency—Sufficiency of injury to belligerent.]—**THE OROZEMBO, No. 442, *ante*.

**448. — Carrying despatches of own government no protection.]—**A neutral merchant vessel asserted to be carrying despatches for the govt. of its own country, cannot set up that employment as a ground of protection for a voyage otherwise illegal; & even when such a claim shall be given on the part of the govt., it may become a serious question, how far a neutral state possesses the right of imparting such a protection.

This ship was taken on a voyage from New York to Bourdeaux, with several passengers on board, some of whom are described by the master as French refugees from the island of St. Domingo. On what ground he describes them to be refugees does not at all appear. . . Some of them it is true are women & children, but the others may be persons of the most obnoxious character; they may form a part of the military establishment of the enemy or be employed upon other services most injurious to the interests of this country (SIR WILLIAM SCOTT).—THE DRUMMOND (1811), 1 Dods. 103; 165 E. R. 1248.

**449. Persons in civil service—Sent by enemy at public expense.]—**THE OROZEMBO, No. 442, *ante*.

**450. Stowaway carried with connivance of captain—No evidence as to destination—Or carriage at enemy expense.]—**A Swedish ship on a voyage from Buenos Ayres to a Danish port, took on board at Pernambuco with the connivance of the captain a German stowaway who was a qualified third officer in the German mercantile marine. He was discovered at Halifax, Nova Scotia, after the captain had made some attempt to conceal his presence on board. There was no evidence that the stowaway was carried at the expense of the

German Govt., or that he intended to go to Germany. The captain had on board a small parcel of contraband goods which he was carrying as a venture of his own. The Prize Ct. at Halifax condemned the vessel.—*Held*: without defining the circumstances in which a neutral ship may be condemned for the performance of an unneutral service in the carriage of an enemy passenger, no unneutral service was performed & the ship was improperly condemned.—*THE SVITHIOD*, [1920] A. C. 718; 89 L. J. P. C. 193; 123 L. T. 148; 15 Asp. M. L. C. 9, P. C.

#### SUB-SECT. 4.—NEUTRAL SHIP CARRYING DESPATCHES OF ENEMY STATE.

##### A. In General.

**451. Liability to condemnation.]**—*THE CONSTITUTION* (1802), cited in 6 Ch. Rob. at p. 455; 165 E. R. 997, H. L.

*Annotation*:—*Apld.* *THE ATALANTA* (1808), 6 Ch. Rob. 440.

**452. —.]**—*THE ATALANTA*, No. 439, *ante*.

##### B. What Despatches justify Capture.

###### (a) In General.

**453. Despatches of enemy agent—Neutral port to enemy port—Ignorance of master of ship.]**—Despatches from an agent of the enemy on board a neutral ship going from a neutral port to a port of the enemy;—plea of ignorance on the part of the neutral master admitted.—*THE RAPID* (1810), Edw. 228; 2 Eng. Pr. Cas. 45; 165 E. R. 1091.

*Annotation*:—*Consd.* *The Aline & Fanny* (1856), Spinks, 322.

**454. Despatches to enemy consul—Enemy port to neutral port.]**—Despatches on board a neutral ship going from a hostile port to a consul of the enemy, resident in a neutral country, not a ground of condemnation.—*THE MADISON* (1810), Edw. 224; 2 Eng. Pr. Cas. 42; 165 E. R. 1090.

###### (b) Official Communications on Affairs of State.

**455. Ground of condemnation.]**—*THE CONSTANTIA* (1808), 6 Ch. Rob. 461, n.; 165 E. R. 999.

**456. Despatches between mother country & colonies.]**—(1) Despatches on board a neutral ship, but going from the ambassador of the enemy's state, resident in the neutral state.

The carrying of despatches of the enemy from the colonies to the mother country is a criminal interposition in the war that will lead to condemnation (*SIR WILLIAM SCOTT*).

(2) [Despatches] are all official communications of official persons, on the public affairs of the govt. The comparative importance of the particular papers is immaterial . . . & is sufficient, that they relate to the public business of the enemy, be it great or small. It is the right of the belligerent to intercept & cut off all communication between the enemy & his settlements, & to the utmost of his power, to harass & disturb this connection, which it is one of the declared objects of the ambition of the enemy to preserve . . . the true criterion will be, is it on the public business of the state, & passing between public persons for the public service. . . . If the papers so taken relate to public concerns, be they great or small, civil or military, the ct. will not split hairs, & consider their relative importance (*SIR WILLIAM SCOTT*).—*THE CAROLINE* (1808), 6 Ch. Rob. 461; 1 Eng. Pr. Cas. 615; 165 E. R. 999.

**457. —.]**—*THE ATALANTA*, No. 439, *ante*.

**458. Despatches of ambassador accredited to neutral country.]**—*THE CAROLINE*, No. 456, *ante*.

**459. Proof of delinquency—Receipt apparently given by master.]**—*THE HOPE* (1803), cited in 6 Ch. Rob. at p. 450; 165 E. R. 997, P. C.

*Annotation*:—*Consd.* *The Atalanta* (1808), 6 Ch. Rob. 449.

**460. Comparative importance immaterial.]**—*THE CAROLINE*, No. 456, *ante*.

**461. —.]**—*THE SUSAN* (1808), 6 Ch. Rob. 461, n.; 165 E. R. 999.

**462. Effect of ignorance of master.]**—*THE SUSAN* (1808), 6 Ch. Rob. 461, n.; 165 E. R. 999.

**463. —.]**—*THE HOPE* (1808), 6 Ch. Rob. 463, n.; 165 E. R. 1000.

##### (c) Postal Correspondence and Packets.

**464. Postal correspondence.]**—Art. 1 of the Hague Conventions, 1907, No. XI., while exempting postal correspondence from capture, does not apply to parcel post.—*THE SIMLA* (1915), 50 Sol. Jo. 546; 1 P. Cas. 281.

**465. —.]**—Bearer bonds & coupons shipped by letter mail in Dutch steamships for carriage from Dutch ports to New York were seized in the course of the voyage, & their detention claimed under the Reprisals Order in Council of Mar. 11, 1915. The securities in some cases had been brought in Germany for American buyers, & had been received, & were being forwarded to them, by the buyer's Dutch agents; in some other cases they had been bought in Germany by Dutch dealers for prompt resale, or for delivery under sales already made, in the United States:—*Held*: (1) the securities were not "postal correspondence" so as to be exempt from seizure under Hague Convention No. 11; (2) they were "goods" within the Order in Council; (3) although the securities in the cases above stated were not to be deemed "enemy property" for the purpose of the Reprisals Order, they were goods of "enemy origin" within its meaning, & consequently liable to detention; (4) there was nothing to prevent the proper officer of the Crown applying forthwith for the release of the securities in question to resps.—*THE NOORDAM* (No. 2), [1920] A. C. 904; 89 L. J. P. 234; 123 L. T. 477; 36 T. L. R. 581; 15 Asp. M. L. C. 27; 3 P. Cas. 599, P. C.

*Annotation*:—*Generally*, *Mentd.* *R. v. Dickinson*, [1920] 3 K. B. 552.

**466. Parcel post.]**—*THE SIMLA*, No. 461, *ante*.

**467. Contraband goods sent by post.]**—Contraband goods sent by post are not protected by Art. 1 of the 11th Hague Convention, & when seized as prize are liable to condemnation.—*THE TUBANTIA*, *THE GELRIA* & *THE HOLLANDIA* (1916), 32 T. L. R. 529.

**468. Goods of enemy origin.]**—Goods of Austrian origin which were also Austrian property, found among the letter mail discharged from four neutral steamships under the provisions of the Reprisals Order in Council of Mar. 11, 1915, were seized in June, 1916, but were not brought before the Prize Ct. to be dealt with until July 25, 1917:—*Held*: para. 2 of the Order in Council dated Jan. 10, 1917, is valid as a new Reprisals Order, & these goods, being in the custody of the Prize Ct. or the possession of the Crown at the date of the passing of the Order, must be dealt with upon the same footing as goods which originally came under the Order in Council of Mar. 11, 1915.—*THE CHUMPON*, *THE DELFLAND*, *THE ZUIDERDIJK*, *THE OSCAR II.* (1917), 2 P. Cas. 542; 6 Lloyd, Pr. Cas. 420.

**469. — Enemy securities.]**—German Govt. bonds, which had been sent from a German banking co. in Berlin to a firm in Copenhagen to be





necessity must be urgent & evident (*per* CUR.).—THE ST. JUAN BAPTISTA & LA PURISSIMA CONCEPTION (1803), 5 Ch. Rob. 33; 1 Eng. Pr. Cas. 417; 165 E. R. 687.

480. — To be acquainted with nature of duties.]—THE ST. JUAN BAPTISTA & LA PURISSIMA CONCEPTION, No. 479, *ante*.

481. — Obligation to insure prize.]—THE SÜDMARK (No. 2), No. 483, *post*.

482. — —.]—THE NEW SWEDEN, No. 603, *post*.

483. — Towards owners of property seized—Governed by international not municipal law.]—(1) Seizure as prize are made by executive officers of the Crown; their duties towards the owners of the property seized fall to be determined by international law, not by the municipal law which governs their duties towards the Crown. There is no accepted rule of international law as to the officer in whose custody prizes should be placed when brought into a convenient port.

Naval Prize Act, 1864 (c. 25), s. 16, provides that "every ship taken as prize, & brought into port within the jurisdiction of a prize ct. shall forthwith & without bulk broken, be delivered up to the marshal of the ct.; if there is no such marshal . . . to the principal officer of customs of the port."

A German ship carrying copra, which belonged to British subjects & had been shipped before the war, was captured in the Red Sea, & on Aug. 20, 1914, was taken into Alexandria. At the time Egypt was in British occupation, but no prize ct. had been there established; the nearest place at which a prize ct. was then sitting was Gibraltar. There being at Alexandria no marshal nor any British customs officer, the captor delivered the ship & cargo to a detaining officer who had been appointed by the British military authorities to take custody of prizes. That officer, in consequence of representations by the master of the ship that the copra was liable to deteriorate & other circumstances, without proceedings in prize having been instituted, caused the copra to be unloaded & placed in a warehouse, where it was partially destroyed by fire without negligence. The copra, so far as it was undestroyed, was released to the owners, & they subsequently claimed & were decreed damages against the captor & the detaining officer:—*Held*: neither the captor nor the detaining officer was liable, because (a) as to the captor, Alexandria was a convenient port, & the captor was justified in delivering the ship & cargo to the detaining officer, who did not receive it as the captor's agent; (b) under the circumstances a prize ct. if applied to would have ordered the copra to be unloaded, & consequently the damage was not the result of not making an application; & further, the damages were too remote, there being no contract of bailment.

(2) There is no obligation on the part of the Crown or its executive officers, or the Prize Ct. marshal, to effect insurances against fire for the benefit of cargo owners (LORD PARKER).—THE SÜDMARK (No. 2), [1918] A. C. 475; 87 L. J. P. C. 88; 118 L. T. 383; 34 T. L. R. 289; 62 Sol. Jo. 363; 14 Asp. M. L. C. 201, P. C.

*Annotations*:—As to (2) *Conrad*, The Cairnmore, The Gunda, [1921] 1 A. C. 439. *Refd.* The New Sweden, [1922] 1 A. C. 229.

— To use due diligence.]—*See* Nos. 564, 580, *post*.

484. Liabilities—Action for false imprisonment—Ship acquitted.]—*LÆ CAUX v. EDEN*, No. 1001, *post*.

485. — Embezzlement of goods.]—THE

CONCORDIA (1799), 2 Ch. Rob. 102; 165 E. R. 253.

486. — To whom attaching—Actual wrongdoer.]—(1) The actual wrongdoer is the only person responsible in the Ct. of Admty. for injuries of seizure; a suit was dismissed against the admiral of the station being not privy to the fact.

I do not say that the Statute of Limitations extends to prize causes. . . . I must notice . . . an entire novelty in a prize cause, viz. that it is a proceeding for calling to adjudication, not the immediate alleged wrongdoer, but a person who was neither present at nor cognisant of the transaction, & who is to be affected in responsibility merely on this ground, that the person alleged to have done the injury was acting under his general authority. . . .

The actual wrongdoer is the man to answer in judgment; to him responsibility is attached in this ct. He may have other persons responsible over to him, & that responsibility may be enforced. . . . If a captain made a wrong seizure, under the express orders of an admiral, that admiral may be made answerable in the damages occasioned to the captain by that improper act. But it is the constant practice of this ct. to have the actual wrongdoer held the party before the ct., & every man must see the propriety of that practice; because if the ct. was once to open the door to complaints founded on a remote & consequential responsibility, there would be no end. If a monition is to go against the admiral, for not issuing his revocatory orders, a monition, in like manner, might go against the Lords of the Admty., for a similar neglect; or against the Secretary of State, for not issuing similar directions to the Lords of the Admty.; & these persons might be made parties in a prize cause, & called upon to proceed to adjudication. . . .

(2) If an act of mischief was done by the King's officers, through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility. If by arts., a place or district was put under the King's peace, & an act of hostility was afterwards committed therein, the injured party might have a right to resort to a ct. of prize, to show that he had been injured by this breach of the peace, & was entitled to compensation; & if the officer acted through ignorance, his own govt. must protect him. It is the duty of govts., if they put a certain district within the King's peace, to take care that due notice shall be given to those persons by whose conduct that peace is to be maintained; & if no such notice has been given, nor due diligence used to give it, & a breach of the peace is committed through the ignorance of those persons, they are to be borne harmless, at the expense of that govt. whose duty it was to have given that notice (SIR WILLIAM SCOTT).—THE MENTOR (1799), 1 Ch. Rob. 179; 1 Eng. Pr. Cas. 96; 165 E. R. 141.

*Annotations*:—As to (1) *Apld.* The Athol (1842), 1 Wm. Rob. 374. As to (2) *Conrad*, Schacht v. Otter, The Ostsee (1855), 9 Moo. P. C. C. 150. *Refd.* The Oscar II., [1919] P. 171. *Generally*, *Refd.* The Harmony (1815), Coop. G. 325; La Madonna della Lettera (1829), 2 Hag. Adm. 289; The Katherina (1860), 30 L. J. P. M. & A. 21; The Wilhelmina, [1923] P. 112.

487. — Sale of cargo—Liability to extent of proceeds.]—Proceeds of sale less than amount of original value. Compensation not allowed, in case of justified seizure; & conduct not impeached.

The ct. is very desirous that full justice should be done to claimants, but the cargo is not equal to it. . . . The seizure . . . is justified by the

*Sect. 1.—In general. Sect. 2: Sub-sects. 1 & 2. Sect. 3: Sub-sect. 1.]*

order for further proof. . . . [The cargo] was carried to Leghorn, where there is a standing commission of the Admty. Ct. . . . There is no suggestion that the sale was made for any sinister purposes, or in any manner injurious to the property. . . . I cannot think that the captors are answerable for more than the proceeds, it not being shown that they have conducted themselves otherwise than with fair intentions (*per CUR.*).—*THE TWO SUBANNAHS* (1799), 2 Ch. Rob. 132; 1 Eng. Pr. Cas. 208; 165 E. R. 264.

488. — *Acts done in ignorance.*—*THE MENTOR*, No. 486, *ante*.

489. — *Sailing or firing under false colours.*—*THE PEACOCK*, No. 526, *post*.

490. — *Putting captured crew in irons.*—*THE ST. JUAN BAPTISTA & LA PURISSIMA CONCEPCION*, No. 479, *ante*.

491. — *Meddling with cargo—Without authority of court.*—*THE WASHINGTON*, No. 529, *post*.

492. — *Proceeds deposited for safe custody—Subsequent difficulty in recovery.*—*SUNDRY BOATS (OR TRABACOLAS) CAPTURED IN THE ADRIATIC* (1824), 1 Hag. Adm. 294; 166 E. R. 104.

493. — *Liabilities of commissioned & non-commissioned captors distinguished.*—*THE ELIZE (OTHERWISE THE ELISE WILHELMINE)*, No. 999, *post*.

494. — *Goods captured & proceedings discontinued—Liability for detention—Seizure not unjustifiable.*—*THE FALK, ETC.*, No. 1249, *post*.

## SECT. 2.—RIGHT TO VISIT AND SEARCH.

### SUB-SECT. 1.—IN GENERAL.

495. *Right incontestible—To lawfully commissioned cruisers of belligerent nation.*—(1) A vessel sailing under convoy of an armed ship for the purpose of resisting visitation & search condemned.

(2) In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me; namely, to consider myself as stationed here not to deliver occasional & shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral & some to be belligerent. . . . It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain, which he would not allow to Sweden in the same circumstances & to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character (*SIR WILLIAM SCOTT*).

(3) The right of visiting & searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, & the destinations, what they may, because till the ships are visited & searched, it does not appear what the ships, or the cargoes, or the destinations are; & it is for the purpose of ascertaining these points that the

necessity of this right of visitation & search exists. . . . A lawful force cannot lawfully be resisted (*SIR WILLIAM SCOTT*).

(4) The authority of the sovereign of the neutral country being interposed in any manner of mere force cannot legally vary the rights of a lawfully commissioned belligerent cruiser (*SIR WILLIAM SCOTT*).

(5) The only remaining question which I have to consider is, the matter of expenses; & this I think myself bound to dispose of with as much tenderness as I can use in favour of individuals. . . . The captors have been extremely tardy in proceeding to adjudication. Attending to all these considerations, I think claimants are clearly entitled to have their expenses charged upon the value of the property up to the time of the order for further proof. From that time the property might have been withdrawn upon bail, & it is no answer to the ct. to say that this gentleman or another gentleman did not think it advisable to commit their private fortunes in the extent of the security required (*SIR WILLIAM SCOTT*).—*THE MARIA* (1799), 1 Ch. Rob. 340; 1 Eng. Pr. Cas. 152; 165 E. R. 199.

*Annotations:—As to (2) Consd. The Zamora* (1916), 85 L. J. P. 89. *As to (3) Refd. Robinson Gold Mining Co. v. Alliance Inco.*, [1901] 2 K. B. 919. *Generally, Mentd. R. v. Keyn* (1876), 13 Cox, C. C. 403.

496. *Purpose of right.*—*THE MARIA*, No. 495, *ante*.

497. *When right exists—Not in time of peace.*—

(1) For if no right to visit & search, then no ulterior right of seizing & bringing in, & proceeding to adjudication; & it is in the course of those proceedings above, that the facts are produced that she is a French ship trading in slaves; & if these facts are made known to the seizer by his own unwarranted acts, he cannot avail himself of discoveries thus unlawfully produced, nor take advantages of the consequences of his own wrong (*SIR WILLIAM SCOTT*).

(2) Upon the question whether the right of search exists in time of peace . . . two principles of public law are generally recognised as fundamental. One is the perfect equality & entire independence of all distinct states. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour; & any advantage seized upon that ground is mere usurpation. . . . The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. . . . I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals (*SIR WILLIAM SCOTT*).—*LE LOUIS* (1817), 2 Dods. 210; 165 E. R. 1484.

*Annotations:—Generally, Refd. The St. Juan Nepomuceno* (1824), 1 Hag. Adm. 265. *Mentd. R. v. Serva, etc.* (1845), 1 Den. 104; *Buron v. Denman* (1848), 2 Exch. 187; *Santos v. Illidge* (1859), 5 Jur. N. S. 1358; *R. v. Keyn* (1876), 2 Ex. D. 63.

498. *Where capture unlawful—Captor cannot avail himself of discoveries.*—*LE LOUIS*, No. 497, *ante*.

499. *Right to bring into port for search—Suspicion slight.*—Two neutral ships bound from a French colonial port to Rotterdam with cargoes of ground nuts, & each having a document called an "*acquit à caution*," showing that the shipment was by the permission of the French authorities, were stopped by a British cruiser & ordered into Kirkwall. That order was given not on

## PART V. SECT. 2, SUB-SECT. 1.

*p. Right to secure cargo—Ship sent to port for analysis of cargo.*—*THE MONTANA* (1919), 3 P. Cas. 340.

account of any suspicion with regard to the cargoes, but because neither ship had the document, known as a green clearance, given to ships which started from a British port on a voyage to a port affording access to enemy territory, or which when on such a voyage wherever commenced had called at a British port for the examination of her cargo in order to comply with the Order in Council of Feb. 16, 1917, the second Reprisals Order. While the ships were proceeding to Kirkwall, which involved passing through an area more dangerous from German submarines than the course which it was intended to take, they were attacked by a German submarine; one ship was sunk & the other damaged. The owners of the ships & cargoes brought actions in the Prize Ct. against the Procurator-General to recover damages:—*Held*: the Order in Council did not apply to a ship which started from a British or Allied port, & the owners were entitled to recover damages although the order to proceed to Kirkwall was given under an honest mistake as to the effect of the Order in Council.—*THE BERNISSE, THE ELVE*, [1921] 1 A. C. 458; 90 L. J. P. 118; 124 L. T. 554; 37 T. L. R. 193; 3 P. Cas. 771; 9 Lloyd, Pr. Cas. 243; 15 Asp. M. L. C. 167, P. C.

*Annotations*:—*Consd.* Netherlands American Steam Navigation Co. v. H.M. Procurator General, [1926] 1 K. B. 84. *Mentd.* Comitato Portuario d'Importazione dei Carboni Fossili di Genova v. Instone, [1922] W. N. 260.

#### SUB-SECT. 2.—RESISTANCE TO VISITATION AND SEARCH.

**500. Liability to condemnation.]—THE MARIA**, No. 495, *ante*.

**501. —.**—Resistance to the exercise of the right of visitation & search. An armed American vessel having carried on the forced trade on the Spanish main, & while under a British flag, seized some vessels for the purpose of ransoming part of the crew which had been detained on shore, etc., on arriving off Macao attempts to resist a British cruiser in the exercise of the right of visitation & search, captured after a desperate resistance. Condemnation.—*THE TOPAZ* (1811), 2 Act. 20; 12 E. R. 164.

**502. — Vessel ignorant of war.]—THE ST. JUAN BAPTISTA & LA PURISSIMA CONCEPTION**, No. 479, *ante*.

**503. — Resistance of convoying ship.]—**(1) Resistance to search is penal, & the penalty is confiscation: that resistance, being directed to be given by the sovereign of the state, affords no protection: the resistance of the convoying ship is the resistance of the whole convoy (*SIR WILLIAM SCOTT*).

(2) If the intention is voluntarily & clearly abandoned, an intention so abandoned, or even a slight hesitation about it, does not constitute a violation of right (*SIR WILLIAM SCOTT*).—*THE ELSABE* (1803), 4 Ch. Rob. 409; 1 Eng. Pr. Cas. 167; 105 E. R. 657.

*Annotation*:—*As to* (1) *Consd.* The Derfflinger, The Förde, The Leda, *Re* American Meat Packers' Agreement, *Re* Certain Swedish Copper, [1919] P. 264.

**504. — Resistance by enemy master—Cargo property of neutral merchant.]—THE CATHARINA ELIZABETH**, No. 628, *post*.

**505. Neutral country cannot resist right of search.]—THE MARIA**, No. 495, *ante*.

**506. What amounts to resistance—Not mere**

**attempt to escape.]—THE ST. JUAN BAPTISTA & LA PURISSIMA CONCEPTION**, No. 479, *ante*.

**507. — Effect of abandonment of intention.]—THE ELSABE**, No. 503, *ante*.

#### SECT. 3.—DUTY TO PROCEED TO ADJUDICATION.

##### SUB-SECT. 1.—IN GENERAL.

**508. Duty to proceed.]—**Whoever seizes & detains a ship belonging to the subjects of a neutral power, does it at his peril; & unless he proceeds in the regular stated form to the condemnation of ship & cargo, & prevails in it, or gives legal & sufficient reasons to justify his conduct, he must, as matter of course, pay the costs, damages, & demurrage.—*FALLIEFF v. ELPHINSTONE* (1784), 5 Bro. Parl. Cas. 343; 2 E. R. 719.

**509. —.**—Motion in the Instance Ct. to arrest a ship taken at Curaçoa, never brought to adjudication, rejected.

This motion is unnecessary. If a return was to be made by govt. in whose hands it appears the ship is, that they held it as agent for the captor; the proceedings must then take the common form of a proceeding in prize. . . . If the ship was in the hands of a foreigner, or in danger of being sent away, the ct. would be called upon to exert its utmost diligence; as the matter now stands, there is no necessity for this motion (*per CUR.*).—*THE GEORGE* (1801), 3 Ch. Rob. 212; 165 E. R. 440.

**510. —.**—*THE MADONNA DEL BURSO*, No. 8, *ante*.

**511. — Vessel brought to port.]—**The vessel was not brought into port. The obligation on the captors to institute proceedings may be held not to attach quite so strongly as when a ship is brought into port, when the captor has taken complete possession, & is bound by the express directions of the Prize Act to proceed to adjudication. Whilst the ship is at sea, he may deliberate, & after mature investigation discharge himself of the custody. He may remain liable for misconduct in having detained at sea, but the obligation to proceed, in the direct question of Prize, is not so imperative upon him, as in a case where the vessel is actually brought in. If any inconvenience is to be apprehended from delay, that will be sufficiently counteracted by the opportunity which the other party has of instituting proceedings, & of calling upon the captor to compensate for the detention, under another form than that of a Prize Proceeding (*SIR WILLIAM SCOTT*).—*THE SUSANNA* (1805), 6 Ch. Rob. 48; 165 E. R. 846.

*Annotations*:—*Consd.* The Katharina (Cargo Ex) (1860 Lush. 142. *Refd.* The Wilhelmina, [1923] P. 112.

**512. Vessel not brought to port.]—THE SUSANNA**, No. 511, *ante*.

**513. Liability for breach of duty—Liability for costs & damages.]—FALLIEFF v. ELPHINSTONE**, No. 508, *ante*.

**514. —.**—*THE CORIER MARITIMO*, No. 1145, *post*.

**515. —.**—*THE MARIA*, No. 495, *ante*.

**516. —.**—*THE ST. JUAN BAPTISTA & LA PURISSIMA CONCEPTION*, No. 479, *ante*.

**517. — If natural consequence of failure.]—THE SÜDMARK** (No. 2), No. 483, *ante*.

**518. — Right of claimant to compel captor to proceed.]—THE HULDAH**, No. 1252, *post*.

#### PART V. SECT. 2, SUB-SECT. 2.

*q. What amounts to resistance—Ship turned against boarding boat.]—THE FRIENDS' ADVENTURE* (1806), Stewart, 97.  
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*Sect. 3.—Duty to proceed to adjudication: Sub-sects. 1 & 2, A. & B.]*

519. — Effect of lapse of time.]—THE SUSANNA, No. 511, *ante*.

520. Captor applying to wrong tribunal—Claimant may proceed before proper tribunal.]—THE HULDAH, No. 1252, *post*.

521. Degree of despatch required—Commanders of expeditions & individual cruisers distinguished.]—THE CAROLINA, No. 440, *ante*.

522. Ship not brought into port—Captor may divest himself of custody—Liability for detention at sea.]—THE SUSANNA, No. 511, *ante*.

523. — No prize crew put on board—Inability of captor so to do—Duty to record time & place of capture.]—THE BERLIN, No. 334, *ante*.

524. Examination of principal officers.]—CREMIDI v. POWELL, THE GERASIMO, No. 71, *ante*.

525. Deposit of documents found on board.]—CREMIDI v. POWELL, THE GERASIMO, No. 71, *ante*.

#### SUB-SECT. 2.—DESPATCH OF VESSEL TO CONVENIENT PORT.

##### A. In General.

526. Duty to send to convenient port—Latitude allowed in performance of duty—Privateer & war-ship distinguished.]—(1) The capture was made in latitude 42, considerably to the north of Lisbon, the wind being then fair for England. It was their duty to have brought the prize directly to England; for if the public instructions give to captors the power of coming to the most convenient ports, they do not give them a mild & arbitrary discretion, but a discretion to be soundly exercised, on a due consideration of their own convenience, & of the interest of the neutral persons that may be concerned. . . . I feel it impossible not to pronounce, that the privateer has acted improperly, in carrying the vessel into Lisbon, & keeping her there so long. I do not say that the original seizure was wrongful, or that the privateer would not have acted with perfect correctness, if she had brought the ship to England, & instituted proceedings here. The captors not having done that, but having carried her to Lisbon, & detained her there unnecessarily for such a length of time, I am of opinion, that they are liable to costs & damages; deducting the expenses, which would have been incurred, by proceeding here, & also so much time as would have been necessary for that purpose (SIR WILLIAM SCOTT).

(2) It is the duty of privateers to bring their prizes home to a port of this kingdom as soon as they can. King's ships may reasonably be allowed a greater latitude, as being frequently attached to stations which they cannot leave (SIR WILLIAM SCOTT).

(3) To sail & chase under false colours may be an allowable stratagem of war, but firing under false colours is what the maritime law of this country does not permit; for . . . it may occasion the loss of the lives of persons who, if they were apprised of the real character of the cruiser, might, instead of resisting, implore protection (SIR WILLIAM SCOTT).—THE PEACOCK (1802), 4 Ch. Rob. 185; 105 E. R. 579.

527. — Limitation to convenient port.]—This ship was seized on a voyage from Amsterdam to Archangel, under a suspicion of Dutch property. She was going in ballast to bring a cargo to Amsterdam, & appears to have been very much in the habit of Dutch trade, particularly during

the war. On these & other grounds, it could not be fairly denied that there were circumstances to justify the seizure; but the second act of sending the vessel to such a place as Shetland is not so defensible. The Prize Act undoubtedly gives the captor some latitude on this subject; he is directed generally "to send his prize to some convenient port." Shetland cannot be considered in any manner as such a port. It is a place where the captor cannot get advice; much less can the claimant learn in what manner to proceed, or where to resort for justice. The captor is certainly not justified under the Prize Act to select any port that he pleases. It must be a convenient port, & in that consideration the convenience of claimant, in proceeding to adjudication, is among one of the first things to which the attention of the captor ought to be addressed (SIR WILLIAM SCOTT).

To release a vessel . . . without her consent, after she was once brought in, would be contrary to the directions of the Prize Act. . . . I shall allow one month's demurrage, & the expenses of the present hearing (SIR WILLIAM SCOTT).—THE WILHELMSBERG (1804), 5 Ch. Rob. 143; 105 E. R. 727.

528. — As soon as possible.]—CREMIDI v. POWELL, THE GERASIMO, No. 71, *ante*.

529. Liability for breach of duty—Costs & damages.]—This is a question of damage sustained by a vessel coming from Monte Video to London, with a large cargo, documented generally as belonging to persons in America, but of which a considerable part has been claimed for merchants in London. The vessel had sailed from the colony of the enemy after hostilities. Considering the general circumstances of the case, & that the property did not clearly appear . . . the captors were justified in the act of seizure, & it was not an unreasonable curiosity, on their part, to bring the question of property to judicial investigation, & to take the benefit of any question of law that might arise out of the facts. . . . The first duty of captors . . . is to bring their prize "to some convenient port." Convenient is a large & general term, leaving a certain latitude of discretion, but a discretion to be cautiously exercised . . . Conveniences are of different kinds. . . . Among the most important must be considered that of bringing a vessel to a port where she may lie in safety, since that cannot unquestionably be deemed a convenient port, which does not afford security & protection to the property that is brought in. An open road, for instance, where the ship may be occasionally exposed to the weather, cannot be a place of security. It is therefore quite impossible that it should be considered as a convenient port for the preservation of property. Another material ingredient of convenience is that the port shall be of sufficient capacity to admit vessels to enter without unloading their cargoes, since it is the intention of the legislature that bulk shall not be broken. If there is not depth of water to allow vessels to lie without taking out the cargo, *non erit his locus*; since captors are not to meddle with the cargo in any manner, without the authority of the Ct., which cannot be exercised until the vessel has been brought into port. It is also highly desirable that the port should be a place which holds ready communication with the tribunals which have to decide on questions arising out of the capture; that the parties may have access to advice, & may be enabled to obtain the necessary information; & that the directions of the Ct. of Admlty. be carried into effect with despatch. On

the other hand, there may be conveniences of a subordinate nature, in favour of the captor . . . for instance, that owners of privateers may elect their own port, is but a reasonable advantage in itself, when kept within proper limits. . . . The privilege of electing their own ports is a convenience which may be allowed *cæteris paribus* (SIR WILLIAM SCOTT).—THE WASHINGTON (1806), 6 Ch. Rob. 275 ; 165 E. R. 930.

*Annotation* :—*Refd.* The Ostsee (1855), 2 Ecc. & Ad. 170.

**530.** ———.]—Captors' expenses allowed, deducting charges incurred by the ship in consequence of their misconduct.

I shall disallow the expense of the unlivery of the cargo, which became necessary entirely from their own [the captors] misconduct, in carrying this vessel to a place where she could hardly fail to receive some damage (SIR WILLIAM SCOTT).—THE PRINCEPE (1809), 1 Edw. 70 ; 165 E. R. 1036.

**531.** ———.]—Deducting expenses of proceeding to proper port.]—THE PEACOCK, No. 526, *ante*.

**532.** ———.]—Effect of offer to release.]—THE WILHELMSBERG, No. 527, *ante*.

**533.** ———.]—Loss of freight.]—THE CATHARINA ELIZABETH, No. 539, *post*.

**534.** Procedure on arrival at port.—Proper officer to have custody of ship & cargo.]—THE SÜDMARK (No. 2), No. 483, *ante*.

#### *B. What Constitutes Convenient Port.*

**535. Port of captors — Privateer.]**—(1) The question is, whether military salvage is due, as for a rescue from the enemy. No case has been cited, & I know of none, in which military salvage has been given, where the property rescued was not in the possession of the enemy, or so nearly as to be certainly & inevitably under his grasp. . . . But in this case there was no enemy to encounter. The danger to the parties was contingent only, & though probable to occur had not actually occurred (SIR WILLIAM SCOTT).

(2) If a capture is made with an intention of prize, & the ship turns out to belong to a friend, there is no reason why the original but mistaken intention of the captor should defeat any salvage interest, that might arise from other circumstances in the case (SIR WILLIAM SCOTT).

(3) The next question is, whether the claim is defeated by bringing the vessel so much out of her way. . . . The ct. cannot forget, that at the time of the capture, the ship was actually going into a Spanish port, without any apparent excuse for so doing, & without sufficient documents of property on board. The captors had a right to bring her in as a prize. In this point of view, the bringing into Jersey, the port of the privateer, & as such, the most convenient port to the captors, was not improper. If this does not defeat the right, the ct. has only to consider what is the nature of the service performed. It is that of sending on board a number of men, & bringing the vessel & cargo safe into port. This . . . is no more than an act of humanity, so are all services of salvage acts of humanity ; but still they are such as the policy of the law considers as entitled to reward (SIR WILLIAM SCOTT).—THE FRANKLIN (1801), 4 Ch. Rob. 147 ; 1 Eng. Par. Cas. 365 ; 165 E. R. 566.

*Annotation* :—*Refd.* The Svanfos, The Borgila, [1919] P. 189.

**536. Port where captor & claimant can obtain advice.]**—THE WILHELMSBERG, No. 527, *ante*.

**537. Importance of convenience to claimant.]**—THE WILHELMSBERG, No. 527, *ante*.

**538. Not remote port.]**—THE ANNA, No. 285, *ante*.

**539.** ———.]—Carrying to a remote port for adjudication in most cases unjustifiable. Costs & damages decreed against the captor for misconduct. Freight pronounced to be due in consequence of the interruption of a voyage by the capture & subsequent condemnation of the vessel in a remote port. Specie restored, "being to the consignment of several British merchants," though from an enemy's port.—THE CATHARINA ELIZABETH (1810), 1 Act. 309 ; 12 E. R. 120.

**540. Port where vessel may be in safety.—Not open road.]**—THE WASHINGTON, No. 529, *ante*.

**541. Port of sufficient capacity to admit vessel.—Without unloading cargo.]**—THE WASHINGTON, No. 529, *ante*.

**542.** ———.]—THE SÜDMARK (No. 2), No. 483, *ante*.

**543. Port in easy communication with prize court.]**—THE WASHINGTON, No. 529, *ante*.

**544.** ———.]—Port where prize court sitting.]—THE SÜDMARK (No. 2), No. 483, *ante*.

**545. Discretion of captor to decide.—Must be soundly exercised.]**—THE PEACOCK, No. 526, *ante*.

**546.** ———.]—THE WASHINGTON, No. 529, *ante*.

**547.** ———.]—Claim admitted on behalf of the Danish Govt. for Algerine property taken under the Danish flag, the Dey having exacted payment from the Danish consul.

It is . . . the duty of captors, in all cases, to carry their prizes to places where they can be put into a course of legal inquiry ; but in captures made on the property of Oriental subjects, a more than ordinary caution, & regularity of proceeding, should be observed, because it is very much the practice of those countries, under a law of nations now peculiar to themselves, to resort immediately to a very summary justice, & to redress themselves for what they consider as an unjust capture, by demanding compensation from the countrymen of the aggressors.

The cargo consisted of corn, sugar, & cotton, laden at Algiers on board a Danish ship, & destined ostensibly to Leghorn, but . . . really to Marseilles. Immediately on hearing of the capture, the Dey of Algiers sent for the Danish consul, & with an emphasis which the Danish consul did not think it prudent to resist, demanded of him to refund the value of the cargo taken on board the Danish ship ; alleging that the Danish flag ought to have protected the cargo, & that if it did not, the Danish Govt. & its public agents, were answerable ; the Danish agent paid the money under this demand, & on a representation of all the circumstances to the Danish Govt., they reimbursed him ; & the application now made is, that the Danish Govt. may be permitted to claim in the place of the original proprietors. . . . If subjects of a neutral country submit to any flagrant act of violence, as for instance, if the Dey of Algiers should step forward to claim a cargo, evidently French, & they submit to refund the value of the property, I should certainly not permit their acquiescence to defeat the right which a British captor had gained in such a cargo. But in a doubtful case, the ct. would incline to support an act done for the prevention of mischief, & although the transaction might not be strictly correct, if it appeared to have a solid foundation of justice at the bottom, the ct. would be strongly inclined to uphold it in its full extent (SIR WILLIAM SCOTT).—THE KINDERS KINDER (1799), 2 Ch. Rob. 88 ; 165 E. R. 248.

*Annotations* :—*Distd.* The Fortune (1800), 2 Ch. Rob. 92. *Refd.* The Hurlidge Hane (1801), 3 Ch. Rob. 324.

## SECT. 4.—RESTITUTION.

## SUB-SECT. 1.—IN GENERAL.

**548. Probable attendant consequences of restitution.]—**SCHACHT v. OTTER, THE OSTSEE, No. 586, *post*.

**549. Whether bar to second seizure—Liability of second captor for costs & damages.]—**THE MERCURIUS, No. 733, *post*.

**550. ———.]—**(1) A ship under American colours, laden with West India produce taken in at St. Bartholomew & Philadelphia, and coming to Rotterdam. She was first seized by a privateer & released, & was afterwards taken by the present captors. Certainly to seize a vessel which has already been released, & is sailing with a copy of her restitution on board, is a measure to be practised with great circumspection (SIR WILLIAM SCOTT).

(2) Unless I could go to the length of holding, that persons detected in the meditation of fraud, not for this voyage, but for some future transaction, are totally incapacitated from obtaining any credit, with regard to the present transaction, & that such a discovery is sufficient to blow up every case in which they are concerned, there is no ground on which I could pronounce a sentence of condemnation. I do not conceive that to be a wholesome rule, on which this ct. can venture to proceed. That the parties have discredited themselves, with respect to some future transaction, is not sufficient (SIR WILLIAM SCOTT).—THE ELIZA & KATY (1805), 6 Ch. Rob. 185; 165 E. R. 895.

**551. Simple restitution decreed—Where loss owing to conduct of persons captured or agents.]—**THE PROVIDENTIA (1799), 1 Ch. Rob. 142; 165 E. R. 268.

**552. — No fault in captor or captured.]—**SCHACHT v. OTTER, THE OSTSEE, No. 586, *post*.

**553. — Both captor & captured at fault.]—**SCHACHT v. OTTER, THE OSTSEE, No. 586, *post*.

**554. Restitution accepted without reservation—Bar to subsequent claim for damages.]—**If there had been any intention to prosecute a demand for damages arising from the seizure, the offer should have been accepted *sub modo*; instead of that, the restitution was accepted in the manner in which it was proposed, & as such, must be understood to include an act of amnesty on both sides. It is not for the parties, then, to come again before the ct., after all the papers have been withdrawn, & charge the captors with an unjustifiable seizure, when they have, in consequence of the restitution, lost the opportunity of defending themselves (SIR WILLIAM SCOTT).—THE MARIA POWLONA (1806), 6 Ch. Rob. 236; 165 E. R. 914.

**555. Restitution only in character in which claim made—Onus of proof on claimant.]—**THE SOGLASIE, No. 150, *ante*.

**Remedy for violation of neutrality.]—**See Nos. 309–312, *ante*.

## SUB-SECT. 2.—PAYMENT OF COSTS TO CAPTORS.

**556. Capture occasioned by conduct of captured ship.]—**THE HENDRIC & ALIDA (1777), Marr. 96; 165 E. R. 22.

**557. — Circumstances amounting to misconduct.]—**THE ELIZA & KATY, No. 550, *ante*.

**558. ———.]—**SCHACHT v. OTTER, THE OSTSEE, No. 586, *post*.

**559. — Circumstances creating suspicion—Ship leaving blockaded port.]—**THE OTTO & OLAF, No. 713, *post*.

**560. ———.]—**A neutral vessel, which, by means of false papers or other deceitful practice intended to defeat the rights of belligerents, has been used by her owner to carry contraband goods to the enemy, & which has delivered such goods on an outward voyage, remains confiscable if seized upon the return voyage. What would constitute the return voyage will depend upon all the circumstances of the particular case. If, however, the intention & voyage are definitely abandoned before seizure the offence is dissipated & purged & the vessel is no longer liable to confiscation.

The *Alwina*, a Dutch steamship, sailed from Newport, Mon., with a cargo of Welsh steam coal, ostensibly consigned to consignees in the River Plate, but really intended for the use of German warships in the South Atlantic. She called at Teneriffe for bunkers, & there, after a stay of several weeks, her cargo of coal was sold to a firm of British merchants. On her return voyage she had to put into Falmouth for repairs & she was there seized:—*Held*: (1) as the intention to convey contraband to the enemy had been abandoned before consummation, the vessel was immune from confiscation & must be restored to her owner; (2) by reason of his conduct the owner must pay the costs & expenses of & incident to the capture & detention of the vessel & of & incident to the prize proceedings.—THE ALWINA, [1916] P. 131; 85 L. J. P. 199; 114 L. T. 707; 32 T. L. R. 494; 60 Sol. Jo. 540; 13 Asp. M. L. C. 311; *affd.*, [1918] A. C. 444, P. C.

*Annotations:—As to (1) Reidd. The Edna*, [1921] 1 A. C. 735. *As to (2) Reidd. The Leonora*, [1918] P. 182.

**561. Capture occasioned by nature of cargo—Making examination necessary.]—**Torse is so like hemp that, if it is permitted to be carried without examination, the enemy would be very well supplied with hemp. It is necessary that such cargoes should be brought in for examination (*per* CUR.).—THE JONGE HERMANUS (1801), 4 Ch. Rob. 95, n.; 165 E. R. 548.

**562. Capture under Reprisals Order—Claimants with knowledge of order.]—**A quantity of goods were seized under the Reprisals Order in Council of Mar. 11, 1915, from the parcels mail of a neutral vessel bound from Copenhagen to New York, & decrees were made that the goods were of enemy origin & were enemy property & they, or their proceeds if sold, were ordered to be detained until the conclusion of peace or further order.

Various claimants, American citizens, who had submitted to these orders either without entering appearances or without objection at the hearing, claimed that, peace having been concluded, they were entitled to the release of the goods or their proceeds; & they filed evidence to show that according to the law applicable to mercantile transactions in time of peace, though not under the rules of international law applicable to the passing of property in goods forwarded by sea in time of war, the goods at the time of seizure were the property of respective claimants. The A.-G. thereupon waived the rights of the Crown in respect of the declarations of enemy ownership

## PART V. SECT. 4, SUB-SECT. 2.

*r. Captors justified in bringing in vessel for examination.]—*Captors entitled to costs where they were held justified in bringing in the vessel for

examination.—THE STOCKHOLM (1812), Stewart, 379.

*t. Inquiry into validity of claim.]—*The Admiralty is entitled to require that a claimant to cargo on an enemy

ship, seized in time of war, shall pay the costs incurred by the Admiralty in satisfying itself of the validity of the claim, before releasing the cargo.—WOODHEAD PLANT & Co., LTD. v. THE ADMIRALTY, [1914] W. L. R. 724.



& consented to orders for release, but claimed that any order for release should be conditional upon payment by claimants of the expenses of detention & the premiums paid for the insurance of the goods:—*Held*: (1) the seizures & detention being consequent upon shipments presumably made with knowledge of the Order in Council & of the measures directed to be taken thereunder, the releases ought to be subject to the terms that the expenses properly & necessarily incurred in the discharge, detention, & sale of the goods should be borne by claimants; (2) the marshal being charged with the safe keeping of the goods for the sole purpose of eventual restitution, insurance was a necessary precaution in the interests of the owners of the goods, & not in the interests of the Crown as in the case of goods seized & claimed to be subject to condemnation as prize, & accordingly the cost of the insurance must likewise be borne by claimants.—*THE UNITED STATES*, [1920] P. 430; 3 P. Cas. 750; 90 L. J. P. 73; 125 L. T. 446; 36 T. L. R. 832; 15 Asp. M. L. C. 314.

*Annotation*:—*As to* (2) *Consd.* *The New Sweden*, [1922] 1 A. C. 229.

**563. What costs or expenses allowed—Whether expenses of insurance.**—*THE REAL DUGUE* (1797), cited in 2 Hag. Adm. at p. 162, n.; 166 E. R. 204, P. C.

*Annotation*:—*Refd.* *The Malta* (1828), 2 Hag. Adm. 162, n.

**564.** ———.]—(1) Captors are generally bound for two things: for safe & fair custody, & if the property is lost or destroyed for want of that safe & fair custody, they are responsible for the loss. For these two things every captor is answerable; but if an accident, or mere casualty happens, against which no fair exertions of human diligence could protect, it must fall on the party to whom the property is ultimately adjudged. If to secure himself against the negligence of his own agents, or to secure his own responsibility, the captor chooses to make insurance, the practice of the registrar & merchants has been not to allow it in their report. . . . Claimant is not bound to look further, nor to contribute to the expense which the captor, for his own security, may choose to incur. . . . (2) Whatever means the captors may take to relieve themselves from their personal responsibility, it is a matter, which is foreign to the claimant. Where the ct. orders a removal, & a fresh risk is incurred, for which the ct. directs an insurance, it may be subject to a different consideration. . . . Where claimant himself has actually insured, the demand is utterly unsustainable. In such a case, to lay upon him the additional expenses which the captor incurred for his own security, would be highly injurious (*Sut WILLIAM SCOTT*).—*THE CATHERINE & ANNA* (1801), 4 Ch. Rob. 39; 1 Eng. Pr. Cas. 336; 165 E. R. 528.

*Annotations*:—*As to* (1) *Consd.* *The Cairnsmore, The Gunda*, [1921] 1 A. C. 439. *As to* (2) *Refd.* *The United States*, [1920] P. 430.

**565.** ———.]—Ship & cargo sent on to England by order of Vice-Admty. Ct. for sale pursuant to 41 Geo. 3, c. 96, s. 9. Expense attending the providing securities to be allowed a charge upon the property. Insurance upon the same & upon freight allowed. Commission on effecting insurance; on purchase of exchequer bills.—*THE JAMES & WILLIAM* (1810), 1 Act. 337; 12 E. R. 132.

**566.** ———.]—*THE UNITED STATES*, No. 562, *ante*.

**567.** ———.]—Claimants to goods seized as prize but released under an order of the Prize Ct. are not chargeable, as part of the expenses of detention, with the cost of an insurance on the goods effected by the marshal, unless they have during the currency of the risk assented to the marshal insuring on their behalf.—*THE CAIRNSMORE, THE GUNDA*, [1921] 1 A. C. 439; 124 L. T. 553; 15 Asp. M. L. C. 162; *sub nom.* *PROCURATOR-GENERAL v. BALLINS SONNER & CO.*, *THE CAIRNSMORE, THE GUNDA*, 90 L. J. P. 123, P. C.

*Annotations*:—*Refd.* *The Oregon, The Cairnsmore & The Gunda*, [1921] P. 224; *The New Sweden*, [1922] 1 A. C. 229.

**568.** ——— **Expenses of providing securities.**—*THE JAMES & WILLIAM*, No. 565, *ante*.

**569.** ——— **Expenses of marshal.**—A ship & cargo taken as prize having been condemned by the Admty. Ct. was sold under a decree of that ct. pursuant to Prize Act, 1854 (c. 18), s. 20. The decree was reversed by the appellate ct. & simple restitution decreed:—*Held*: as the captors were *bonâ fide* in possession during litigation they were entitled to the rights, allowances & incidents attaching to such possession & claimants were only upon simple restitution entitled to the nett proceeds of sale, after deducting from the gross charges the marshal's charges consisting of (a) expenses of sale, (b) reasonable expenses for the care & custody of the property pending adjudication, & (c) pilotage, lights & other dues incurred in bringing the ship to England.—*THE FRANCISKA* (1856), 10 Moo. P. C. C. 73; 14 E. R. 417, P. C.

*Annotations*:—*Apld.* *The Dusseldorf*, [1920] A. C. 1034. *Refd.* *The Cairnsmore, The Gunda*, [1921] 1 A. C. 439.

#### SUB-SECT. 3.—PAYMENT OF COSTS AND DAMAGES BY CAPTORS.

##### A. In General.

**570. Seizure justifiable—Compensation for loss on sale.**—*THE PROVIDENTIA* (1800), 2 Ch. Rob. 149, n.; 165 E. R. 270.

**571. Liability for wrongful capture.**—*THE JUFFROW MARIA SCHROEDER*, No. 772, *post*.

**572.** ——— **Vexatious conduct by captors unnecessary.**—*SCHACHT v. OTTER, THE OSTSEE*, No. 586, *post*.

**573.** ——— **Nature of liability—Compensation to injured party—Not punishment of captor.**—*SCHACHT v. OTTER, THE OSTSEE*, No. 586, *post*.

**574.** ——— **Effect of honest mistake—Occasioned by act of government.**—*SCHACHT v. OTTER, THE OSTSEE*, No. 586, *post*.

**575.** ——— **Wrong construction of reprisal order.**—*THE SIGURD*, No. 245, *ante*.

**576.** ———.]—*THE BERNISSE, THE ELVE*, No. 499, *ante*.

— **After restitution.**—*See* Nos. 549, 550, *ante*.

**Where claim for violation of neutrality.**—*See* Nos. 313, 314, *ante*.

##### B. No Probable Cause for Suspicion.

###### (a) General Rule.

**577. Liability for costs & damages.**—*FALLIEFF v. ELPHINSTONE*, No. 508, *ante*.

**578.** ———.]—This ship was coming on a voyage from St. Thomas to Altona, fully documented for such a voyage; the bill of lading did not express account & risk, but the other papers did; the

#### PART V. SECT. 4, SUB-SECT. 3.—A.

a. *Cargo belonging to enemy—Without knowledge of captain—Ship & freight restored.*—*THE VENUS* (1806), Stewart, 96.



*Sect. 4.—Restitution: Sub-sect. 3, B. (a) & (b); sub-sect. 4, A. & B.]*

depositions of the master, & of the mate, expressed the fullest belief of property. But the captors have picked up a Jew passenger, on whose evidence alone it is attempted to discredit this claim. These depositions seem, on the face of them, to have been strangely taken; without them, the case would have been perfectly clear. It being a case of a voyage from St. Thomas to Altona, both neutral ports, without any doubt on the destination, & without any sufficient ground of seizure, claimants are entitled to costs & damages (SIR WILLIAM SCOTT).—THE TRITON (1801), 4 Ch. Rob. 79; 165 E. R. 542.

*Annotation:—*Reid. Schacht v. Otter, The Ostsee (1855), 9 Moo. P. C. C. 150.

579. —.].—THE ANNA, No. 285, *ante*.

580. —.].—Damage against the captor owing to a defect of due diligence in not having taken a pilot on board. Restitution in value.

The ct. has decreed the restitution of the ship, & parts of a valuable cargo. The captors have pleaded in discharge of that decree, "that the vessel was lost at sea without any fault or misconduct on their part." It lies on them to establish that fact, & if it is not proved, the responsibility will fall upon the owners, though they were not present, or personally concerned in the transaction. You will have to judge on the facts submitted to you, whether there was any misconduct or not. From your local knowledge of the island, & of the navigation of that part, you will be enabled to form a more correct judgment, whether the prize master was guilty of any neglect of duty, fairly chargeable upon him, in omitting to take a pilot, & more especially, whether he was justified in not acceding to the request made by the master of the vessel, that he would take a pilot? Should you be of opinion that he was justified in not taking a pilot, you will then consider whether, in proceeding in the course described, up to that particular point, he made proper allowance, as a pilot or person prudently conducting the navigation of the vessel, so as to avoid, on one side, the sunken rock, which he was bound to know, & the other side, to guard against the danger of being carried out by the current, which he seems to have apprehended (SIR WILLIAM SCOTT).—THE WILLIAM (1806), 6 Ch. Rob. 316; 165 E. R. 945.

*Annotations:—*Apld. The Oscar II., The Bernisse, The Elve, [1921] P. 173. *Consd.* The Canadia (1922), 127 L. T. 499. *Reid.* Schacht v. Otter, The Ostsee (1855), 9 Moo. P. C. C. 150; The Santa Catharina (1919), 88 L. J. P. 170; The Bernisse & The Elve, [1920] P. 1; The Cairnmore, The Gunda, [1921] 1 A. C. 439.

581. —.].—Costs & damages seem incident to a sentence of restitution, where there has been no probable ground of seizure.—THE BAROSSA (1822), 1 Hag. Adm. 75, n.; 166 E. R. 27, P. C.

582. —.].—THE ELIZE (OTHERWISE THE ELISE WILHELMINE), No. 999, *post*.

583. —.].—A captor having seized a vessel & sent her home for adjudication on mere suspicion of her intention to break the blockade of Riga, when the ship's papers clearly indicated Stockholm as her destination, condemned in costs & damages.

When the ship papers & depositions clearly point to a legal destination, the ct. will not, from the locality of the capture, infer an illegal one, without the assistance of Trinity Masters. If no probable cause for capture appear on the depositions or ship papers, claimants are entitled to

restitution with costs & damages. The ct. must learn the place of capture from the papers & depositions, but, except in a very glaring case indeed, would hesitate to infer from that place an intended breach of blockade without the aid of Trinity Masters.—THE FORTUNA (1855), Spinks, 307; 2 Jur. N. S. 71; 4 W. R. 166; 164 E. R. 453.

584. —.].—SCHACHT v. OTTER, THE OSTSEE, No. 586, *post*.

585. —.].—THE BARON STJERNBLAD, No. 828, *post*.

(b) *What Amounts to Probable Cause.*

586. *Circumstances of each case considered—No general definition.*—A neutral ship was captured in the Gulf of Finland by one of Her Majesty's ships of war, for breach of the blockade of Cronstadt, when no such blockade existed, & sent to England for adjudication as a prize:—*Held*: the owners of such ship & cargo were entitled to restitution, with costs & damages, as the seizure was made without probable or reasonable cause.

(1) Restitution of a ship seized as a prize may be attended, according to the circumstances of the case, with any one of the following consequences: (a) Claimants may be ordered to pay to the captors their costs & expenses. (b) The restitution may be simple restitution, without costs, or expenses, or damages, to either party, or (c) the captors may be ordered to pay costs & damages to claimant.

(2) Costs & damages, when decreed against the captors, are not inflicted as a punishment on the captors, but as affording compensation to the injured party.

(3) In order to exempt captors from costs & damages in case of restitution, there must be some circumstances connected with the ship or cargo affording reasonable ground for belief that the ship or cargo might prove a lawful prize.

(4) What amounts to such a probable cause as to justify a capture incapable of definition, & is to be regulated by the peculiar circumstances of each case.

(5) It is not necessary to prove vexatious conduct on the part of the captors to subject them to condemnation in costs & damages.

(6) Neither will honest mistake, though occasioned by an act of govt., relieve the captors from liability to compensate a neutral for damage which the captors by their conduct have caused the neutral to sustain.

(7) In order to justify a condemnation for breach of blockade, three things must be proved: the existence of an actual blockade; the knowledge of the party; some act of violation either by going in or coming out with a cargo laden after the commencement of the blockade.

(8) A ship may, by her own misconduct, have occasioned her capture, & in such a case it is very reasonable that she should indemnify the captors against the expenses which her conduct has occasioned (*per* CUR.).

(9) She may be involved, with little or no fault on her part, in such suspicion as to make the right, or even the duty, of a belligerent to seize her. There may be no fault either in the captor or the captured or both may be in fault, & in such cases there may be *damnum absque injuria*, & no ground for anything but simple restitution (*per* CUR.).—SCHACHT v. OTTER, THE OSTSEE (1855), 9 Moo. P. C. C. 150; 2 Ecc. & Ad. 170; Spinks,

PART V. SECT. 4, SUB-SECT. 3.—B. (b).

b. *Ship carrying false papers.*—THE FAME (1807), Stewart, 112.

174; 2 Eng. Pr. Cas. 432; 25 L. T. O. S. 45; 14 E. R. 255, P. C.; *revsg.* (1854), 18 Jur. 1006.

**Annotations:—***As to (2) Consd.* The Dusseldorf, [1920] 1 A. C. 1034. *As to (3) Apld.* *It. v. Hilderbrandt*, The Allie & Fanny (1856), 10 Moo. P. C. C. 491; The Bernisse, The Elve, [1921] 1 A. C. 458. *Consd.* The Edna, [1921] 1 A. C. 735; The Falk, [1921] 1 A. C. 787; The Oregon, The Cairnsmore & The Gunda, [1921] P. 224. *Refd.* The Baron Stjernblad, [1918] A. C. 173. *As to (6) Apld.* The Fortuna (1855), Spinks, 307. *Consd.* The Bernisse, The Elve, [1921] 1 A. C. 458. *Refd.* The Elize (otherwise The Elise Wilhelmno) (1854), 2 Ecc. & Ad. 31; The Ionian Ships (1855), 2 Ecc. & Ad. 212; The Sigurd, [1917] P. 250; The Canada (1922), 127 L. T. 499.

**587. Vessel sailing from enemy port—To enemy port.]—**THE SPECULATION, No. 338, *ante*.

**588. — After hostilities—Property not clearly appearing.]—**THE WASHINGTON, No. 529, *ante*.

**589. Vessel entering enemy port —Without sufficient excuse.]—**THE FRANKLIN, No. 535, *ante*.

**590. Absence of ship's papers.]—**THE FRANKLIN, No. 535, *ante*.

**591. — In absence of credible explanation.]—**THE ANNA, No. 285, *ante*.

**592. — Sea pass.]—**A neutral vessel sailing the seas in time of war should be provided with an instrument called a sea pass or something tantamount thereto. . . . The absence of a sea pass is a suspicious circumstance for that is one of the documents which the ct. always requires to be produced. . . . This is a document of first rate importance, for this is the document which entitles him to sail under the flag & pass of the nation to which he belongs (DR. LUSHINGTON).—THE CAROLINE (1855), Spinks, 252; 2 Eng. Pr. Cas. 501; 164 E. R. 433.

**593. Vessel carrying war material—To naval arsenal of enemy.]—**THE ZACHEMAN, No. 805, *post*.

**594. Vessel habitually in enemy trade—Going in ballast.]—**THE WILHELMSBERG, No. 527, *ante*.

**595. Vessel leaving blockaded port.]—**THE OTTO & OLAF, No. 713, *post*.

**596. —.]—**THE MECKLENBURGH (1855), 3 L. T. 515.

**597. Reasonable doubt as to neutrality of vessel.]—**THE LEUCADE, No. 1349, *post*.

**598. —.]—**THE EDNA, No. 1558,

(2) If the captor has used due diligence, he is exonerated; it is necessary to show negligence on his part, in order to fix a responsibility upon him (SIR WILLIAM SCOTT).—THE MARIA, THE VROW JOHANNA (1803), 4 Ch. Rob. 348; 165 E. R. 636.

**Annotations:—***As to (2) Consd.* The Santa Catharina (1919), 88 L. J. P. 170. *Generally, Refd.* The Valeria, [1920] P. 81.

**603. — Loss from unreasonable action.]—**The well-settled rule of prize that captors are not liable for damage to goods seized unless it results from their unreasonable action, negligence, or wilful wrongdoing, & are not under an obligation to insure, applies to goods the discharge of which at a British port has been required under the Order in Council of Mar. 11, 1915. If goods so discharged have not been placed in the custody of the marshal at once, there being reasonable grounds for the delay, & in the interval are damaged by fire without negligence, the owners are not entitled to recover for the loss so caused, although the goods would have been covered against fire by a floating policy had they been in the custody of the marshal when the fire occurred.—THE NEW SWEDEN, [1922] 1 A. C. 229; 91 L. J. P. 53; 126 L. T. 455; 38 T. L. R. 164; 15 Asp. M. L. C. 439, P. C.

**604. — Loss from wilful wrongdoing.]—**THE NEW SWEDEN, No. 603, *ante*.

#### B. Negligence.

**605. Captor not liable for damages—In absence of negligence.]—**THE CATHERINE & ANNA, No. 564, *ante*.

**606. —.]—**THE MARIA, THE VROW JOHANNA, No. 602, *ante*.

**607. —.]—**THE WILLIAM, No. 580, *ante*.

**608. —.]—**Captors having a *bonâ fide* possession, & using due care, are not responsible for losses occasioned by mere misfortune.—THE JOHN (1818), 2 Dods. 336; 2 Eng. Pr. Cas. 232; 165 E. R. 1505.

**Annotations:—***Consd.* The Valeria, [1921] 1 A. C. 477. *Refd.* Schacht v. Otter, The Ostsee (1855), 9 Moo. P. C. C. 150; The Franciska (1856), 10 Moo. P. C. C. 74.

**609. —.]—**The captors of a prize are liable for any deficiency of due diligence in the care of the captured ship & cargo.

In a case in which a ship laden with coal captured in a hot climate, & there was no prize ct. near at hand to which she could be taken immediately, & the exigencies of war made it impossible to spare a prize crew to put on board her, & she was left unattended, without even a watchman on board, for a time during which the coal caught fire by spontaneous combustion, & the ship & cargo were totally destroyed:—*Held*: as it did not appear that there was any reason to expect imminent danger to the cargo, or that a single watchman, if on board, could have stopped the fire, there was no evidence of negligence on the part of the captors.—THE SANTA CATHARINA (1919), 88 L. J. P. 170; 3 P. Cas. 367; 8 Lloyd, Pr. Cas. 35, P. C.

**610. —.]—**THE NEW SWEDEN, No. 603, *ante*.

**611. — Loss of freight secured on cargo.]—**(1) The captor took *cum onere*. If the loss had happened by accident only in bringing in, the captor, having made a justifiable seizure, would not have been liable to any restitution, either for the freight, or for the ship; but this loss has not arisen from any casual misfortune (WILLIAM SCOTT).

(2) The freight is as much a part of the loss as the ship, for he was bound to answer equally

#### SUB-SECT. 4.—RESTITUTION IMPOSSIBLE—DAMAGES.

##### A. In General.

**599. Liability of captor for loss of vessel or cargo—Capture unjustifiable.]—**THE CHRISTOPHILUS (1761), Burrell, 222; 167 E. R. 546.

**600. —.]—**THE WILLIAM, No. 580, *ante*.

**601. —.]—**Costs & damages on loss of a ship captured on unjustifiable grounds. Navigation Act not considered to extend to Gibraltar.—THE NEMESIS (1808), 1 Edw. 50; 165 E. R. 1029.

**Annotation:—***Refd.* Schacht v. Otter, The Ostsee (1855), 9 Moo. P. C. C. 150.

**602. — While under custody of law.]—**(1) When the goods were brought in, they were placed under the custody of the law. It became necessary to take them out of the ship, & the captor obtained a commission of unlivery from the ct.; they were put into warehouses, & nothing has been advanced to show that these warehouses were not proper places, & sufficiently secure. The question comes forward therefore on the general principle, & on this point, I am disposed to think that the captor is not responsible for a loss happening to goods whilst they were under the custody of the law (SIR WILLIAM SCOTT).

**Sect. 4.—Restitution: Sub-sect. 4, B. & C. Sect. 5. Part VI. Sect. 1.]**

for both. The captor has, by taking possession of the whole cargo, deprived claimant of the fund to which his security was fixed. He was bound to bring in that cargo subject to the demand for freight. He was just as answerable for the freight of the voyage, as for the ship which was to earn it, or which was rather to be considered as having already earned it (SIR WILLIAM SCOTT).—DER MOHR (1802), 4 Ch. Rob. 314; 1 Eng. Pr. Cas. 395; 165 E. R. 624.

*Annotations:—As to (1) Consd. The Valeria, [1920] P. 81; The Canada (1922), 127 L. T. 499. Refd. The Oscar II., The Bernisse, The Elve, [1921] P. 173.*

**612. ——— Compensation by government—Accident under management of public officer.]**—No blame attached to the captors in this case, but since it had happened to a neutral vessel, brought in by force, that an unsuitable place for quarantine had been assigned, & that the vessel had received considerable injury from that circumstance, it seemed but proper that the matter should be represented to govt. as a damage fit to be redressed from that quarter; since it had happened under the management of the public officers of the port, though without any misconduct imputable to them (*per cur.*).—THE FREYA (1803), 5 Ch. Rob. 75; 165 E. R. 703.

**613. Degree of care necessary.]**—THE CATHERINE & ANNA, No. 564, *ante*.

**614. ———.]**—THE WILLIAM, No. 580, *ante*.

**615. What amounts to negligence—Refusal to take pilot on board.]**—Owners are further answerable for the proper conduct of the persons to whose care they entrust the conduct of their privateer (SIR WILLIAM SCOTT).—DIE FIRE DAMER (1805), 5 Ch. Rob. 357; 165 E. R. 804.

**616. ———.]**—THE WILLIAM, No. 580, *ante*.

**617. ——— Want of skill in steering.]**—THE WILLIAM, No. 580, *ante*.

**618. Exemption from liability—Employment of pilot.]**—As to the question of legal responsibility, it appears that there was a regular pilot on board, to whom the care of the navigation of the vessel was necessarily confided. If persons under him do their duty, & it is not shown that the cause of damage arises from want of obedience in them, or from any cause assignable to the want of that control which the captor is bound to exercise over the crew, I am of opinion that the captor is exonerated (*per cur.*).—THE PORTSMOUTH (1807), 6 Ch. Rob. 317, n.; 165 E. R. 946.

**619. Liability of Procurator-General—Negligence of captor.]**—Resp.'s goods on board the neutral ship *O.* were lost through a collision with His Majesty's ship *P.*, while the *P.* was effecting the capture of the *O.* The collision was solely caused by the negligence of the *P.* Proceedings in prize were instituted by the Procurator-General against some of the parcels of goods laden in the *O.*, & they were condemned, but there were no proceedings against the ship nor against resp.'s goods, which it was admitted were not liable to condemnation. In an action brought by resp. by writ in the Prize Ct. against the Procurator-General, the President ordered the restoration of resp.'s goods & that their value be ascertained by the registrar & merchants:—*Held*: as the effect of the Prize Ct. Rules, 1914, whereby the Procurator-General was substituted for the actual captors, he was liable to resp.; & the rules were not *ultra vires* so far as they imposed that liability.

**PART V. SECT. 4, SUB-SECT. 4.—C.**  
*c. Loss of vessel through shipwreck*  
*—No misconduct on part of captors*

*proved—Claim disallowed.]*—Claim for damages, upon loss of vessel by shipwreck after capture, rejected, there

—THE OSCAR II., [1920] A. C. 748; 89 L. J. P. 221; 123 L. T. 474; 36 T. L. R. 583; 15 Asp. M. L. C. 14; 3 P. Cas. 588; Lloyd, Pr. Cas. 267. P. C.

*Annotation:—Refd. The Wilhelmina, [1923] P. 112.*

**C. Destruction of Prize.**

**620. Measure of compensation—Materiality of motive for destruction.]**—The natural rule is, that if a party be unjustly deprived of his property he ought to be put as nearly as possible in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution, with costs & damages. That is the general rule upon the subject, but like all other general rules it must be subject to modification. If, for instance, any circumstances appear which show that the suffering party has himself furnished occasion for the capture, if he has by his own conduct in some degree contributed to the loss, then he is entitled to a somewhat less degree of compensation, to what is technically called simple restitution. . . . Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise (SIR WILLIAM SCOTT).—THE ACTEON (1815), 2 Dods. 48; 2 Eng. Pr. Cas. 209; 165 E. R. 1411.

*Annotations:—Fold. The Rufus (1815), 2 Dods. 55. Consd. The Elize (otherwise The Elise Wilhelmine) (1854), 2 Ecc. & Ad. 31; The Leucade (1855), 2 Ecc. & Ad. 228; The Ostsee (1855), 2 Ecc. & Ad. 170; The Bernisse, The Elve, [1921] 1 A. C. 458. Refd. The Rannveig, [1920] P. 177.*

**621. S. P. THE RUFUS (1815), 2 Dods. 55; 165 E. R. 1414.**

*Annotation:—Refd. The Ostsee (1855), 2 Ecc. & Ad. 170.*

**622. Ship sailing under licence—Existence of licence not disclosed.]**—If a captor destroys a ship for which a British licence has been granted, he or his govt. is responsible for the loss occasioned by such destruction; but if the existence of the licence was not disclosed to him by those whose duty it was to inform him, & he had no sufficient means to inform himself, he is exempt from responsibility.—THE FELICITY (1819), 2 Dods. 381; 2 Eng. Pr. Cas. 233; 165 E. R. 1520.

*Annotation:—Refd. The Mario Glaeser, [1914] P. 218.*

**SECT. 5.—RESCUE.**

**623. Subsequent recapture—Rights of original captors.]**—THE LUCRETIA (1778), Marr. 228; 165 E. R. 52.

**624. ———.]**—THE POLLY (1780), 4 Ch. Rob. 217, n.; 165 E. R. 590.

*Annotation:—Fold. The Felicidade (1848), 3 Wm. Rob. 45.*

**625. ———.]**—THE MARGUERITE (1781), 4 Ch. Rob. 217, n.; 165 E. R. 590.

*Annotation:—Fold. The Felicidade (1848), 2 Wm. Rob. 45.*

**626. ———.]**—The principles of recapture in prize cases apply to vessels recapturing ships engaged in the slave trade; therefore where a ship was first taken by one of Her Majesty's vessels, & afterwards rescued by her own crew & the prize crew destroyed & subsequently recaptured by another of Her Majesty's vessels:—*Held*: the latter only was entitled to the bounties on tonnage granted under 1 & 2 Vict. c. 47, s. 3.—THE FELICIDADE (1848), 3 Wm. Rob. 45; 12 Jur. 441; 166 E. R. 880.

**627. Liability to condemnation—Rescue by master & crew.]**—Rescue of a neutral ship by her

being no misconduct on the part of the captors.—THE ROSCIO (1813), Stewart, 556.

crew, from the hands of a lawful cruiser, cause of condemnation.

If neutral crews may be allowed to resort to violence to withdraw themselves out of the possession taken by a lawful cruiser, for the purpose of a legal inquiry, & may, as it has been termed, hustle them out of the command of the vessel, the whole business of the detention of neutral ships will become a scene of mutual hostility & contention; the crews of neutral ships must be guarded with all the severity & strictness practised upon actual prisoners of war, for the same measures of precaution & distrust will become equally necessary; the intercourse of nations neutral & friendly towards each other will be embittered by acts of hostility mutually committed by their subjects. . . . It is the duty of the cruiser to treat the crew of an apparently neutral ship which he takes possession of for further inquiry into the real character of herself & her cargo with all reasonable indulgence; & it is the duty of neutrals under that possession to take care that they do not put themselves in the condition of enemies, by resorting to such conduct as can be justified only by the character of enemies (SIR WILLIAM SCOTT).—THE DISPATCH (1801), 3 Ch. Rob. 279; 165 E. R. 463.

**628. ——— Enemy master.]**—Resistance by an enemy-master will not affect the cargo, being the property of a neutral merchant.

If a neutral master attempts a rescue he violates a duty which is imposed upon him by the law of nations, to submit to come in for inquiry, as to the property of the ship or cargo; & if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner & extends also to the confiscation of the whole cargo entrusted to his care, & thus fraudulently attempted to be withdrawn from the rights of war. With an enemy master, the case is very different; for no duty is violated by such an act on his part (SIR WILLIAM SCOTT).—THE CATHARINA ELIZABETH (1804), 5 Ch. Rob. 232; 165 E. R. 759.

**629. ——— Neutral master.]**—THE CATHARINA ELIZABETH, No. 628, *ante*.

**630. ——— Ship & cargo in different owners.]**—THE FRANKLIN (1811), 2 Act. 106; 12 E. R. 196.

**631. ——— Necessity for actual resistance—Navigation by master through inability of captors.]**—THE PENNSYLVANIA (1809), 1 Act. 33; 12 E. R. 13.

## Part VI.—Blockade.

### SECT. 1.—DEFINITION AND NATURE.

**632. Definition & object of.]**—THE FREDERICK MOLKE, No. 710, *post*.

**633. ———.]**—THE VROUW JUDITH, No. 648, *post*.

**634. ———.]**—(1) A commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority delegated to him as may be necessary to provide for the exigencies of the service on which he is employed (SIR WILLIAM SCOTT).

(2) All that is necessary to make a notification effectual & valid is that it shall be communicated in a credible manner. . . . The usual mode of communicating such intelligence undoubtedly is, not to the hostile govt., but to neutral states . . . here it was not practicable. Sir Home Popham took the only method that could be adopted, by sending to the governor of the place, & by desiring him to make it known to the subjects of neutral powers, who had no public agents or consuls resident there, to whom it could be more formally addressed (SIR WILLIAM SCOTT).

(3) It is then said, that there are other circumstances that will defeat the operation of the penalty, namely, that the blockade was irregularly maintained by the blockading force, in suffering some ships to go in, & others to come out, which would tend to deceive other persons, & would therefore vitiate the effect of the notification, & confess, if I was satisfied of the fact that such instances did occur, I should be disposed to admit the conclusion, that such a mode of keeping up,

or rather of relaxing the blockade, would altogether destroy the effect of it. For what is a blockade but a uniform universal exclusion of all vessels not privileged by law (SIR WILLIAM SCOTT).—THE ROLLA (1807), 6 Ch. Rob. 364; 165 E. R. 963.

*Annotations:—As to (1) Refd.* Cameron v. Kyte (1835), 3 Knapp, 332; Hill v. Bigge (1841), 3 Moo. P. C. C. 465; Phillips v. Eyre (1870) L. R. 6 Q. B. 1. *As to (3) Distd.* Tottle v. Heathcote, The Johanna Maria (1855), 10 Moo. P. C. C. 70. *Refd.* Northcote v. Douglas, The Franciska (1855), 10 Moo. P. C. C. 37.

**635. ———.]**—NORTHCOTE v. DOUGLAS, THE FRANCISKA, No. 685, *post*.

**636. Nature of—Act of sovereignty.]**—(1) Notification of a blockade is an act of high sovereignty & not to be extended by those employed to carry it into execution.

(2) Notice of a general blockade of the coast of Holland, untrue in fact is not available by limitation to a blockade of Amsterdam only, though really existing.

(3) I should hold that a blockade may be broken by obstinacy, as well as by fraud; & if a master says, he will go, & he must go there [to blockaded port], in defiance of notice, his owners must take the consequences of his conduct (SIR WILLIAM SCOTT).—THE HENRICK & MARIA (1799), 1 Ch. Rob. 146; 165 E. R. 129.

*Annotations:—As to (1) Distd.* The Rolla (1807), 6 Ch. Rob. 364. *Consd.* Northcote v. Douglas, The Franciska (1855), 10 Moo. P. C. C. 37. *As to (2) Consd.* Northcote v. Douglas, The Franciska (1855), 10 Moo. P. C. C. 37.

**637. ———.]**—THE ROLLA, No. 634, *ante*.

**638. ———.]**—THE FRANCISKA, No. 674, *post*.

### PART VI. SECT. 1.

**632 i. Definition & object of.]**—A blockade is not a measure which legally affects the enemy at all: it

operates, in point of law, only upon neutrals. Upon them it has a real legal effect. It gives new rights to the blockaders. Without it neutrals might trade in safety to the port.

It is the blockade alone which creates the right of capturing the vessels of neutrals.—THE ORION (1813), Stewart, 497.

## SECT. 2.—NOTIFICATION OF BLOCKADE.

## SUB-SECT. 1.—IN GENERAL.

639. Extent of notice—Must coincide with extent of blockade.]—THE HENRICK & MARIA, No. 636, *ante*.

640. ———.]—NORTHCOTE v. DOUGLAS, THE FRANCISKA, No. 685, *post*.

Extent of blockade.]—See Sect. 3, *post*.

Notice of modification of blockade.]—See Sect. 6, *post*.

Notice of revocation of blockade.]—See Sect. 7, *post*.

## SUB-SECT. 2.—NECESSITY FOR NOTICE.

641. General rule—Knowledge of blockade essential.]—NORTHCOTE v. DOUGLAS, THE FRANCISKA, No. 685, *post*.

642. Vessels sailing without knowledge of blockade.]—THE COLUMBIA, No. 676, *post*.

643. Notice to neutral merchants.]—THE VROUW JUDITH, No. 648, *post*.

644. Notice to foreign states.]—THE ADELAIDE, No. 659, *post*.

## SUB-SECT. 3.—EXPRESS NOTICE.

645. Notice by one of blockading squadron.]—THE MERCURIUS, No. 733, *post*.

646. By declaration to foreign government.]—THE VROUW JUDITH, No. 648, *post*.

647. To whom given—To commander of blockaded port.]—THE ROLLA, No. 634, *ante*.

## SUB-SECT. 4.—CONSTRUCTIVE NOTICE.

648. Blockade *de facto*—Presumption from notoriety—Vessels entering port.]—(1) The act of the master of the vessel binds the owner in respect of the conduct of the ship, as much as if it were committed by the owner himself. There are powers with which the law invests him; & if he abuses his trust, it is a matter to be settled between him & the person who constituted him master; but his act of violation is, as to the penal consequences, to be considered as the act of the owners (SIR WILLIAM SCOTT).

(2) A blockade is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection & correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, & a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it, but it must be considered as a rule which this *ct.* means to apply, that a neutral ship departing, can only take away a cargo *bond fide* purchased & delivered, before the commencement of the blockade, if she afterwards takes on board a cargo, it is a fraudulent act, & a violation of the blockade (SIR WILLIAM SCOTT).

(3) It is necessary that a blockade should be intimated to neutral merchants in some way or

other. It may be notified in a public & solemn manner, by declaration to foreign govts.; it may commence also *de facto*, by a blockading force giving notice on the spot to those who come from a distance, & who may therefore be ignorant of the fact. Vessels going in are, in that case, entitled to a notice before they can be justly liable to the consequences of breaking a blockade, but I take it to be quite otherwise with vessels coming out of the port which is the object of the blockade; there no notice is necessary, after the blockade has existed *de facto* for any length of time; the continued fact is itself a sufficient notice. It is impossible for those within to be ignorant of the forcible suspension of their commerce. The notoriety of the thing supersedes the necessity of particular notice to each ship (SIR WILLIAM SCOTT).—THE VROUW JUDITH (1799), 1 Ch. Rob. 150; 1 Eng. Pr. Cas. 86; 165 E. R. 130.

*Annotations*:—As to (2) *Reid*, Northcote v. Douglas, The Franciska (1855), 10 Moo. P. C. C. 37; Rodocanachi v. Elliott (1874), L. R. 9 C. P. 518; Sanday v. British & Foreign Marine Insco., [1915] 2 K. B. 781.

649. ———.]—Then the whole case comes to a question of fact whether there is anything to show that these parties were ignorant of the fact of the blockade, for as the notification was made to their govt., the want of personal information, if proved, might protect them. After a limited time, it lies *prima facie* on the party to show that he was not apprised of the fact of the blockade (SIR WILLIAM SCOTT).—THE HURTIGE HANE (1801), 3 Ch. Rob. 324; 165 E. R. 480.

*Annotation*:—*Apld.* Northcote v. Douglas, The Franciska (1855), 10 Moo. P. C. C. 37.

650. ———.]—Condemnation of a neutral entering a port under a blockade *de facto*, although a justification attempted by pleading ignorance of its existence.—THE ROBERT (1809), 1 Act. 62; 12 E. R. 24, P. C.

651. ———.]—Blockade of Cadiz, whether fairly & legally imposed by a fleet's appearance off the port prohibiting the entrance of all vessels. Notoriety of the fact & knowledge of its intention sufficient to bind the neutral. Under such circumstances formal notification rendered unnecessary.—THE HARE (1810), 1 Act. 252; 12 E. R. 97, P. C.

652. ———.]—THE FRANCISKA, No. 674, *post*.

653. ——— Vessels leaving port.]—THE VROUW JUDITH, No. 648, *ante*.

654. ———.]—CREMIDI v. POWELL, THE GERASIMO, No. 71, *ante*.

655. ——— Rebuttal of presumption.]—(1) It is only under special circumstances allowable to make inquiries of the blockading force. The *ct.* requires the clearest & most satisfactory proof of special ignorance of the blockade.

I am of opinion that the evidence proves that both the owners & master were cognisant of the fact of blockade, & relied for their protection on there being no notification (DR. LUSHINGTON).

Where it is intended to prove ignorance of a blockade which was a matter of general notoriety, it must be proved by the clearest & most satisfactory evidence to the judgment of the *ct.* (DR. LUSHINGTON).—THE UNION (1855), 2 Ecc. & Ad. 161; Spinks, 164; 164 E. R. 365.

656. Notified blockade—Presumption from lapse of time.]—The notification of the blockade must have been known at Rotterdam on Apr. 15,

## PART VI. SECT. 2, SUB-SECT. 1.

d. Extent of notice—Public notice.]—Where a blockade has been notified publicly, no further information is

necessary; & if a vessel, knowing of such notification, sails to the port, & finds it blockaded, it is a breach of the blockade.—THE CARLOTTA (1813), Stewart, 539.

## PART VI. SECT. 2, SUB-SECT. 2.

e. General rule.]—A blockade must be *de facto*. Notification alone is not sufficient.—THE REPUBLICAN (1813), Stewart, 571.

as it was known to the Prussian consul at Amsterdam on the 12th; I am therefore compelled to say that the continuing to take in a cargo after the time when the party was bound to take notice of the notification of blockade was sufficient to render the ship liable to condemnation (SIR WILLIAM SCOTT).—THE CALYPSO (1799), 2 Ch. Rob. 298; 165 E. R. 322.

657. ———.]—I do not think a week is sufficient time to affect the parties with legal knowledge of this blockade (*per Cur.*).—THE JONGE PETRONELLA (1799), 2 Ch. Rob. 131; 165 E. R. 264.

658. ———.]—THE NEPTUNUS, No. 747, *post*.

659. ———. Against subjects of state not notified.]—(1) From the moment that a notification is made to a govt., it binds the subjects of that state; because it is supposed to circulate through the whole country (*per Cur.*).

(2) Although a notification does not *proprio vigore* bind any country but that to which it is addressed, yet, in a reasonable time, it must affect neighbouring states, with knowledge, as a reasonable ground of evidence (*per Cur.*).—THE ADELAIDE (1799), 2 Ch. Rob. 111, n.; 165 E. R. 257.

Annotations:—As to (1) *Apud* Northcote v. Douglas; The *Franciska* (1853), 10 Moo. P. C. C. 37. Generally, *Menté*. *Harratt v. Wise* (1829), 9 B. & C. 712; *Naylor v. Taylor* (1829), 9 B. & C. 718.

660. ———. Notice to neutral government—Presumption of notice to all subjects.]—THE ADELAIDE, No. 659, *ante*.

661. ———.]—(1) It was the duty of the Prussian govt., having received the public notification many months before, to have communicated it to their subjects in different ports (SIR WILLIAM SCOTT).

(2) If a ship, that has broken a blockade, is taken in any part of that voyage she is taken *in delicto*, & subject to confiscation (SIR WILLIAM SCOTT).—THE WELVAART VAN PILLAW (1799), 2 Ch. Rob. 128; 165 E. R. 263.

### SECT. 3.—EXTENT OF BLOCKADE.

662. Confined to shipments from ports blockaded.]—Blockade of Amsterdam not violated by an order from America as for a shipment to be made at Amsterdam, the actual shipment having been made at Rotterdam. The interior carriage of the articles from Amsterdam to Rotterdam, not within the scope & operation of the blockade.

If the general law is, that egress as well as ingress is prohibited by blockade, the neutral merchant is bound to know it; & if he entertains any doubt he must satisfy himself by applying to the country imposing the blockade, & not to the party who has an interest in breaking it. . . . The legal consequences of a blockade must depend on the means of blockade; & on the actual or possible application of the blockading force. On the land side Amsterdam neither was or could be affected by a blockading naval force. It could be applied only externally. The internal communications of the country were out of its reach, & in no way subject to its operation (SIR WILLIAM SCOTT).—THE OCEAN (1801), 3 Ch. Rob. 297; 1 Eng. Pr. Cas. 310; 165 E. R. 470.

663. ———.]—Blockade of Holland, not violated by a destination to Antwerp.

Antwerp is no part of Holland; & with respect to the Scheldt, it is not within the Dutch territory,

but rather a conterminous river, dividing Holland from the adjacent country; & though by treaties with the Dutch, made in favour of the Dutch, we have considered the Scheldt as shut up, & appropriated to the use of Holland, yet, those treaties being extinguished by our present war with Holland, it is too much to say, that it is at this time to be legally regarded as standing upon that footing, particularly for the purposes of a blockade, which is to act upon the interests of other states who might be no parties to those treaties, even when they did exist. If the govt. had notified in express terms that the blockade was to include the Scheldt, which they might certainly have done, I should have enforced the rule so prescribed; but no signification being made, I do not think myself authorised to hold the Scheldt to be now necessarily included in the blockade of Holland (SIR WILLIAM SCOTT).—THE FRAU ILISABE (1801), 4 Ch. Rob. 63; 165 E. R. 536.

664. ———.]—Blockade of Amsterdam not violated by shipments to Emden, by inland navigation, with ulterior destination.

A blockade may be of different descriptions. . . . The ct. cannot take upon itself to say that a legal blockade exists where no actual blockade can be applied. In the very notion of a complete blockade, it is included, that the besieging force can apply its power to every point of the blockaded state. If it cannot, it is no blockade of that quarter where its power cannot be brought to bear; & where such a partial blockade is undertaken, it must be presumed that this is no more than what was foreseen by the blockading state, which, nevertheless, thought proper to impose it to the extent in which it was practicable (SIR WILLIAM SCOTT).—THE STEET (1801), 4 Ch. Rob. 65; 1 Eng. Pr. Cas. 348; 165 E. R. 537.

665. ———.]—The blockade of Amsterdam is from the nature of the thing a partial blockade, a blockade by sea; & if the goods were going to Emden, with an ulterior destination by land to Amsterdam, or by an interior canal navigation, it is not a breach of the blockade (SIR WILLIAM SCOTT).—THE JONGE PIETER (1801), 4 Ch. Rob. 79; 1 Eng. Pr. Cas. 353; 165 E. R. 542.

Annotation:—*Menté*. The *Panariellos*, [1915] 84 L. J. 140.

666. Confined to hostile ports.]—THE FRANCISKA, No. 674, *post*.

### SECT. 4.—EFFECTIVENESS OF BLOCKADE.

#### SUB-SECT. 1.—IN GENERAL.

667. Proof of effectiveness—Evidence of Commander-in-Chief.]—THE FRANCISKA, No. 674, *post*.

#### SUB-SECT. 2.—NECESSITY FOR ENFORCEMENT.

668. General rule.]—(1) A declaration of blockade by a commander without an actual investment will not constitute blockade.

(2) In a case of neutral property captured & recaptured by the French, compensation was sued from the original British captors, but refused, on the ground of a *bonae fidei* possession; irregularities to bind a former captor being a *bonae fidei* possessor, must be such as produce irreparable loss, or justly prevent restitution from the recaptors.—THE BETSEY (1798), 1 Ch. Rob. 93; 1 Eng. Pr. Cas. 63; 165 E. R. 109.

Annotations:—As to (2) *Consd.* The *Oscar II.*, The *Bernisse*, The *Elve*, [1921] P. 173. *Refd.* The *Franciska* (1856), 10 Moo. P. C. C. 74; The *Valeria*, [1921] 1 A. C. 471.

**Sect. 4.—Effectiveness of blockade: Sub-sects. 2, 3, 4, 5 & 6. Sect. 5: Sub-sects. 1 & 2, A. (a).]**

*Generally, Refd.* The *Leucade* (1855), 2 Ecc. & Ad. 228; *Northcote v. Douglas, The Franciska* (1855), 10 Moo. P. C. C. 37; *Schacht v. Otter, The Ostace* (1855), 9 Moo. P. C. C. 150.

**669. —**—[*THE JUFFROW MARIA SCHROEDER*, No. 772, *post*.]

#### SUB-SECT. 3.—SUFFICIENCY OF FORCE.

**670. Force must be adequate.]—**Blockade of Martinique. The vessel contended to have committed a breach of the blockade, restored; the blockading squadron having gone on an expedition to Surinam, & left no adequate force behind to maintain the blockade.—*THE NANCY (HURD, MASTER)* (1809), 1 Act. 57; 12 E. R. 22, P. C.

**671. — Whether single ship sufficient.]—**Under particular circumstances a single vessel may be adequate to maintain the blockade of one port & co-operate with other vessels at the same time in the blockade of another neighbouring port.—*THE NANCY (WOODBERRY, MASTER)* (1809), 1 Act. 63; 12 E. R. 25, P. C.

*Annotation:—Apld.* *The Franciska, Northcote v. Douglas* (1855), 8 State Tr. N. S. 349.

**672. —**—[*THE* blockade imposed by the Order in Council of Apr. 26, 1809, was never intended to be maintained in the regular mode of enforcing blockades by stationing a number of ships round the mouth of the blockaded port, & was sometimes maintained by a single ship.—*THE ARTHUR* (1814), 1 Dods. 423; 165 E. R. 1364.

*Annotations:—Refd.* *Banda & Kirwee Booty* (1866), L. R. 1 A. & E. 109. *Menté. The Leonora*, [1918] P. 182.

#### SUB-SECT. 4.—DISTANCE OF FORCE.

**673. Distance not material—If blockade effective.]—**A blockading squadron may lawfully lie at any distance convenient for shutting up the port blockaded, provided it does not obstruct any other.—*NAYLOR v. TAYLOR* (1828), Mood. & M. 205, N. P.; *subsequent proceedings* (1829), 9 B. & C. 718.

*Annotations:—Consd.* *The Franciska, Northcote v. Douglas* (1855), 26 L. T. O. S. 153. *Refd.* *Dalglish v. Hodgson* (1831), 5 Moo. & P. 407; *Medeiros v. Hill* (1832), 8 Bing. 231; *The Helen* (1865), L. R. 1 A. & E. 1.

**674. —**—[*(1)* Blockade is a high act of sovereignty, & cannot be imposed by a commander unless invested with authority for the purpose. On distant stations he is presumed to be so invested; in Europe it may be different.

[*(2)* Two requisites to a blockade, that ports blockaded be hostile & that the force efficiently maintain it.

[*(3)* The testimony of a commander-in-chief is the best, & sometimes conclusive evidence, as to the sufficiency of the blockading force.

[*(4)* The legality of a blockade is not affected by the distance of the blockading force, which may be at any distance convenient for closing the port blockaded.

[*(5)* A blockading squadron would invalidate the blockade by capriciously permitting ingress or egress, & by an unjustifiable absence from the locality.

[*(6)* Notice to neutrals of a blockade *de facto* is indispensably necessary, but whatever brings it credibly to their knowledge is sufficient. Unless the blockade is notorious, individual warning is requisite. Knowledge is presumed from notoriety. Notoriety precludes neutrals from approaching the port on any pretence whatever.

Knowledge of the blockade, & not the mode in which such knowledge was communicated, justifies capture.

[*(7)* The Prize Ct. receives every kind of evidence unfettered by the municipal law of evidence.—*THE FRANCISKA* (1855), 2 Ecc. & Ad. 113; Spinks, 111; *reversd.* on other grounds, *sub nom.* *NORTHCOTE v. DOUGLAS, THE FRANCISKA*, 10 Moo. P. C. C. 37, P. C.

*Annotations:—As to (7) Consd.* *The Berlin*, [1914] P. 265. *Generally, Refd.* *The Zamora*, [1916] 2 A. C. 77.

#### SUB-SECT. 5.—WITHDRAWAL OF FORCE.

**675. Voluntary or temporary withdrawal—Stress of weather.]—***THE FREDERICK MOLKE*, No. 710, *post*.

**676. —**—[*(1)* The penalty of breaking a blockade attaches on the property of persons ignorant of the fact by the conduct of the master; or of their consignee if entrusted with power over the vessel.

[*(2)* The actual sailing with an intention to break a blockade, is a breach of the blockade.

[*(3)* The blockade was to be considered as legally existing, although the winds did occasionally blow off the blockading squadron. It was an accidental change which must take place in every blockade; but the blockade is not therefore suspended (*SIR WILLIAM SCOTT*).

[*(4)* Where vessels sail without a knowledge of the blockade, a notice is necessary (*SIR WILLIAM SCOTT*).—*THE COLUMBIA* (1799), 1 Ch. Rob. 154; 1 Eng. Pr. Cas. 89; 165 E. R. 132; *affd.* (1801), 1 Ch. Rob. 157, P. C.

*Annotation:—Generally, Refd.* *The Neptunus* (1800), 3 Ch. Rob. 173.

**677. —**—[*THE JUFFROW MARIA SCHROEDER*, No. 772, *post*.

**678. —**—[*When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, & which introduces therefore a very different train of presumptions, in favour of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed; & therefore if it is to be renewed, it must proceed *de novo*, by the usual course, & without reference to the former state of facts, which has been so effectually interrupted (*SIR WILLIAM SCOTT*).—*THE HOFFNUNG* (1805), 6 Ch. Rob. 112; 1 Eng. Pr. Cas. 533; 165 E. R. 869.*

**679. — Chase of suspicious vessel.]—**Chasing suspicious vessels in the neighbourhood of a blockaded port, no cessation of the blockade.—*THE EAGLE* (1809), 1 Act. 65; 12 E. R. 25.

**680. — Without justification.]—***THE FRANCISKA*, No. 674, *ante*.

**681. Compulsory withdrawal—Owing to hostile force—Proof of resumption.]—**It certainly is notorious that the British squadron was driven off on Apr. 10 by a superior force. It must be shown that the actual blockade was again resumed (*SIR WILLIAM SCOTT*).—*THE TRIHETEN* (1805), 6 Ch. Rob. 65; 165 E. R. 851.

**682. —**—[*THE HOFFNUNG*, No. 678, *ante*.



## SUB-SECT. 6.—RELAXATION OF BLOCKADE.

**683. General rule—Blockade ceases to be effective.]—**THE *ROLLA*, No. 634, *ante*.

**684. Relaxation in favour of particular ports.]—**Condemnation for a breach of blockade of the rivers Elbe & Weser. Relaxation of blockade made in favour of the Hanse Towns by the British Govt. in 1806, not sufficient to sanction a foreign trade to the ports of the enemy.—THE *SOPHIA ELIZABETH* (1809), 1 Act. 46; 12 E. R. 18.

**685. Relaxation in favour of belligerents—To exclusion of neutrals.]—**Whatever may be the demerits of a ship, she cannot be condemned for a breach of blockade, unless, at the time when she committed the alleged offence, the port for which she was sailing was legally in a state of blockade, & was known to be so, by the master or owner.

Notice of a blockade must not be more extensive than the blockade itself.

The existence & extent of a blockade may be so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, & such knowledge may supply the place of a direct communication from a blockading squadron, yet the fact, with notice of which an individual is so to be fixed, must be one which admits of no reasonable doubt.

On Apr. 15, 1854, the commander of the Baltic fleet blockaded, *de facto*, the coast of Courland but his notice to the British Ministers, including the British Minister at Copenhagen, was of that character, that the impression was, that all the Russian ports in the Baltic were blockaded. The English Govt. also on that date issued an Order in Council, giving permission up to May 15, for Russian vessels to discharge their cargoes from Russian ports in the Baltic & White Sea to their port of destination, even though those ports were in a state of blockade. A similar permission was granted by the French Govt., & the Russian gov't. by a *ukase* allowed the same indulgence to English & French ships. On May 14, 1854, a neutral vessel, under Danish colours, sailed from Copenhagen for Riga, & was captured off Riga by an English ship of war on the 22nd of that month, for a breach of the blockade of that port:—*Held*: (1) the vessel was improperly seized, as there was no legal blockade at the time of the seizure; (2) as the Order in Council must be taken to have extended to British & French ships, & as it relaxed the blockade in favour of the belligerents to the exclusion of neutrals, the blockade was illegal; (3) assuming the blockade to be legal, yet the master of the ship must be fixed with personal knowledge of all that was publicly known at Copenhagen on May 14, & as the general notoriety, so far as it existed at that time & place, was, that all the Russian ports in the Baltic were blockaded, which was not the fact, the notice, therefore, of the blockade being more extensive than the blockade itself, it was of no effect against a neutral.

(4) If a partial modified blockade is to be enforced against neutrals, justice seems to require that the modification intended to be introduced should be notified to neutral states, & that they should be

fully apprised what acts their subjects may or may not do (*per CUR.*).

(5) It is clear that the operations of the siege or blockade may be interrupted by any communication of the blockaded or besieged place with foreigners; & LORD STOWELL when he defines a blockade, always speaks of it as the exclusion of the blockaded place from all commerce, whether by egress or ingress (*per CUR.*).—*NORTHCOTE v. DOUGLAS, THE FRANCISKA* (1855), 10 Moo. P. C. C. 37; Spinks, 287; 8 State Tr. N. S. 349; 26 L. T. O. S. 153; 4 W. R. 100; 2 Eng. Pr. Cas. 346; 14 E. R. 403, P. C.

*Annotations*:—*Generally, Reffd.* The *Zamora*, [1916] 2 A. C. 77. *Mentd.* The *Berlin*, [1914] P. 265.

**686. — Extended to neutrals.]—***NORTHCOTE v. DOUGLAS, THE FRANCISKA*, No. 685, *ante*.

## SECT. 5.—BREACH OF BLOCKADE.

## SUB-SECT. 1.—IN GENERAL.

**687. Nature of offences—Not contrary to municipal law.]—**In a suit upon an agreement contemplating a breach of blockade of the ports of the Confederate States of America, & upon a motion to strike out the fourth art. of deft.'s answer which pleaded that such agreement was not binding by reason of a breach of blockade being illegal:—*Held*: a breach of blockade by neutrals is not an offence against the municipal law of this country.—*THE HELEN* (1865), L. R. 1 A. & E. 1; 35 L. J. Adm. 2; 13 L. T. 305; 11 Jur. N. S. 1025; 14 W. R. 136; 2 Mar. L. C. 293.

*Annotations*:—*Mentd.* *Gelpel v. Smith* (1872), L. R. 7 Q. B. 401; *Catue v. Palace Shipping Co.*, [1907] 1 K. B. 670.

—*See CONTRACT*, Vol. XII., pp. 268, 269, Nos. 2196–2199.

**688. Penalty for breach—Loss of property.]—**THE *COLUMBIA*, No. 676, *ante*.

## SUB-SECT. 2.—WHAT CONSTITUTES BREACH.

## A. Inwards Breach

## (a) Sailing for Blockaded Port.

**689. Sailing with knowledge of blockade.]—**THE *COLUMBIA*, No. 676, *ante*.

**690. —.]—**If a vessel sail for a blockaded port, after having received notification of the blockade, the act of sailing is to be considered as a breach of the blockade. . . . I hold it to be the duty of a country notifying a blockade to notify the revocation also; there had been no such revocation notified, & therefore I must presume that it was still existing (*per CUR.*).—*THE VROW JOHANNA* (1799), 2 Ch. Rob. 109; 165 E. R. 256.

**691. —.]—**THE *HENRICK & MARIA*, No. 636, *ante*.

**692. — Intention to inquire as to continuance of blockade—At intermediate port.]—**That American merchants should therefore send their ships upon a fair conjecture that the blockade had, after a long continuance, terminated, & for the purpose of making fair inquiry whether it had

## PART VI. SECT. 4, SUB-SECT. 6.

1. *Evidence of suspension.]—*Nothing can be considered as evidence of a suspension which is consistent with an actual blockade.—*THE NANCY* (1805), Stewart, 28.

2. *Onus of proof.]—*Where a blockade has been known to exist *pltf.* must prove the relaxation; but where it is not known that a blockade has been com-

menced, it is for the captors to establish it by evidence.—*THE ORION* (1813), Stewart, 497.

## PART VI. SECT. 5, SUB-SECT. 1.

h. *Cargo brought from blockaded port by land—Shipped in open port—Not liable to confiscation.]—*Cargo brought from a blockaded port by land, & shipped in an open port, not liable to

confiscation.—*THE THOMAS WILSON* (1811), Stewart, 269.

k. *What constitutes—Goods brought to ports not included in Order in Council.]—*Goods brought from the blockaded ports by water to ports not comprehended in the Order in Council, constitute a breach of the blockade.—*THE MARQUIS DE SOMERUELES* (1813), Stewart, 445.

*Sect. 5.—Breach of blockade: Sub-sect. 2, A. (a) & (b), & B.]*

so determined or not, is, I think, not exceptionable; though . . . this inquiry should be made not in the very mouth of the river or estuary from the blockading vessels, but in the ports that lie in the way, & which can furnish information without furnishing opportunities of fraud (SIR WILLIAM SCOTT).—THE BETSEY (1799), 1 Ch. Rob. 332; 165 E. R. 195.

693. ————] —THE SHEPHERDESS, No. 737, *post*.

694. ————] —Objected that an American vessel sailing from America with knowledge of the actual blockade of the port for which she has a contingent destination, should in her papers disclose in explicit terms the place at which the inquiry was intended to be made relative to the fact of its continuance. Overruled, it being ascertained that H., whence pilots were always procured to secure the insurance of vessels entering that harbour, was the usual place for vessels to make inquiry.—THE DISPATCH (1809), 1 Act. 163; 12 E. R. 61.

695. ————] —'The sentence of a foreign ct. of Admty. is not conclusive as to the ground of condemnation, unless it be explicitly stated what the ground is:—*Held*: this did not appear on a sentence which stated "that the ship 'George' has sailed from Liverpool knowing of the blockade of Buenos Ayres by the Emperor of Brazil, from a short distance of which port she was taken, & for that reason ought to be considered as violating the blockade; besides which, it was notorious the captured had endeavoured to get goods into Buenos Ayres, as was clear from the evasive answers of the captain; the captured had not the plausible excuse of going first to Monte Video, & thereby complying with the published instructions; from all which, & from what the documents stated, the ship was adjudged good prize."—DALGLEISH v. HODGSON (1831), 7 Bing. 495; 5 Moo. & P. 407; 9 L. J. O. S. C. P. 138; 131 E. R. 192.

*Annotations*.—*Apld.* Hobbs v. Henning (1865), 17 C. B. N. S. 791. *Refd.* Simpson v. Fogo (1863), 1 New Rep. 422; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Fracis, Times v. Carr* (1900), 82 L. T. 698. *Mentd.* De Mora v. Concha (1885), 20 Ch. D. 268.

696. ————] —At blockaded port.] —THE BETSEY, No. 692, *ante*.

697. ————] —If with a knowledge of a blockade & the probability of its continuance, a vessel, under the pretence of making inquiries, goes to the blockading force, she is liable to condemnation.—THE THEMIS (1855), 3 L. T. 514.

698. ————] —THE SHEPHERDESS, No. 737, *post*.

699. ————] —The true rule is, that after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of inquiry. . . . If particular parties are innocent in their intention, it is still a measure of necessary caution, & of preventive legal policy, to hold the rule general against the liberty of inquiring at the very mouth of the blockaded port, which would amount in practice to a universal licence to attempt to enter, & on being prevented, to claim the liberty of going elsewhere (SIR WILLIAM SCOTT).—THE SPES (1804), 5 Ch. Rob. 76; 165 E. R. 703.

700. ————] —THE DISPATCH, No. 694, *ante*.

701. ————] —The ship is captured in a place where the fact is conclusive against her, for it has been determined over & over again that a ship is not at liberty to go up to the mouth

of a blockaded port even to make inquiry. That in itself is a consummation of the offence & amounts to an actual breach of the blockade (SIR WILLIAM SCOTT).—THE JAMES COOK (1810), 1 Edw. 261; 165 E. R. 1103.

*Annotation*.—*Refd.* Baltazzi v. Ryder, The Panaghia Rhomba (1858), 12 Moo. P. C. C. 168.

702. ————] —THE UNION, No. 655, *ante*.

703. ————] —Innocent intention established.] —Instructions having been given by the owners to inquire of the vessels cruising off the Eyder respecting the existence of the blockade. Further proof admitted to ascertain the actual intention of the master in approaching so closely the mouth of the blockaded port. Innocent intention established. Ship & cargo restored.—THE LITTLE WILLIAM (1809), 1 Act. 141; 12 E. R. 54.

704. Sailing without knowledge of blockade—*Bona fide deviation on notice of blockade*.] —THE IMINA, No. 785, *post*.

*(b) Approach to Blockaded Port.*

705. Hovering in neighbourhood of blockaded port.] —The neighbourhood of the blockaded port cannot be considered as the fit *locus deliberandi* for the master's future plans. . . . His first duty is obvious, *fuge litus*; that neighbourhood is at all events to be avoided. He is bound, on the first notice, to take himself out of an equivocal situation, & if he obstinately refuses & neglects so to do, the ct. will hold . . . that such a conduct will amount to a breach of the blockade, & subject the vessel to condemnation (SIR WILLIAM SCOTT).—THE APOLLO (1804), 5 Ch. Rob. 287; 165 E. R. 778.

706. Anchoring close to port.] —This is the case of a ship taken on a professed destination to Emden; but the fact is, that she was seized in Ostend Roads. . . . I understand the situation of the vessel to have been at no great distance from that port. . . . The ship was lying within a sand, & within the protection of the batteries, & in a place, . . . where ships of large burden are usually unlivered by lighters, as the more commodious method of delivering their cargoes at Ostend. . . . A ship going there must be considered as in the port of Ostend, since for the purpose of enforcing a blockade, it is not necessary to restrict the meaning of the word port to the limits of the particular local port regulations, which may not extend beyond the pier head. A belligerent is not bound to that restricted sense of the word. If the situation of the vessel is within the protection of the batteries, & in a place which vessels usually frequent for the purpose of unlivery, & from which importation into Ostend can safely be effected, & is not unusually effected, it would not unreasonably be held to be a part of that port. . . . A belligerent is not called upon to admit, that neutral ships can innocently place themselves in a situation, where they may with impunity break the blockade whenever they please. If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; & if a vessel could, under the pretence of going further, approach *cy-près*, close up to the blockaded port so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained.

. . . The voyage was originally to Emden. What produced the deviation? The master in his deposition states "that the ship's course was directed towards Emden till Feb. 6, when she spoke a small vessel, which informed them that

the Ems was full of ice, which induced him to go to Ostend to get a pilot, as it was necessary . . . that he should be taken into a place of safety." . . . Another witness . . . states "that they went to get a pilot for Flushing." . . . It appears to me to be perfectly unnatural, that he should have made choice of such a port as Flushing. . . . I am of opinion that the ship had been brought into this situation, not with any honest intention, but for the purpose of importing her cargo into Ostend (SIR WILLIAM SCOTT).—THE NEUTRALITET (1805), 6 Ch. Rob. 30; 165 E. R. 839.

**707. Approach within protection of shore.]—**It has appeared in other cases that the blockading frigates do permit vessels to go within no great distance of the shore, for the purpose of procuring pilots. . . . If it had been a case . . . of situation merely, & that at the distance of about twenty miles from the port of Havre, it would be the duty, & the inclination of the ct., not to infer too rigorously, from that circumstance alone, an intention of violating the blockade. . . . The master says "that the course in which he was steering would have carried him directly to Havre, & that he should have continued in that course, though not into the port of Havre, but that he should have gone close under the land, & have taken a pilot for Caen." . . . It is impossible that any blockade can be maintained if such a practice is allowed, that a vessel, under a destination to a port not interdicted, shall be at liberty to pursue her course in such a manner as must draw the cruiser employed in that service under the range of the enemy's batteries (SIR WILLIAM SCOTT).—THE GUTE ERWARTUNG (1805), 6 Ch. Rob. 182; 165 E. R. 894.

**708. —.]—**A person cannot be allowed to approach so near to a blockaded port as to place himself almost within the effectual protection of the shore, & with no necessity existing. To allow such an approach would render the whole purpose of blockade perfectly nugatory (SIR WILLIAM SCOTT).—THE CHARLOTTE CHRISTINE (1805), 6 Ch. Rob. 101; 165 E. R. 864.

*Annotations:—*Refd. The Gute Erwartung (1805), 6 Ch. Rob. 182; The Aline & Fanny (1856), Spinks, 322.

**709. Vessel out of her course.]—**A vessel captured sixty or seventy miles out of its course, & in the neighbourhood of a blockaded port, cannot be restored without further proof of its destination. If claimant declines further proof the ct. is bound to condemn the property.—THE CHRISSEYS (1856), Spinks, 343; 2 Eng. Pr. Cas. 568; 164 E. R. 474.

*Annotation:—*Refd. The Panaja Drapaniotisa (1856), Spinks, 336.

#### B. Outwards Breach.

##### 710. General rule—Sailing constitutes breach.]—

(1) Nothing further is necessary to constitute blockade, than that there should be a force stationed to prevent communication, & a due notice, or prohibition given to the party. It is not an accidental absence of the blockading force, not the circumstance of being blown off by wind, if the suspension, & the reason of the suspension are known, that will be sufficient in law to remove a blockade (SIR WILLIAM SCOTT).

(2) For what is the object of blockade? not merely to prevent an importation of supplies, but to prevent export as well as import, & to cut

off all communication of commerce with the blockaded place. I must therefore consider the act of egress to be as culpable as the act of ingress, & the vessel on her return still liable to seizure & confiscation. There may indeed be cases of innocent egress, where vessels have gone in before the blockade, & in such circumstances it could not be maintained that they might not be at liberty to retire. But even then a question might arise if it was attempted to carry out a cargo, for that would . . . contravene one of the chief purposes of blockade (SIR WILLIAM SCOTT).

(3) A ship in all cases coming out of a blockaded port is in the first instance liable to seizure; & to obtain release, the claimant will be required to give a very satisfactory proof of the innocence of his intention (SIR WILLIAM SCOTT).—THE FREDERICK MOLKE (1798), 1 Ch. Rob. 86; 1 Eng. Pr. Cas. 58; 165 E. R. 106.

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**711. —.]—**(1) A blockade *de facto* ex pires *de facto*; but a blockade by notification is *prima facie* presumed to continue till the notification is revoked; this presumption throws the *onus probandi* on claimant.

(2) Neutral vessels breaking a blockade are liable to confiscation. . . . A blockade is broken as much by coming out with a cargo as by going in; the only exception . . . is that of a cargo shipped or delivered to the master, for the use of his owner, before the commencement of the blockade (SIR WILLIAM SCOTT).

(3) There are two sorts of blockade; one by the simple fact only, the other by a notification accompanied with the fact. In the former case, when the fact ceases, otherwise than by accident or the shifting of the wind, there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the govt. of a belligerent country to neutral govts., I apprehend *prima facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty of a belligerent country, which has made the notification of blockade, to notify in the same way, & immediately, the discontinuance of it. To suffer the fact to cease, & to apply the notification again, at a distant time, would be a fraud on neutral nations; & a conduct which the ct. is not to suppose any country would pursue. I do not say that a blockade of this sort may not in any possible case expire *de facto*, but I say such a conduct is not hastily to be presumed against any nation & therefore till such a case is clearly made out . . . a blockade by notification is, *prima facie*, to be presumed to continue till the notification is revoked.—THE NEPTUNUS (1799), 1 Ch. Rob. 170; 1 Eng. Pr. Cas. 94; 165 E. R. 137.

*Annotation:—*As to (2) *Refd.* The Vrouw Alida (1855), 3 L. T. 514.

**712. —.]—**THE VROUW JUDITH, No. 648, *ante*.

**713. —.]—**(1) *Prima facie* every ship leaving a blockaded port with a cargo is liable to detention without the risk of costs & damages. Where the claim & preparatory evidence is at variance with the documentary, the ct. is bound to require further proof.

(2) It is clear that the cargo could not have been restored without the ship. If it had been contended on the part of the cargo that the cargo

#### PART VI. SECT. 5, SUB-SECT. 2.—B.

1. *Enemy subjects carried on ship—Material service assisting enemy.]—*A vessel hired to carry home the enemy's subjects, who compose the

strength of his country & form his fleets & armies, & whose importance to him is manifested by the peculiar protection granted them by the Govt. itself, is a material service performed

to the enemy, & as such certainly cannot afford to a neutral any plea which can justify the breach of a blockade.—THE TAMAAHMAH (1811), Stewart, 254.

*Sect. 5.—Breach of blockade: Sub-sect. 2, A. (a) & (b), & B.]*

so determined or not, is, I think, not exceptionable; though . . . this inquiry should be made not in the very mouth of the river or estuary from the blockading vessels, but in the ports that lie in the way, & which can furnish information without furnishing opportunities of fraud (SIR WILLIAM SCOTT).—THE BETSEY (1799), 1 Ch. Rob. 332; 165 E. R. 195.

693. ————.] — THE SHEPHERDESS, No. 737, *post*.

694. ————.] — Objected that an American vessel sailing from America with knowledge of the actual blockade of the port for which she has a contingent destination, should in her papers disclose in explicit terms the place at which the inquiry was intended to be made relative to the fact of its continuance. Overruled, it being ascertained that H., whence pilots were always procured to secure the insurance of vessels entering that harbour, was the usual place for vessels to make inquiry.—THE DISPATCH (1809), 1 Act. 163; 12 E. R. 61.

695. ————.] — The sentence of a foreign ct. of Admty. is not conclusive as to the ground of condemnation, unless it be explicitly stated what the ground is:—*Held*: this did not appear on a sentence which stated "that the ship 'George' has sailed from Liverpool knowing of the blockade of Buenos Ayres by the Emperor of Brazil, from a short distance of which port she was taken, & for that reason ought to be considered as violating the blockade; besides which, it was notorious the captured had endeavoured to get goods into Buenos Ayres, as was clear from the evasive answers of the captain; the captured had not the plausible excuse of going first to Monte Video, & thereby complying with the published instructions; from all which, & from what the documents stated, the ship was adjudged good prize."—DALGLEISH v. HODGSON (1831), 7 Bing. 495; 5 Moo. & P. 407; 9 L. J. O. S. C. P. 138; 131 E. R. 192.

*Annotations*:—*Apld.* Hobbs v. Henning (1865), 17 C. B. N. S. 791. *Refd.* Simpson v. Fogo (1863), 1 New Rep. 422; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Frails, Times v. Carr* (1900), 82 L. T. 698. *Mentd.* De Mora v. Concha (1885), 29 Ch. D. 268.

696. ————.] At blockaded port.] — THE BETSEY, No. 692, *ante*.

697. ————.] — If with a knowledge of a blockade & the probability of its continuance, a vessel, under the pretence of making inquiries, goes to the blockading force, she is liable to condemnation.—THE THEMIS (1855), 3 L. T. 514.

698. ————.] — THE SHEPHERDESS, No. 737, *post*.

699. ————.] — The true rule is, that after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of inquiry. . . . If particular parties are innocent in their intention, it is still a measure of necessary caution, & of preventive legal policy, to hold the rule general against the liberty of inquiring at the very mouth of the blockaded port, which would amount in practice to a universal licence to attempt to enter, & on being prevented, to claim the liberty of going elsewhere (SIR WILLIAM SCOTT).—THE SPES (1804), 5 Ch. Rob. 78; 165 E. R. 703.

700. ————.] — THE DISPATCH, No. 694, *ante*.

701. ————.] — The ship is captured in a place where the fact is conclusive against her, for it has been determined over & over again that a ship is not at liberty to go up to the mouth

of a blockaded port even to make inquiry. That in itself is a consummation of the offence & amounts to an actual breach of the blockade (SIR WILLIAM SCOTT).—THE JAMES COOK (1810), 1 Edw. 261; 165 E. R. 1103.

*Annotation*:—*Refd.* Baltazzi v. Ryder, The Panaghia Rhomba (1858), 12 Moo. P. C. 168.

702. ————.] — THE UNION, No. 655, *ante*.

703. ————.] — Innocent intention established.] — Instructions having been given by the owners to inquire of the vessels cruising off the Eyder respecting the existence of the blockade. Further proof admitted to ascertain the actual intention of the master in approaching so closely the mouth of the blockaded port. Innocent intention established. Ship & cargo restored.—THE LITTLE WILLIAM (1809), 1 Act. 141; 12 E. R. 54.

704. Sailing without knowledge of blockade.—*Bonâ fide deviation on notice of blockade.*] — THE IMINA, No. 785, *post*.

#### (b) Approach to Blockaded Port.

705. Hovering in neighbourhood of blockaded port.] — The neighbourhood of the blockaded port cannot be considered as the fit *locus deliberandi* for the master's future plans. . . . His first duty is obvious, *fuge litus*; that neighbourhood is at all events to be avoided. He is bound, on the first notice, to take himself out of an equivocal situation, & if he obstinately refuses & neglects so to do, the ct. will hold . . . that such a conduct will amount to a breach of the blockade, & subject the vessel to condemnation (SIR WILLIAM SCOTT).—THE APOLLO (1804), 5 Ch. Rob. 287; 165 E. R. 778.

706. Anchoring close to port.] — This is the case of a ship taken on a professed destination to Emden; but the fact is, that she was seized in Ostend Roads. . . . I understand the situation of the vessel to have been at no great distance from that port. . . . The ship was lying within a sand, & within the protection of the batteries, & in a place, . . . where ships of large burden are usually un-livered by lighters, as the more commodious method of delivering their cargoes at Ostend. . . . A ship going there must be considered as in the port of Ostend, since for the purpose of enforcing a blockade, it is not necessary to restrict the meaning of the word port to the limits of the particular local port regulations, which may not extend beyond the pier head. A belligerent is not bound to that restricted sense of the word. If the situation of the vessel is within the protection of the batteries, & in a place which vessels usually frequent for the purpose of unlivery, & from which importation into Ostend can safely be effected, & is not unusually effected, it would not unreasonably be held to be a part of that port. . . . A belligerent is not called upon to admit, that neutral ships can innocently place themselves in a situation, where they may with impunity break the blockade whenever they please. If the belligerent country has a right to impose a blockade, it must be justified in the necessary means of enforcing that right; & if a vessel could, under the pretence of going further, approach *cy-près*, close up to the blockaded port so as to be enabled to slip in without obstruction, it would be impossible that any blockade could be maintained. . . . The voyage was originally to Emden. What produced the deviation? The master in his deposition states "that the ship's course was directed towards Emden till Feb. 6, when she spoke a small vessel, which informed them that

the Ems was full of ice, which induced him to go to Ostend to get a pilot, as it was necessary . . . that he should be taken into a place of safety." . . . Another witness . . . states "that they went to get a pilot for Flushing." . . . It appears to me to be perfectly unnatural, that he should have made choice of such a port as Flushing. . . . I am of opinion that the ship had been brought into this situation, not with any honest intention, but for the purpose of importing her cargo into Ostend (SIR WILLIAM SCOTT).—THE NEUTRALITET (1805), 6 Ch. Rob. 30; 165 E. R. 839.

**707. Approach within protection of shore.]—**It has appeared in other cases that the blockading frigates do permit vessels to go within no great distance of the shore, for the purpose of procuring pilots. . . . If it had been a case . . . of situation merely, & that at the distance of about twenty miles from the port of Havre, it would be the duty, & the inclination of the ct., not to infer too rigorously, from that circumstance alone, an intention of violating the blockade. . . . The master says "that the course in which he was steering would have carried him directly to Havre, & that he should have continued in that course, though not into the port of Havre, but that he should have gone close under the land, & have taken a pilot for Caen." . . . It is impossible that any blockade can be maintained if such a practice is allowed, that a vessel, under a destination to a port not interdicted, shall be at liberty to pursue her course in such a manner as must draw the cruiser employed in that service under the range of the enemy's batteries (SIR WILLIAM SCOTT).—THE GUTE ERWARTUNG (1805), 6 Ch. Rob. 182; 165 E. R. 894.

**708. —.]—**A person cannot be allowed to approach so near to a blockaded port as to place himself almost within the effectual protection of the shore, & with no necessity existing. To allow such an approach would render the whole purpose of blockade perfectly nugatory (SIR WILLIAM SCOTT).—THE CHARLOTTE CHRISTINE (1805), 6 Ch. Rob. 101; 165 E. R. 864.

*Annotations:—*Reid. The Gute Erwartung (1805), 6 Ch. Rob. 182; The Allie & Fanny (1856), Spinks, 322.

**709. Vessel out of her course.]—**A vessel captured sixty or seventy miles out of its course, & in the neighbourhood of a blockaded port, cannot be restored without further proof of its destination. If claimant declines further proof the ct. is bound to condemn the property.—THE CHRISSEYS (1856), Spinks, 343; 2 Eng. Pr. Cas. 568; 164 E. R. 474.

*Annotation:—*Reid. The Panaja Drapaniotisa (1856), Spinks, 336.

#### B. Outwards Breach.

##### 710. General rule—Sailing constitutes breach.]—

(1) Nothing further is necessary to constitute blockade, than that there should be a force stationed to prevent communication, & a due notice, or prohibition given to the party. It is not an accidental absence of the blockading force, not the circumstance of being blown off by wind, if the suspension, & the reason of the suspension are known, that will be sufficient in law to remove a blockade (SIR WILLIAM SCOTT).

(2) For what is the object of blockade? not merely to prevent an importation of supplies, but to prevent export as well as import, & to cut

off all communication of commerce with the blockaded place. I must therefore consider the act of egress to be as culpable as the act of ingress, & the vessel on her return still liable to seizure & confiscation. There may indeed be cases of innocent egress, where vessels have gone in before the blockade, & in such circumstances it could not be maintained that they might not be at liberty to retire. But even then a question might arise if it was attempted to carry out a cargo, for that would . . . contravene one of the chief purposes of blockade (SIR WILLIAM SCOTT).

(3) A ship in all cases coming out of a blockaded port is in the first instance liable to seizure; & to obtain release, the claimant will be required to give a very satisfactory proof of the innocence of his intention (SIR WILLIAM SCOTT).—THE FREDERICK MOLKE (1798), 1 Ch. Rob. 86; 1 Eng. Pr. Cas. 58; 165 E. R. 108.

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(2) Neutral vessels breaking a blockade are liable to confiscation. . . . A blockade is broken as much by coming out with a cargo as by going in; the only exception . . . is that of a cargo shipped or delivered to the master, for the use of his owner, before the commencement of the blockade (SIR WILLIAM SCOTT).

(3) There are two sorts of blockade; one by the simple fact only, the other by a notification accompanied with the fact. In the former case, when the fact ceases, otherwise than by accident or the shifting of the wind, there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the govt. of a belligerent country to neutral govts., I apprehend *primâ facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty of a belligerent country, which has made the notification of blockade, to notify in the same way, & immediately, the discontinuance of it. To suffer the fact to cease, & to apply the notification again, at a distant time, would be a fraud on neutral nations; & a conduct which the ct. is not to suppose any country would pursue. I do not say that a blockade of this sort may not in any possible case expire *de facto*, but I say such a conduct is not hastily to be presumed against any nation & therefore till such a case is clearly made out . . . a blockade by notification is, *primâ facie*, to be presumed to continue till the notification is revoked.—THE NEPTUNUS (1799), 1 Ch. Rob. 170; 1 Eng. Pr. Cas. 94; 165 E. R. 137.

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**712. —.]—**THE VROUW JUDITH, No. 648, *ante*.

**713. —.]—**(1) *Primâ facie* every ship leaving a blockaded port with a cargo is liable to detention without the risk of costs & damages. Where the claim & preparatory evidence is at variance with the documentary, the ct. is bound to require further proof.

(2) It is clear that the cargo could not have been restored without the ship. If it had been contended on the part of the cargo that the cargo

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to the enemy, & as such certainly cannot afford to a neutral any plea which can justify the breach of a blockade.—THE TAMAHAH (1811), Stewart, 254.

*Sect. 5.—Breach of blockade: Sub-sect. 2, B.; sub-sect. 3, A. (a) & (b).]*

was not to blame, that it ought to have been restored immediately, then the answer is this: the cargo must participate in the lot & fate of the ship. If there was good ground to bring the ship to this country, then also there was good ground to bring the cargo . . . consequently it is utterly vain to contend for costs & damages in cases of that description (DR. LUSHINGTON).

(3) I am of opinion that this was a perfectly lawful undertaking; the owners had a right to enter as they did into the charterparty . . . namely, to take a cargo out in the first instance, & then to bring back another, if they chose to run the risk of being detained by the ice, knowing that a blockade would be imposed, & then to assert their rights to carry out the cargo by reason of its having been laden antecedent to the blockade (DR. LUSHINGTON).—THE OTTO & OLAF (1855), Spinks, 257; 2 Eng. Pr. Cas. 507; 164 E. R. 436.

714. ———.]—Condemnation of a neutral ship for a breach of the blockade of Riga. The ship having come out of the blockaded port with a full knowledge of the blockade.

Ship condemned, without costs of appeal, on account of the laxity of the blockade.—TOTTIE V. HEATHCOTE, THE JOHANNA MARIA (1855), 10 Moo. P. C. C. 70; 26 L. T. O. S. 159; 4 W. R. 106; 14 E. R. 415, P. C.

715. Exception to rule.—Blockade only declared against ingress.]—CREMIDI v. POWELL, THE GERASIMO, No. 71, *ante*.

716. Liberty of neutral ship to retire.—With cargo loaded before blockade.]—THE VROUW JUDITH, No. 648, *ante*.

717. ———.]—THE NEPTUNUS, No. 711, *ante*.

718. ———.]—THE PIGOU (1807), cited in 6 Ch. Rob. at p. 375; 165 E. R. 967.

Annotation:—*Distd.* The Rolla (1807), 6 Ch. Rob. 363.

719. ———.]—THE OTTO & OLAF, No. 713, *ante*.

720. ———.]—CREMIDI v. POWELL, THE GERASIMO, No. 71, *ante*.

721. ———.]—With cargo loaded after blockade.]—THE FREDERICK MOLKE, No. 710, *ante*.

722. ———.]—THE CALYPSO, No. 656, *ante*.

723. ———.]—Compelled to load by enemy regulations.]—A neutral ship coming out of a blockaded port in consequence of a rumour that hostilities were likely to take place between the enemy & the country to which the vessel belongs, is not liable to condemnation, though laden with a cargo, where the regulations of the enemy would not permit a departure in ballast.—THE DRIE VRIENDEN (1813), 1 Dods. 269; 165 E. R. 1307.

724. ———.]—In ballast.—Cargo conveyed by lighters to neighbouring port.]—Goods shipped in the *Jade* having been previously sent in lighters from the blockaded port, & under charterparty, with the ship proceeding also from the blockaded port in ballast to take them on board.—THE MARIA (1805), 6 Ch. Rob. 201; 1 Eng. Pr. Cas. 546; 165 E. R. 901.

725. ———.]—THE CHARLOTTE SOPHIA (1806), cited in 6 Ch. Rob. 204, n.; 165 E. R. 902.

Annotation:—*Distd.* The Lisette (1807), 6 Ch. Rob. 387.

726. ———.]—(1) This ship was taken on a voyage from Tonningen to Malagar, but a voyage accompanied with this fact that she had gone from Hamburg to Tonningen, under a charterparty formed at Hamburg for this ulterior

voyage, & had there taken on board the cargo which was brought from Hamburg in lighters . . . the ship had gone from Hamburg in ballast, but the goods are to be considered as taken in one uninterrupted voyage, commencing in an actual breach of the blockade, & continuing as the same identical shipment, on the original destination, from the blockaded port to Spain. . . . In blockades . . . which are applied to the ports of neutral & amicable states . . . I have been compelled in principle to hold, that when goods are brought down from the blockaded port to a neighbouring port, on purpose to be shipped for the enemy's country, an adventure so conducted is nevertheless a breach of the blockade (SIR WILLIAM SCOTT).

(2) The ship was not taken *in delicto*, & I have not had any case pointed out to me in which the ct. has pronounced an unfavourable judgment on a ship seized for the breach of a bygone blockade. . . . The blockade being gone, the necessity of applying the penalty to prevent future transgression cannot continue (SIR WILLIAM SCOTT).—THE LISETTE (1807), 6 Ch. Rob. 387; 1 Eng. Pr. Cas. 587; 165 E. R. 972.

Annotation:—*Generally, Refd.* The Alwina, [1916] P. 131.

727. ———.]—Goods *bonâ fide* property of neutral.]—THE JEANNE MARIE, No. 751, *post*.

728. Enemy ship transferred to neutral ownership during blockade.]—THE POTSDAM (1801), 4 Ch. Rob. 89; 1 Eng. Pr. Cas. 355; 165 E. R. 545.

Annotations:—*Refd.* The Vigilantia (1805), 6 Ch. Rob. 122; The Jeanne Marie (1855), 2 Ecc. & Ad. 165.

729. ———.]—(1) There are two facts in this case which attract attention, first that the vessel was clearly the property of the enemy at the commencement of the war; & secondly, that she was taken coming out of a blockaded port, from which she could not legally sail, if she had been transferred from the enemy during the existence of the blockade. These two facts make it necessary to be proved to the satisfaction of the ct., that there had been such a transfer made to the person now claiming the property, as entitled him to bring the vessel out of the blockaded port (SIR WILLIAM SCOTT).

(2) I will not say that a ship originally neutral, upon which no suspicion of enemy's property could arise, might be transferred by one neutral to another in a blockaded port (SIR WILLIAM SCOTT).—THE VIGILANTIA (1805), 6 Ch. Rob. 122; 165 E. R. 872.

730. ———.]—Vessel purchased in a blockaded port. Putting into this country by stress of weather makes no termination of the voyage.—THE GENERAL HAMILTON (1805), 6 Ch. Rob. 61; 165 E. R. 850.

731. Departure under permission to go to neutral port.—Fraudulent deviation to enemy port.]—The permission to go to a neutral port, if accepted, implies a contract that that destination should be *bonâ fide* pursued. . . . But the fact turns out afterwards, that she deposits her cargo in a port, to which she would not have been permitted to go, if the real intention of the voyage had been disclosed. . . . Until the vessel had actually entered the interdicted port, nothing appeared whether she was *in delicto* or not. . . . She goes in, & then the offence is consummated, & the intention is for the first time consummated. It is not till the vessel comes out again that any opportunity is afforded of vindicating the law. . . . I shall . . . pronounce the ship & cargo subject to condemnation (SIR WILLIAM SCOTT).—THE CHRISTIANSBERG (1807), 6 Ch. Rob. 375; 1 Eng. Pr. Cas. 580; 165 E. R. 968.



**732. Right of neutral to withdraw property.]—**THE JUFFROW MARIA SHREEDER (1797), 4 Ch. Rob. 89, n.; 165 E. R. 546.  
*Annotation:—*Fold. The Joanne Marie (1855), 2 Ecc. & Ad. 165.

SUB-SECT. 3.—LIABILITY FOR ACTS OF AGENT.

A. *Acts of Master of Ship.*

(a) *Liability of Ship.*

**733. Shipowner affected with knowledge of master.]—**(1) Restitution does not bar a second seizure, by other parties, either on the same or different evidence; but a second seizor would be subject to the risk of costs & damages.

(2) Violation of blockade by the master affects the ship but not the cargo, unless the property to the same owner, or unless the owner of the cargo is cognisant of the intended violation.

(3) The interest of prize is vested in the captor, & captors may, against the wish of the Crown, proceed to adjudication (SIR WILLIAM SCOTT).

(4) A blockade may exist without a public declaration; although a declaration unsupported by fact will not be sufficient to establish it. . . . The fact . . . duly notified on the spot, is of itself sufficient; for public notifications between govts. can be meant only for the information of individuals; but if the individual is personally informed, that purpose is still better obtained than by a public declaration (SIR WILLIAM SCOTT).

(5) In cases of contraband . . . innocent parts of the cargo belonging to other owners shall not be infected (SIR WILLIAM SCOTT).—THE MERCURIUS (1798), 1 Ch. Rob. 80; 1 Eng. Pr. Cas. 54; 165 E. R. 104.

*Annotations:—*As to (2) *Consd.* The Emanuel (1799), 1 Ch. Rob. 296; *Baltazzi v. Ryder*, The Panaghia Rhomba (1858), 12 Moo. P. C. C. 168. As to (3) *Refd.* The Oranjo Nassau, [1921] P. 190.

**734. ———.]—**THE VROUW JUDITH, No. 648, *ante*.

**735. ———.]—**THE COLUMBIA, No. 676, *ante*.

**736. Fraudulent conduct of master.]—**(1) Freight refused to a ship bound from Mauritius ostensibly to Hamburg, but taken going into a French port (under a pretence of want of water).

(2) If a ship is going with false papers the owner shall lose his freight; I do not say that if an owner makes out a clear case that he had been duped by the fraud of the master, the ct. would in all cases press the rule to the utmost rigor against him; I will not say that a case may not be supposed in which the ct. would incline to exonerate the owner, in spite of the general rule, that the act of the master shall bind his owner; & in spite of all those considerations of utility & necessity by which the rule is sustained (*per Cur.*).—THE AMERICA (1800), 3 Ch. Rob. 36; 1 Eng. Pr. Cas. 127; 165 E. R. 376.

*Annotation:—*As to (2) *Refd.* The Prins der Nederlanden, [1921] 1 A. C. 754.

**737. Intoxication of master.]—**(1) The ct. has held, even where the blockade of a port in Europe has been notified in America, that the merchants of that country might still clear out conditionally for the blockaded port, on the supposition that before the arrival of the vessel, a relaxation may have taken place. But . . . the inquiry should be made at some of the British ports in the channel. It could not be, that ships should be permitted to resort to the ports of the blockaded country. . . . The ports of the blockading country are the proper ports for inquiry (SIR WILLIAM SCOTT).

(2) It would be a dangerous doctrine to hold, that a master in a state of intoxication might be permitted to go on for the blockaded port, &

that the supercargo should lie by, & then come & plead the intoxication of the master, & exculpate himself, by stating a mere intention to dispossess him, & to steer another course. It was the duty of the supercargo, & of the officers concerned in the navigation of the ship, to have dispossessed the master of the command in such critical circumstances (SIR WILLIAM SCOTT).—THE SHEPHERDESS (1804), 5 Ch. Rob. 262; 165 E. R. 770.

*Annotations:—*As to (1) *Apld.* Medeiros v. Hill (1832), 8 Bing. 231. *Refd.* Harratt v. Wise (1829), 9 B. & C. 712; Naylor v. Taylor (1829), 9 B. & C. 718; Dalglish v. Hodgson (1831), 7 Bing. 495.

**738. Master obeying enemy shipper.]—**The ship appears to have been a Prussian vessel, which had been lying some time in Bourdeaux; & if the matter had rested only on the general notoriety of the blockade at Bourdeaux, at the time, it might have laid a ground for that sort of indulgent consideration, which has been pressed upon the ct. as due to ships lying in the enemy's ports, to which information may be supposed to travel with much uncertainty. . . . The master . . . seems to have acted only under an opinion, that because he had signed the charter-party he was bound to proceed. I conceive the law is not so; but that he would have been justified in refusing to go on. As in all other contracts that become illegal, he might have protested against being any longer bound by his charter-party. Does he apply to his own consul, or to the ct. of justice? He does not appear to have applied for any such redress. If he had, indeed, it could not be held in this ct., that his mere engagement to do an act which had become illegal, however injuriously pressed upon him by the artifices of the enemy shipper, could exonerate him from the penalties consequent upon it. Unless it could be maintained, then, that the ship is justified by the direction of the employer in the enemy's country, I can find no principle on which the vessel can be relieved. Such a position would be altogether untenable (SIR WILLIAM SCOTT).—THE TUTELA (1805), 6 Ch. Rob. 177; 165 E. R. 892.

*Annotation:—**Mentd.* Jackson v. Union Marine Insec. (1871), L. R. 10 C. P. 125.

(b) *Liability of Cargo.*

**739. General rule — Cargo follows the ship.]—**This case is, in effect, decided by the decree, which has pronounced the ship subject to condemnation, for fraudulently attempting to go into a blockaded port; for when the ct. decided that, it did, in effect, decide that the vessel was so going to dispose of this cargo. The inference in all cases being that a ship going into a blockaded port is going with an intention of disposing of the cargo (SIR WILLIAM SCOTT).—THE ALEXANDER (1801), 4 Ch. Rob. 93; 1 Eng. Pr. Cas. 358; 165 E. R. 547.

*Annotations:—**Refd.* *Baltazzi v. Ryder*, The Panaghia Rhomba (1858), 12 Moo. P. C. C. 168; The Kim, The Björnstjerne Björnson, The Alfred Nobel, [1920] P. 310. *Mentd.* The André Théodore (1904), 93 L. T. 184.

**740. ———.]—**THE OTTO & OLAF, No. 713, *ante*.

**741. ———.]—**(1) The general, but not universal, rule is, that where a ship is condemned for breach of blockade, the cargo follows the same fate.

(2) The presumption is against a vessel captured in entering a blockaded port, & an imperative & overwhelming necessity for so doing must be established by the owner to exempt from condemnation.

(3) It is not competent to owners of a cargo on board a vessel condemned for breach of blockade to save the cargo from condemnation by showing



*Sect. 5.—Breach of blockade: Sub-sect. 3, A. (b), & B.; sub-sect. 4, A. & B.; sub-sect. 5, A.]*

their innocence in the transaction, as the owners of the cargo are concluded by the illegal act of the master, although it was done without the privity of the owners of the cargo, & even if it was done contrary to their wishes.

When a blockade is known, or might have been known, to the owners of the cargo, at the time when the shipment was made, & they might, therefore, by possibility, be privy to an intention of violating the blockade, such privity will be assumed as an irresistible inference of law, & it is not competent to rebut it by evidence, as in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent; the master is to be treated as the agent for the cargo, as well as for the ship.—*BALTAZZI v. RYDER, THE PANAGHIA RHOMBA* (1858), 12 Moo. P. C. C. 168; 31 L. T. O. S. 373; 14 E. R. 874, P. C.

*Annotations:—As to (3) Distd. The Twee Ambt, [1920] P. 413. Refd. The Kim, The Björnstjerne Björnson, The Alfred Nobel, [1920] P. 319.*

**742. Whether privity of cargo owner material.]**—*THE MERCURIUS, No. 733, ante.*

**743. — Blockade known to all parties.]**—*THE ADONIS* (1804), 5 Ch. Rob. 256; 165 E. R. 767.

*Annotations:—Apld. Baltazzi v. Ryder, The Panaghia Rhomba* (1858), 12 Moo. P. C. C. 168. *Refd. The Kim, The Björnstjerne Björnson, The Alfred Nobel, [1920] P. 319.*

**744. — — —.]**—*BALTAZZI v. RYDER, THE PANAGHIA RHOMBA, No. 741, ante.*

**745. Cargo owner also owner of ship.]**—*THE MERCURIUS, No. 733, ante.*

**746. — — —.]**—*THE MANCHESTER, No. 749, post.*

#### *B. Acts of Agent resident in Enemy Country.*

**747. Strict rule of agency not applied.]**—(1) A shipment was made between July 9 & 19, the notification of the blockade of Amsterdam having been made on June 11, 1798; the first order that the ct. made was for the production of the letters of orders; because, if it had appeared that they were given after the time, when the notification could by a fair possibility be supposed to have been known to the person giving the orders, he would be bound directly by his own act; or if they were sent previous to the notification, two questions might arise; whether sufficient time had intervened since the notification, to have given him an opportunity of counter-ordering the shipment; for if so, he would be legally answerable for the consequences of his own negligence; or, if sufficient time had not intervened, whether, though personally free from all imputation of offence, the claimant might not be bound by that powerful general principle of law, which holds the employer responsible for the acts of his agent. The date of the order in this instance takes the party out of the first description, because it being given, in Oct. 1797, long before the blockade *de facto* commenced the parties are entirely exculpated from all offence in this stage of the transaction (*SIR WILLIAM SCOTT*).

(2) The abstract rule is undoubtedly just that persons are bound by their agents. . . . The agents of foreign merchants in the enemy's country, that country being under blockade, do not stand in the same situation as other agents. They have not only a distinct, but even an opposite interest from that of their principal, to fulfil the commission at all risks as rapidly as possible, for their own private advantage, & for the public interest of their country, at that time under particular

pressure as to the exportation of its produce. This may fairly be allowed to impose a strong obligation on the candour of the ct. not to hold an employer too strictly bound, on mere general principles, by an agent who may be actuated by interests different from those of his principal (*SIR WILLIAM SCOTT*).—*THE NEPTUNUS* (1800), 3 Ch. Rob. 173; 1 Eng. Pr. Cas. 292; 165 E. R. 426.

*Annotations:—As to (1) Consd. The Jeanne Marie* (1855), 2 Ecc. & Ad. 165. *As to (2) Foll'd. The Vrouw Alida* (1855), 3 L. T. 514.

**748. — — —.]**—(1) In cases of agency of persons in an enemy's country during a blockade, something more than the mere strict principle of law is necessary in order to bind employers by their acts (*SIR WILLIAM SCOTT*).

(2) There are two obligations . . . arising out of the public duties of govts., the duty of making immediate communication to foreign states, on the part of the govt. imposing the blockade, & the duty of transmitting such communication immediately on the part of those public ministers to whom it is immediately made (*SIR WILLIAM SCOTT*).—*THE ADELAIDE* (1801), 3 Ch. Rob. 281; 1 Eng. Pr. Cas. 306; 165 E. R. 464.

*Annotations:—As to (1) Apld. The Jeanne Marie* (1855), 2 Ecc. & Ad. 165. *Foll'd. The Vrouw Alida* (1855), 3 L. T. 514. *As to (2) Refd. Oddy v. Bovill* (1802), 2 East, 473.

**749. — — —.]**—(1) Condemnation of ship & that part of the cargo, laden by the directions of the master for owner's account, under the authority of a letter of instructions from the owner of the ship, which stated the vessel to have been "consigned to his (the master's) order."

(2) Wine laden for account of another American merchant by an agent residing in Cadiz, who appeared to act in this instance under the authority of a general order to make such returns as he should consider eligible for goods transmitted to him from this American merchant, in their general course of trade, restored.—*THE MANCHESTER* (1811), 2 Act. 60; 12 E. R. 179, P. C.

**750. — — —.]**—*THE VROUW ALIDA* (1855), 3 L. T. 514.

**751. — — —.]**—(1) As a general rule of law, principals must be bound by the acts of their agents, but this ct. as appears by many judgments, is not disposed to carry this rule to the full extent to which it might properly be applied in ordinary transactions. It looks with indulgence, & I think with a just indulgence, to those cases where neutrals, without any fault of their own, have had their property placed in jeopardy by the breaking out of hostilities, & the acts of agents over whom they could not, at the time, exercise control, & who might have an interest in the very act which endangered the property of their principals (*DR. LUSHINGTON*).

(2) The goods of neutrals in a port before a blockade may be withdrawn (*DR. LUSHINGTON*).—*THE JEANNE MARIE* (1855), 2 Ecc. & Ad. 165; *Spinks*, 167; 164 E. R. 367.

#### *SUB-SECT. 4.—EXCUSES FOR BREACH.*

##### *A. Permission from Blockading Ship.*

**752. Permission to enter with cargo—Implies permission to return with cargo.]**—*THE HENRICUS* (1799), 3 Ch. Rob. p. 159, n.; 165 E. R. 421.

*Annotation:—Apld. The Francisca* (1855), 2 Ecc. & Ad. 113.

**753. Whether valid excuse.]**—*THE VROW BARBARA* (1799), 3 Ch. Rob. 158, n.; 165 E. R. 421.

*Annotation:—Consd. The Francisca* (1855) 2 Ecc. & Ad. 113

**754. — Permission in contradiction of Order in Council.]—**Breach of Order, Jan. 7. Permission given by British officer to proceed, not a ground of protection.

All the certificate of the British officer says is, "I have permitted this vessel to proceed from Pillau, with her cargo to Colberg." Did he possess any authority to grant such permission, in the very face of an Order in Council? It cannot be. I am very sorry that this conduct in the British officer has had the effect of misleading the master of the vessel, but, at all events, his owners have not been deceived; theirs was the original purpose of sending the vessel to an interdicted port, & from which purpose they had never departed. At the same time it is not without some degree of pain that I condemn this ship & cargo, as proceeding to an interdicted port under an insufficient authority (SIR WILLIAM SCOTT).—THE COURIER (1810), Edw. 249; 2 Eng. Pr. Cas. 50; 165 E. R. 1099.

**755. — Proof of permission.]—**If it is contended, on the part of a neutral vessel, that she is entitled to go to a blockaded port by reason of permission having been given to her by one of the blockading force or one of Her Majesty's cruisers, it is her duty, if she means the *et.* to place any reliance on such permission, to take care to have the name of the cruiser, that it may be contradicted if not true. A mere statement of there being a cruiser, without any name & without any definite place being stated where she was seen, never can be received. The vessel must be condemned, & I can make no distinction in favour of the cargo because it was purchased in a blockaded port by the supercargo, an agent sent by the owners of the cargo for the purpose (DR. LUSHINGTON).—THE NOIRNEN (1855), Spinks, 171; 2 Ecc. & Ad. 169; 164 E. R. 369.

#### B. Stress of Circumstances.

**756. General rule — Absolute & unavoidable necessity.]—**It is usual to set up the want of water & provisions as an excuse, & if I was to admit pretences of this sort, a blockade would be nothing more than idle ceremony. . . . I will not say that cases of necessity may not occur that would afford a sufficient justification, & I add that if the party can show that they were under any great necessity I would certainly admit such an excuse. But if they cannot do this, & unless it is proved that in coming up the Channel there was no other port, either English or French, but the interdicted port of Amsterdam into which they could put, I shall reject the apology (*per Cur.*).—THE HURTIGE HANE (1799), 2 Ch. Rob. 124; 165 E. R. 261; *subsequent proceedings*, 3 Ch. Rob. 324.

**757. — —.]—**The want of provisions is an excuse which will not on light grounds be received; because an excuse, to be admissible, must show an imperative & overruling compulsion to enter the particular port under blockade which can scarcely be said in any instance of mere want of provisions. It may induce the master to seek a neighbouring port, but it can hardly ever force a person to resort exclusively to the blockaded port. What is stated respecting the wind is of a different nature. . . . This is a fact that may admit of specific evidence, &, therefore, I shall admit affidavits to be offered on that point. . . . Considering the reference that has been made to

the particular state of the winds in the present case, . . . I shall admit evidence to be introduced on this point (SIR WILLIAM SCOTT).—THE FORTUNA (1803), 5 Ch. Rob. 27; 1 Eng. Pr. Cas. 417; 165 E. R. 685.

**758. — —.]—**In this case the fact is not denied, that the ship was taken in a port which is blockaded, & therefore the whole burden of exonerating himself from the penal consequences lies upon the party. He must show that he was led there by some accident which he could not control, or by some want of information which he could not obtain (SIR WILLIAM SCOTT).—THE ARTHUR (1810), Edw. 202; 2 Eng. Pr. Cas. 37; 165 E. R. 1082; *affd.* (1811), Edw. n., P. C. Annotation: *Refd.* The Leonora, [1918] P. 182.

**759. — —.]—**BALTAZZI v. RYDER, THE PANAGHIA RHOMBA, No. 741, *ante*.

**760. Want of water & provisions—Unblockaded ports available.]—**THE HURTIGE HANE, No. 756, *ante*.

**761. — —.]—**THE AMERICA, No. 736, *ante*.

**762. — —.]—**THE STAR (1801), 3 Ch. Rob. 193; 165 E. R. 433.

**763. — —.]—**THE FORTUNA, No. 757, *ante*.

**764. Damage to ship.]—**THE VENSAR (1799), 3 Ch. Rob. 159, n.; 165 E. R. 421.

Annotation: *Refd.* The Francisca (1855), 2 Ecc. & Ad. 113.

**765. — —.]—**THE STAR (1801), 3 Ch. Rob. 193; 165 E. R. 433.

**766. Stress of weather.]—**THE FORTUNA, No. 757, *ante*.

**767. — —.]—**THE CHARLOTTA (1810), Edw. 252; 2 Eng. Pr. Cas. 52; 165 E. R. 1099.

**768. To procure pilot.]—**THE ARTHUR, No. 758, *ante*.

**769. Exhaustion of crew.]—**THE ELIZABETH (1810), Edw. 198; 165 E. R. 1081.

**770. To avoid capture.]—**A Swedish ship laden with tar, pitch, & deals, sailing under instructions to take British convoy for Lisbon, in case the master should not be able to obtain a purchaser at Copenhagen for the ship & cargo, but afterwards detected entering a Dutch port, liable to condemnation with her cargo, notwithstanding the protest of the master, alleging the impossibility of obtaining convoy, & that the deviation was occasioned by his apprehension of capture by French cruisers. All favourable construction with respect to the general trade of Sweden in these articles removed by suspicious circumstances in the case.—THE CHARLOTTE (1810), 1 Act. 201; 12 E. R. 77, P. C.

#### SUB-SECT. 5.—TERMINATION OF LIABILITY FOR BREACH.

##### A. Termination of Voyage.

**771. General rule — Liability continues till end of voyage.]—**THE WELVAART VAN PILLAW, No. 661, *ante*.

**772. — — —.]—**This is the case of a ship taken on a voyage from Havre to Altona; all the papers express that the ship came from Havre . . . the master on his examination says "that he does not know for what reason he was taken," but it is not necessary that the captor should have assigned any reason at the time of capture; he takes at his own peril, & on his own responsibility

#### PART VI. SECT. 5, SUB-SECT. 4.—B.

**756.1. General rule—Absolute & unavoidable necessity.]—**It has been laid down as a general rule in British Cts. of Prize, that no excuse or pretence

whatever, short of the most insurmountable necessity, shall be admitted as an adequate justification for a vessel proceeding to a blockaded port. Whatever other reason is assigned it

is presumed she is going there to trade.—THE EXPRESS (1811), Stewart, 292.

**781.1. Want of water & provisions.]—**THE ELIZABETH (1805), Stewart, 80.

*Sect. 5.—Breach of blockade: Sub-sect. 5, A. & B. Sects. 6 & 7. Part VII. Sects. 1 & 2.]*

to answer in costs & damages, for any wrongful exercise of the rights of capture. At the same time it may be a matter of convenience that some declaration should be made; because it is possible, that if the grounds are stated, it may be in the power of the neutral master to give such reasons as may explain away the suspicion that is suggested. It may, therefore be convenient to both parties, but it is not absolutely necessary; it is not a duty incumbent on the captor to state his reasons; much less it is to be argued negatively, that, because no mention is made of the blockade at the time of capture, it does not follow that it must necessarily have been unknown to both the parties. . . . Where a ship has contracted the guilt by sailing with an intention of entering a blockaded port, or by sailing out, the offence is not purged away till the end of the voyage; till that period is completed, it is competent to any cruisers to seize & proceed against her for that offence. . . . A blockade may be more or less rigorous, either for the single purpose of watching the military operations of the enemy, & preventing the egress of their fleet, . . . or on a more extended scale, to cut off all access of neutral vessels to that interdicted place, which is strictly & properly a blockade, for the other is in truth no blockade at all, as far as neutrals are concerned. It is an undoubted right of belligerents to impose such a blockade, though a severe right, & as such, not to be extended by construction; it may operate as a grievance on neutrals, but it is one to which, by the law of nations, they are bound to submit. Being, however, a right of a severe nature, it is not to be aggravated by mere construction. . . .

A temporary & forced secession of the blockading force, from the accidents of winds & storms, is not sufficient to constitute a legal relaxation. . . .

What is a blockade but to prevent access by force. If the ships stationed on the spot to keep up the blockade will not use their force for that purpose, it is impossible for a ct. of justice to say there was a blockade actually existing at that time.

It is in vain for govts. to impose blockades, if those employed on that service will not enforce them (SIR WILLIAM SCOTT).—THE JUFFROW MARIA SCHROEDER (1800), 3 Ch. Rob. 148; 1 Eng. Pr. Cas. 279; 165 E. R. 417.

*Annotations:—*Consd. The Leucade (1855), 2 Eco. & Ad. 228; The Falk, etc., [1921] 1 A. C. 787. *Refd.* The Franciska (1855), 2 Eco. & Ad. 113; The Ostsee (1855), 2 Eco. & Ad. 170.

773. What amounts to termination of voyage—Harbouring due to stress of weather.]—THE GENERAL HAMILTON, No. 730, *ante*.

*B. Raising of Blockade.*

774. Absolute termination of liability.]—The blockade was raised before the vessel sailed so that there is not the *corpus delicti* existing (SIR WILLIAM SCOTT).—THE CONFERENZRATH (1806), 6 Ch. Rob. 362; 1 Eng. Pr. Cas. 571; 165 E. R. 963.

*Annotations:—*Refd. The Baltica (1855), Spinks, 264; Sorensen v. R., The Ariel (1857), 11 Moo. P. C. C. 119.

775. —.]—THE LISETTE, No. 726, *ante*.

SECT. 6.—MODIFICATION OF BLOCKADE.

776. Necessity for notice of nature of modification.]—NORTHCOTE v. DOUGLAS, THE FRANCISKA, No. 685, *ante*.

SECT. 7.—REVOCATION OF BLOCKADE.

777. Necessity for notice.]—THE NEPTUNUS, No. 711, *ante*.

778. —.]—THE VROW JOHANNA, No. 690, *ante*.

779. —.]—It is to be presumed that the notification will be formally revoked, & that due notice will be given of it; till that is done, the port is to be considered as closed up (SIR WILLIAM SCOTT).—THE NEPTUNUS (1799), 2 Ch. Rob. 110; 1 Eng. Pr. Cas. 195; 165 E. R. 256.

*Annotations:—*Apld. The Juffrow Maria Schroeder (1800), 3 Ch. Rob. 148. *Refd.* Harratt v. Wise (1829), 9 B. & C. 712; Naylor v. Taylor (1829), 9 B. & C. 718; Medeiros v. Hill (1832), 8 Bing. 231; Northcote v. Douglas, The Franciska (1855), 10 Moo. P. C. C. 37.

## Part VII.—Contraband.

SECT. 1.—IN GENERAL.

780. Nature of carriage of contraband—Not unlawful.]—It is not an offence against the law of nations, or the law of this country, for the subject of a neutral state to supply contraband of war to a belligerent power; & the right of the other belligerent to seize such contraband of war *in transitu* is merely a co-existent conflicting right, which exposes the neutral merchant to the risk of confiscation, but does not render illegal a contract between him & another neutral subject for a joint adventure for the supply of such contraband goods.—*Re GRAZEBROOK, Ex p. CHAVASSE* (1865), 4 De G. J. & Sm. 655; 6 New Rep. 6; 34 L. J. Bcy. 17; 12 L. T. 249; 11 Jur. N. S. 400; 13 W. R. 627; 2 Mar. L. C. 197; 46 E. R. 1072, L. C.

*Annotations:—*Refd. Austin Friars Steam Shipping Co. v. Strack, [1905] 2 K. B. 315; Caine v. Palace Steam Shipping

Co., [1907] 1 K. B. 670. *Mentd.* The Helen (1865), L. R. 1 A. & E. 1; Connolly v. Sibery (1905), 69 J. P. 115.

781. —.]—ANDERSEN v. MARTEN, No. 264, *ante*.

782. — Adventure liable to termination—At instance of offended belligerent.]—*Re GRAZEBROOK, Ex p. CHAVASSE*, No. 780, *ante*.

783. —.]—ANDERSEN v. MARTEN, No. 264, *ante*.

784. — Enemy character not given to neutral ship.]—ANDERSEN v. MARTEN, No. 264, *ante*.

785. When carriage of contraband commences—Quitting port for hostile destination.]—The master having altered his destination on hearing of the blockade of Amsterdam the question of contraband was held not to arise.

Goods going to a neutral port cannot come under the description of contraband, all goods going there

PART VI. SECT. 7.

*m. Fessel seized after revocation—Necessity for restitution.]—THE BETSEY* (1804), Stewart, 39.

*n. Common opinion that blockade raised—Insufficient to establish sus-*

*pension—Unless founded on facts supporting such conclusion.]—THE NANCY* (1805), Stewart, 28.

PART VII. SECT. 1.

*o. Distinction between absolute & conditional contraband.]—The expression*

contraband of war has a twofold meaning:—(1) absolute contraband, which includes everything useful for war only; (2) conditional contraband, which includes all things which though useful for both peace & war, become contraband if destined for the purpose of

being equally lawful. . . . The rule respecting contraband, is that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, the offence is complete, & it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, & in the actual prosecution of such a voyage, the penalty is not now generally held to attach (SIR WILLIAM SCOTT).—THE IMINA (1800), 3 Ch. Rob. 167; 1 Eng. Pr. Cas. 289; 165 E. R. 424.

*Annotations*:—CONSOL. THE MINERVA (1801), 3 Ch. Rob. 229; Hobbs v. Henning (1865), 17 C. B. N. S. 791. *Reid*, Seymour v. London & Provincial Marine Insce. (1872), 41 L. J. C. P. 193; The Alwina, [1916] P. 131.

**786. Carriage between ports of same country.**—THE EDWARD, No. 801, *post*.

**787. Loss of character of contraband—Port of destination becoming British—Before arrival of goods.**—There must be a *delictum* existing at the moment of seizure to sustain the penalty. It is said that the offence was consummated by the act of sailing & so it might be with respect to the design of the party, & if the seizure had been made whilst the offence continued, the property would have been subject to condemnation. But when the character of the goods is altered & they are no longer to be considered as contraband, going to the port of an enemy, it is not enough to say that they were going under an illegal intention. There may be the *mens rea*, not accompanied by the act of going to an enemy's port. The same rule does apply to cases of contraband, & upon the same principle in which it has been applied in those of blockade; I am not aware of any cases in which the penalty of contraband has been inflicted on goods not *in delicto*, except in the recent class of cases respecting the proceeds of contraband carried outward with false papers. But on what principle have those decisions been founded? On this, that the right of capture having been defrauded in the original voyage, the opportunity should be extended to the returned voyage. Here the opportunity has been afforded till the character of the port of destination became British. Till that time the liability attached; after that, though the intention is consummated, there is a material defect in the body & substance of the offence, in the fact, though not in the intent. I am of opinion that it is a discharge, & a complete acquittal that long before the time of seizure these goods had lost their noxious character of going as contraband to an enemy's port (*per Cur.*).—THE TRENDE SOSTRE (1807), 6 Ch. Rob. 390, n.; 1 Eng. Pr. Cas. 588; 164 E. R. 973.

*Annotations*:—CONSOL. THE ATALANTA (1808), 6 Ch. Rob. 440; The Alwina, [1916] P. 131.

**788. Cargo declared contraband during voyage.**—On Sept. 16, 1914, a neutral Dutch vessel left a neutral Spanish port for a neutral destination, Rotterdam, with a cargo of iron ore shipped by a Spanish firm & consigned to a Dutch firm. On Sept. 19, when off the Isle of Wight, the vessel was stopped by a British warship & sent into a British port for examination. On Sept. 21 iron ore, which had been declared free,

was made conditional contraband, &, on Oct. 4, the cargo was seized as prize, on the assumption that it was intended for ultimate delivery to Krupp's in Germany. To discharge the cargo the vessel was sent to Middlesbrough, where she was released:—*Held*: the cargo could be properly condemned as the seizure took place after iron ore had been declared contraband; but the ship-owners were, in the circumstances, entitled to freight, though not to demurrage, as the temporary detention of a neutral vessel by a belligerent was an unfortunate result of a state of war.—THE KATWIJK, [1916] P. 177; 114 L. T. 1214; 31 T. L. R. 448; 13 Asp. M. L. C. 399.

*Annotation*:—*Reid*, The Sorfareren (1915), 85 L. J. P. 121.

**789. Whether doctrine applicable to persons.**—TRENT CASE (1861), Hall's International Law, 8th ed. p. 830.

*Annotation*:—*Reid*, Yangtze Insce. Assocn. v. Indemnity Mutual Marine Assocn., [1908] 1 K. B. 910.

**790.** —.]—During the Russo-Japanese war plaintiffs re-insured with defts. their risk on a neutral vessel which was to carry a cargo of kerosene only from Shanghai to Vladivostok. They policy contained the clause: "Warranted no contraband of war." While on the insured voyage the vessel was captured by a Japanese cruiser, & was subsequently condemned by a Japanese Prize Ct. for having on board two Russian naval officers who had been received on board as passengers to Vladivostok. The Prize Ct. held that the ship "must be confiscated, as the vessel was actually engaged in transporting contraband persons":—*Held*: contraband persons were not "contraband of war" within the meaning of the warranty, & defts. were liable on the policy. *Semble*: the expression "contraband of war" as ordinarily used does not apply to persons, but only to property.—YANGTZE INSURANCE ASSOCN. v. INDEMNITY MUTUAL MARINE ASSURANCE CO., [1908] 2 K. B. 504; 77 L. J. K. B. 995; 99 L. T. 498; 24 T. L. R. 687; 52 Sol. Jo. 550; 13 Com. Cas. 283; 11 Asp. M. L. C. 138, C. A.

— **Carriage of enemy personnel.**—See Part IV., Sect. 7, sub-sect. 3, *ante*.

**Warranty against carriage of contraband—Marine insurance policies.**—See INSURANCE, Vol. XXIX., p. 184, Nos. 1424, 1425.

## SECT. 2.—CONDITIONAL CONTRABAND.

**791. Liability to condemnation—Purpose for which intended—Civil or warlike purposes.**—Another circumstance to which some indulgence, by the practice of nations, is shown, is, when the articles are in their native & unmanufactured state. Thus iron is treated with indulgence, though anchors & other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage. . . .

The most important distinction is, whether the articles are intended for the ordinary use of life, or even for mercantile ships' use; or whether they are going with a highly probable destination to military use. . . . The nature & quality of the port to which the articles were going is not an irrational test; if the port is a general commercial port, it shall be understood that the articles are going for civil use, although occasionally a frigate

war; excluding from the meaning of contraband of war such things as are useful for the purpose of peace only.—OSAKA SHOSEN KAISHA v. PROMETHEUS (1907), 2 Hong Kong L. R. 207.

## PART VII. SECT. 2.

**791 i. Liability to condemnation—**

*Purpose for which intended—Civil or warlike purposes.*—THE CRAIGSLA, [1915] J. D. R. 878.

*p.* — *Arts & sciences.*—The arts & sciences are admitted, amongst all civilised nations, as forming an exception to the severe rights

of warfare, & as entitled to favour & protection. They are considered not as the *peculium* of this or of that nation, but as the property of mankind at large, & as belonging to the common interest of the whole species.—THE MARQUIS DE SOMERUELES (1812), Stewart, 482.

**Sect. 2.—Conditional contraband. Sects. 3 & 4:**  
**Sub-sect. 1.]**

or other ships of war may be constructed in that port. *Contra*, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, & although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final application of an article *incipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; & the presumption of hostile use, founded on its destination to a military port, is very much inflamed, if at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful (SIR WILLIAM SCOTT).—THE JONGE MARGARETHA (1799), 1 Ch. Rob. 189; 1 Eng. Pr. Cas. 100; Tudor, L. C. Mer. Law, 3rd ed. 981; 165 E. R. 143.

**Annotations:—***Distd.* The Frau Margaretha (1805), 6 Ch. Rob. 92. *Consd.* Yangtze Insee, Assocn. v. Indemnity Mutual Marine Assocn., [1908] 2 K. B. 504; The Kim, The Alfred Nobel, The Bjornstjerne Bjornson, The Fridland, [1915] P. 215. *Refd.* The International (1871), 1 R. 3 A. & E. 321; The Hakan, [1918] A. C. 148.

**792. ——— Knowledge of owner of confiscable character.]**—Conditional contraband goods consigned to an enemy port can properly be condemned whenever the ct. is of opinion that, under all the circumstances brought to its knowledge, they were probably intended to be applied for warlike purposes of the enemy. Knowledge of the confiscable character of the goods on the part of the owner of the ship is sufficient to justify the condemnation of the ship, at any rate, where the goods in question constitute a substantial part of the whole cargo.

In Jan. 1916, the Swedish owners of a ship chartered her to German fish merchants for voyages from Scandinavian to German Baltic ports. The ship was captured on Apr. 4, 1916, while carrying under the charterparty a cargo of salted herrings to Lübeck, a German port. Food-stuffs were declared to be conditional contraband on Aug. 4, 1914. The consignees of the herrings were bound to hand them over to a German co., appointed by the German Govt. for purposes connected with the Govt. control of foodstuffs, that control being rendered necessary by the war & the consequent scarcity of food in Germany:—*Held*: upon the facts the cargo was confiscable, & the ship was properly condemned since the owners must have known the facts which rendered the cargo liable to condemnation.—THE HAKAN, [1918] A. C. 148; 87 L. J. P. 1; 117 L. T. 619; 34 T. L. R. 11; 62 Sol. Jo. 23; 14 Asp. M. L. C. 161; 2 P. Cas. 479, P. C.

**Annotations:—***Apld.* The Hillerod, [1918] A. C. 412. *Consd.* The Dirigo, The Hallingdal, etc., [1919] P. 204. *Expld.* The Ran, [1919] P. 319. *Consd.* The Kim, The Bjornstjerne Bjornson, The Alfred Nobel, [1920] P. 319. *Apld.* The Rannveig, [1920] P. 177. *Consd.* The Zamora, [1921] 1 A. C. 801. *Refd.* The Prins der Nederlanden, [1920] P. 216; The Vesta, [1921] 1 A. C. 774.

**793. ——— Material required only for purposes of ship—Sale to enemy at destination.]**—THE MARGARETHA MAGDALENA, No. 908, *post*.

**794. ——— Material to furnish other ship—To be bought at destination.]**—THE MARGARETHA MAGDALENA, No. 908, *post*.

**SECT. 3.—REAL DESTINATION OF CARGO.**

**795. Test of liability to capture.]**—THE JONGE MARGARETHA, No. 791, *ante*.

**796. ———.]**—THE IMINA, No. 785, *ante*.

**797. ———.]**—Timber has frequently, from particular circumstance, a definite & determinate character; it may be denoted, by a particular form, as knee timber, which is crooked timber, peculiarly useful for the building of ships; or it may be distinguished by its dimensions of size. But as to other timber, generally, the fair criterion will be, the nature of the port to which it is going; if it is going to Brest, the destination may be reasonably held to control & appropriate the dubious quality, & fix upon it the character of ship timber, if to other ports, of a less military nature, though timber of the same species, it may be more favourably regarded. . . . It is the practice of this ct. not to consider, as included within the prohibition, all that a more extended interpretation might justify; it restores spars & balks of ordinary magnitude, unless there is something special in the circumstances attending them, to show that they have a positive destination to naval purposes. . . . With respect to such timber as is in its own nature ambiguous, I am disposed to look to the criterion of the destination as an equitable rule of interpretation, taking a fair course between the rights of exportation of native produce, on the part of the neutral country & the defensive rights of the belligerent (SIR WILLIAM SCOTT).—THE TWENDE BRODRE (1801), 4 Ch. Rob. 33; 1 Eng. Pr. Cas. 332; 165 E. R. 525. **Annotation:—***Refd.* The Rannveig, [1920] P. 177.

**798. ———.]**—(1) Simulated papers alone are not such a breach of neutrality as to work a forfeiture of the ship, but only evidence from which a cause of forfeiture may be inferred.

(2) The liability of these goods to lawful seizure although their quality was such as might make them contraband of war, depended on their destination & they were not liable unless it distinctly appeared that the voyage was to an enemy's port (*per* CUR.).—HOBBS v. HENNING (1865), 17 C. B. N. S. 791; 5 New Rep. 406; 34 L. J. C. P. 117; 12 L. T. 205; 11 Jur. N. S. 223; 13 W. R. 431; 2 Mar. L. C. 183; 144 E. R. 317.

**Annotations:—***As to* (2) *Refd.* Seymour v. London & Provincial Marine Insee. (1872), 41 L. J. C. P. 193. *Generally*, *Mentd.* De Mora v. Concha (1885), 29 Ch. D. 268.

**799. ———.]**—THE LOEKKEN, No. 302, *ante*.

**800. ———.]**—THE NOORDAM, No. 829, *post*.

**801. Hostile destination presumed.]**—(1) It appears that there was no reason why the vessel should have been found where she was described to be; on the contrary, that the ordinary rules of navigation required a different course. The ship had an opportunity of pursuing her voyage; the winds were rather favourable. Instead of pursuing her course, she appears to have been hovering about, & adhering to the French coast, for which no reason is assigned; there being no cause assigned, I am under the necessity of inferring that it was done without any justifiable cause & with an intention of getting into a French port (SIR WILLIAM SCOTT).

(2) The rule has been already established that the transfer of contraband from one part of a country to another, where it is required for the purposes of war, is subject to be treated in the same manner, as an original importation into the country itself (SIR WILLIAM SCOTT).—THE EDWARD (1801), 4 Ch. Rob. 68; 1 Eng. Pr. Cas. 350; 165 E. R. 538.

**802. Naval or military port.]**—THE JONGE MARGARETHA, No. 791, *ante*.

**803. ———.]**—THE NEPTUNUS (1800), 3 Ch. Rob. 108; 1 Eng. Pr. Cas. 264; 165 E. R. 403.

**Annotations:—***Refd.* The Jeanne, The Vera, The Forsvik, The Albania, [1917] P. 8; The Prins der Nederlanden [1921] 1 A. C. 754.

**804.** —.]—Contraband rosin, to a port not of a military equipment, not contraband.—THE NOSTRA SIGNORA DE BEGONA (1804), 5 Ch. Rob. 97; 1 Eng. Pr. Cas. 483; 165 E. R. 711.

**805.** —.]—The seizure in this case was perfectly justifiable.

In the case of a ship carrying such a cargo as tar to one of the great naval arsenals of the enemy, it is not improper to bring in for inquiry as to the fact of property, whether it was going on the private account of the neutral merchant, or under a contract with the govt., by which those arsenals were more usually supplied. . . . The ship was brought in on Mar. 20, the claim was given on Mar. 27, & on Mar. 31 the offer or restitution was made. Since that time, there seems to have been some delay. . . . Cases of this description must be conducted with great tenderness to the neutral interest, & as little time as possible must be lost in deliberation, & some demurrage must be allowed, but not against the captors in this case (SIR WILLIAM SCOTT).—THE ZACHEMAN (1804), 5 Ch. Rob. 152; 1 Eng. Pr. Cas. 439; 165 E. R. 730.

*Annotation*.:—*Refd.* The Ostsee, Schacht v. Otter (1855), 9 Moo. P. C. C. 150.

**806.** —.]—Cheese, going to a place of naval equipment, & fit for naval use, is contraband. Corunna is, I believe, itself a place of naval equipment in some degree, & if not so exclusively, & in its prominent character, yet, from its vicinity to Ferrol, is almost identified with that port (SIR WILLIAM SCOTT).—THE ZELDEN RUST (1805), 6 Ch. Rob. 93; 1 Eng. Pr. Cas. 532; 165 E. R. 862.

**807.** —.]—THE RANGER, No. 904, *post*.  
**808.** Port both mercantile & naval.]—THE NEPTUNUS (1800), 3 Ch. Rob. 108; 1 Eng. Pr. Cas. 264; 165 E. R. 403.

*Annotations*.:—*Refd.* The Jeanne, The Vera, The Forsvik, The Albania, [1917] P. 8; The Prins Der Nederlanden, [1921] 1 A. C. 754.

**809.** Colourable destination neutral port.]—

(1) Shipment for neutral merchants between enemies' ports, but with a colourable destination to a neutral port, not admitted to further proof.

(2) If they [neutral claimants] gave absolute directions to the French correspondents to ship the goods for Hamburg, & these French merchants have so departed from their orders, & have exposed this property to condemnation, the neutral merchants will not be answerable for the payment; & the only real losers will be the French shippers themselves (SIR WILLIAM SCOTT).

(3) The master's testimony is the strongest that can be given respecting the fact of destination. It may perhaps be not safe to rely entirely on him, as to the question of property, for he may be totally ignorant of it, & may entertain misapprehensions about it; but if there is any purpose to be effected by a false destination, he is necessarily the person to whom that secret must be confided; he is a witness entitled to great attention on that point, for he is the person who must necessarily be employed to carry it into execution; where he is not fairly discredited, his testimony may be held conclusive as to that point (SIR WILLIAM SCOTT).—THE CAROLINA (1800), 3 Ch. Rob. 75; 165 E. R. 391.

*Annotation*.:—*Generally, Refd.* The Kim, The Alfred Nobel, The Bjornsterjne Bjornson, The Fridland (1915), 85 L. J. P. 38.

**810.** —.]—THE MARGARETHA CHARLOTTE (1801), 3 Ch. Rob. 78, n.; 165 E. R. 392, P. C.

**811.** —.]—The destination is a fact so proper

to be known, for every purpose of justification to the belligerent cruiser, & of convenience & protection to the neutral claimant, that if the voyage is changed from the original intention before the ship sails, it should be notified in the ship's papers, & not be left to be disclosed only by a private letter on board, whilst a different voyage remains standing in all the papers (SIR WILLIAM SCOTT).—THE MARS (1805), 3 Ch. Rob. 79; 165 E. R. 857.

**812.** Port not military or naval.]—THE NOSTRA SIGNORA DE BEGONA, No. 804, *ante*.

**813.** —.]—A destination to Quimper cannot be considered as such an identical destination with a voyage to Brest as to bring this cargo under the authority of the *Jonge Margaretha*, No. 791, *ante*. I am not disposed to hold that these articles, on this destination, are so clearly contraband, though certainly very near it, as to preclude claimant from giving further proof of the property (SIR WILLIAM SCOTT).—THE FRAU MARGARETHA (1805), 6 Ch. Rob. 92; 165 E. R. 861.

*Annotation*.:—*Distd.* The Zelden Rust (1805), 6 Ch. Rob. 93.

**814.** Port as base of supply for enemy forces.]—The ct. condemned as prize a large quantity of coffee seized on board the steamship *Liv* & nine other Scandinavian vessels, the ground of the condemnation being that the goods were intended to be forwarded to Hamburg, which was a base of supply for the enemy forces.—THE LIV (1917), 33 T. L. R. 466.

**815.** — Effect of declaration of armistice.]—THE RANNVEIG, No. 917, *post*.

**816.** Hostile destination abandoned.] — THE ALWINA, No. 560, *ante*.

**817.** Destination not overtly hostile.—Attempt by master to sail for enemy port.—Refusal of crew to assist.]—A Dutch vessel sailed from ports in the Dutch East Indies with a cargo of coffee consigned to the representatives in Holland of the estates on which the coffee was grown. When the vessel reported at Freetown the British naval authorities received information that the master had approached the crew to ascertain whether they would join him in the barratrous enterprise of taking the ship & cargo to Stettin instead of Amsterdam, her port of discharge. The master had several times stated that he intended to take the ship to Stettin; the crew declined to be parties to the undertaking. The ship & cargo were seized at Freetown, & the Crown claimed their condemnation as prize on the ground that they were bound to an enemy base of supply.—*Held*: although the master entertained the design of taking the ship & cargo to an enemy port, the ship was still on her authorised voyage when seized at Freetown; as the crew would not support the master he was not in a position to carry the design into execution & it could not be said, therefore, that the destination of the vessel was Stettin. Accordingly, there was no overt act which would subject the ship & cargo to condemnation & there must be an order for their release.—THE TWEE AMBT, [1920] P. 413; 90 L. J. P. 35; 125 L. T. 448; 15 Asp. M. L. C. 347.

**Doctrine of continuous voyage.**—*See* Sect. 4, *post*.

#### SECT. 4.—DOCTRINE OF CONTINUOUS VOYAGE.

##### SUB-SECT. 1.—IN GENERAL.

**818.** Liability of cargo to confiscation.] — THE MARIA, No. 255, *ante*.

#### PART VII. SECT. 4, SUB-SECT. 1.

##### 818 i. Liability of cargo to confiscation.

*Non*.]—Ship & cargo upon return voyage condemned where contraband goods which composed a part of the

outward cargo were concealed by false papers, & the return cargo was obtained from the proceeds of the outward



*Sect. 4.—Doctrine of continuous voyage: Sub-sects. 1 & 2, A.]*

**819. What constitutes a continuous voyage—Dependent on facts of each case.]—THE MARIA, No. 255, ante.**

**820. ———.]—The interposition of a British port held to take the voyage out of the intendment of the Order Jan. 7, 1407.**

Every case of this sort is a case of circumstances (LORD STOWELL).—THE MERCURIUS (1808), Edw. 53; 165 E. R. 1030.

*Annotations:—Consd. Dunn v. Bucknell, Dunn v. Currie, [1902] 2 K. B. 614; The Leonora, [1918] P. 182.*

**821. —Declared intention in charterparty.]—THE ENOCH (1805), cited in 5 Ch. Rob. at p. 370; 165 E. R. 808.**

*Annotation:—Consd. The Maria (1805), 5 Ch. Rob. 365.*

**822. —Absence of charterparty—Presumption from other circumstances.]—THE ROWENA (1805), cited in 5 Ch. Rob. at p. 370; 165 E. R. 808.**

*Annotation:—Consd. The Maria (1805), 5 Ch. Rob. 364.*

**823. —Vessel calling at British port for trading licence.]—THE MINNA (1807), cited in Edw. at p. 55; 165 E. R. 1031.**

*Annotation:—Consd. The Mercurius (1808), Edw. 11.*

**824. ———.]—THE MERCURIUS, No. 820, ante.**

**825. —Part of voyage in ballast.]—(1) The Order in Council of Mar. 29, 1854, exempts from capture Russian vessels which, prior to Mar. 29, shall have sailed from any foreign port bound for any port in her Majesty's dominions. A vessel under a charterparty for a voyage from Havannah or Matanzas to Cork, sailed from Havannah in ballast prior to such date, took in her cargo at Matanzas, & sailed thence subsequently thereto:—*Held*: it was a continuous voyage; it commenced at Havannah, where the charterparty was entered into, & the ship must be restored under the Order in Council.**

(2) All relaxation of belligerent rights emanating from the Govt. of this country, & declared in authentic documents, should receive a liberal construction, as liberal a construction as the terms of those documents will admit of . . . governed & restricted by the words which are used. . . . The real meaning of the Order in Council is, that the vessel shall have sailed prior to Mar. 29, on a voyage to end in Great Britain (DR. LUSHINGTON).—THE ARGO (1854), 1 Ecc. & Ad. 375; Spinks, 52; 24 L. T. O. S. 16; 18 Jur. 986; 2 Eng. Pr. Cas. 294; 164 E. R. 216.

## SUB-SECT. 2.—ULTIMATE DESTINATION.

### A. In General.

**826. Goods consigned to neutral country—Re-export to enemy country.]—A quantity of dried fruit was shipped on Swedish steamships in United States ports for carriage to a Swedish port. The fruit was afterwards seized by the Crown on board the Swedish vessels under the Reprisals Order on the ground that the goods were contraband & destined ultimately for Germany. The fruit was claimed by the Swedish Victualling Commission:—*Held*: on the facts, the fruit belonged to the Commission & was *bond fide* intended for consumption in Sweden, & therefore the claim must be allowed.—THE PACIFIC & THE SAN FRANCISCO (1917), 33 T. L. R. 529.**

**827. ———.]—A neutral vessel sailed from**

New York in Nov. 1914. Part of her cargo consisted of rubber, which was consigned by claimant, an American citizen, to a Swede at Landsrona. The vessel was captured by a British cruiser. At the hearing in the Prize Ct. evidence was offered by the Crown to the effect that the final destination of the rubber was Germany. The President held that as the doctrine of continuous voyage & transportation, both as regards carriage by sea & land, was part of international law at the time of the commencement of the war in Aug. 1914, all goods which were intended for the use of the German Govt., although nominally having a neutral port as their port of destination, must be condemned as lawful prize. From the order of condemnation claimant appealed:—*Held*: applt.'s title had not been made out, & the probabilities of the case pointed to the version given at the original hearing being the true one.—THE KIM (1917), 116 L. T. 577; 33 T. L. R. 400; 14 Asp. M. L. C. 65, P. C.; *affg.* S. C. *sub nom.* THE KIM, THE ALFRED NOBEL, THE BJORNSTERJNE BJORN-SON, THE FRIDLAND, [1915] P. 215, 267.

*Annotations:—Consd. The Noordam, [1919] P. 58. Refd. The Louisiana, The Nordie, The Tomsk, The Joseph W. Fordney (1915), 32 T. L. R. 619; The Balto, [1917] P. 79; The Derflinger, The Forde, The Leda, Re American Meat Packers' Agreement, Re Certain Swedish Copper, [1919] P. 264; The Ran, [1919] P. 317. Mentd. The San Jose, Cometa & Salerno (1916), 33 T. L. R. 12; Adelaide S.S. Co. v. R. (1922), 127 L. T. 63.*

**828. —Evidence of re-export trade.]—(1) When contraband goods consigned to a neutral port have been seized as prize on the ground that they have an ultimate enemy destination, the existence of an extensive trade by a re-export of similar goods, or products thereof, from the neutral country to an enemy country is of itself such a circumstance of suspicion as disentitles a successful claimant from recovering costs or damages.**

(2) A prize ct. administering international law is not affected by the municipal law of any country as to what discovery may or may not be made by its subjects.—THE BARON STJERNBLAD, [1918] A. C. 173; 87 L. J. P. 11; 117 L. T. 743; 34 T. L. R. 106; 14 Asp. M. L. C. 178; 3 P. Cas. 17, P. C.

*Annotation:—As to (1) Refd. The Falk, etc., [1921] 1 A. C. 787.*

**829. —Intention of buyer.]—A quantity of cotton goods, absolute contraband shipped by the sellers, a neutral firm in America, on a neutral vessel for carriage to Amsterdam was seized as prize. The consignees were the N. O. T., the Netherlands Oversea Trust co., acting on behalf of the buyers, a Dutch firm. Owing to the seizure the buyers refused payment, & the property in the goods remained in the shippers who were claimants. The case for the Crown was that the buyers sold large quantities of cotton goods to Germany, & that if the goods in question had not been intercepted, they would, if the buyers could have evaded the restrictions of the N. O. T., have been resold to buyers in Germany. No allegations were made by the Crown against claimants that they had any intention that the goods should be sent to Germany:—*Held*: (1) the question to be decided was what was the destination intended by the persons who would have had control of the goods when they arrived; (2) neither the fact that claimants had no intention of sending the goods to Germany, nor that the N. O. T. would have exacted guarantees of neutral consumption from the buyers, & if they could, would have frustrated the intention of the buyers to send the goods to Germany, prevented the**

cargo. The outward & return voyages | which the owners of the vessel, & of | cated by the charterparty.—THE  
were one unbroken transaction in | the whole cargo, were equally impli- | ARAMINTHA (1804), Stewart, 47.



application of the doctrine of continuous voyage ; & , as absolute contraband having an ultimate enemy destination, the goods were subject to condemnation.—**THE NOORDAM**, [1919] P. 57 ; 88 L. J. P. 97 ; 120 L. T. 249 ; 14 Asp. M. L. C. 406 ; 3 P. Cas. 317.

**830. — Material for manufacture into goods —Destined for enemy country.]—**A quantity of leather, contraband, consigned to claimants, a firm of boot manufacturers in a neutral country, was seized as prize ex a neutral ship on the ground that it was either destined for the enemy as leather, or was going to claimants' factory to be there made into military boots which were destined for the enemy forces. An application on behalf of the Crown for an order for discovery of claimants' books & documents relating to the sales of leather & boots from the year prior to the outbreak of war down to the date of seizure was resisted, *inter alia*, on the ground that if the leather was going to be made into boots the doctrine of continuous voyage did not apply, & therefore, whatever the ultimate destination of the boots, the leather could not be seized as prize :—**Held** : (1) contraband material, imported into a neutral country to be there manufactured into goods destined for the enemy, does not become part of the common stock of the country so as to defeat the doctrine of continuous voyage ; (2) accordingly an order could be made directing the claimants to make discovery of the books & documents relating to their sales of boots as well as of leather from Aug. 1913, down to the date of seizure.—**THE BALTO**, [1917] P. 79 ; 86 L. J. P. 83 ; 116 L. T. 319 ; 33 T. L. R. 244 ; 61 Sol. Jo. 399 ; 14 Asp. M. L. C. 28.

**Annoucement :—Apld.** The Baron Stjernblad, [1918] A. C. 173.

**831. — — — — — ]—**A quantity of coconut oil, conditional contraband, the property of claimants, a Swedish co. of margarine manufacturers, was seized as prize ex a neutral vessel. The Crown claimed the condemnation of the oil on the ground, *inter alia*, that assuming it was acquired for the manufacture of margarine, it formed part of the supply of a reservoir of edible fats, part of which went to Germany, or that the margarine manufactured therefrom would, to the knowledge of claimants, be consumed in Sweden in substitution for Swedish butter supplied to Germany :—**Held** : had it been shown that the oil was imported for the manufacture of margarine to be sent to the enemy, or even that the particular manufacturers of margarine were acting in combination with particular producers of butter, & the intention & object of their combination was to produce margarine in order that the butter might be sent to Germany, he would have held that the oil was subject to condemnation, but it was not in accordance with international law to hold raw material on its way to citizens of a neutral country, to be there manufactured into an article for consumption in that country, was subject to condemnation merely on the ground that the consequences were that another article of a like kind would be exported to the enemy by other citizens of the neutral country.—**THE BONNA**, [1918] P. 123 ; 87 L. J. P. 109 ; 118 L. T. 360 ; 34 T. L. R. 276 ; 14 Asp. M. L. C. 207 ; 3 P. Cas. 163.

**832. — For consumption there — Release of similar goods in neutral country—For export to enemy country.]—****THE BONNA**, No. 831, *ante*.

**833. — Destined for enemy country for manufacture—Product to be returned to neutral country.]—**Wool, absolute contraband, consigned to applts., neutrals in Sweden, was seized in prize in May & June, 1916. The intention of applts. was to send

the wool to Germany to be combed under an arrangement whereby the combed or spun wool was to be returned to them in Sweden, the waste wool being retained in Germany :—**Held** : without deciding whether there were any circumstances in which the temporary character of the stay of contraband goods in an enemy country would prevent them from being liable to condemnation, as the process contemplated would have involved a considerable stay in the enemy country, & an alteration of the identity of the wool, it was properly condemned as having an enemy destination.—**THE AXEL JOHNSON**, **THE DROTNING SOPHIA**, [1921] 1 A. C. 473 ; 90 L. J. P. 199 ; 125 L. T. 1 ; 15 Asp. M. L. C. 221, P. C. ; *affg.*, [1917] P. 234. **Annotation :—Refd.** The Noordam, [1919] P. 57.

**834. Onus of proving innocent destination.]—****THE SYDLAND & THE INDIANIC** (1916), [1917] P. 161, n. ; 86 L. J. P. 183, n.

**835. — — — — — ]—**The *onus* of proving an innocent destination of goods seized as conditional contraband rests upon the owners under the Declaration of London Order in Council, No. 2, of Oct. 29, 1914. Receipts of prior payment for such goods by claimants on their own behalf & not as sale agents for consignors are evidence which would have a material bearing on the question ; & therefore an opportunity should be allowed claimants of putting in such receipts on the hearing of an appeal which were not put in at the trial in the ct. below, such documents having been in existence & disclosed before the trial, & the omission to put them in being the result of a mistake.—**THE KIM** (No. 4), **THE ALFRED NOBEL** (No. 3), **THE BJORNSTIERNE BJORNSEN** (No. 3), **THE FRIDLAND** (No. 2) (1921), 90 L. J. P. 188 ; 124 L. T. 802 ; 37 T. L. R. 317 ; 15 Asp. M. L. C. 210 ; 3 P. Cas. 851, P. C. ; *reversg.*, [1915] P. 215, 263.

**Annotations :—Refd.** The Louisiana, The Nordic, The Tomsk, The Joseph W. Forduey (1915), 32 T. L. R. 619 ; The Balto, [1917] P. 79 ; The Noordam, [1919] P. 57 ; The Ran, [1919] P. 317. **Mentd.** The San Jose, Cometa & Salerno (1916), 33 T. L. R. 12 ; The Derflinger, The Forde, The Leda, Re American Meat Packers' Agreement, Re Certain Swedish Copper, [1919] P. 264 ; Adelaide S.S. Co. v. R. (1922), 92 L. J. K. B. 102.

**836. — — — — — ]—**Proof of an intention to submit conditional contraband goods to public auction in the neutral country to which they are shipped does not necessarily discharge the *onus* of proving that they are not destined for an enemy govt. or an enemy base of supply.

At the date of the seizure the oranges had been declared conditional contraband. It is therefore for applts. to prove that they were not destined for an enemy govt. or an enemy base of supply. The question to be determined is whether they have satisfactorily discharged the burden which rests upon them . . . when an exporter ships goods under such conditions that he does not retain control of their disposal after arrival at the port of delivery, & the control but for their interception & seizure would have passed into the hands of some other persons, who had the intention either to sell them to an enemy govt. or to send them to an enemy base of supply, then the doctrine of continuous voyage becomes applicable, & the goods on capture are liable to condemnation as contraband (**LORD PARMOOR**).—**THE NORNE**, [1921] 1 A. C. 765 ; 90 L. J. P. 298 ; 125 L. T. 292 ; 37 T. L. R. 541 ; 15 Asp. M. L. C. 222 ; 3 P. Cas. 977, P. C.

**837. — Circumstances increasing onus.]—****PROCURATOR-GENERAL v. NEW YORK & WEST INDIES TRADING CORPN., THE UNITED STATES** (No. 2), No. 839, *post*.

**838. — Discharge of onus.]—****THE HELBIG OLAV**, No. 853, *post*

*Sect. 4.—Doctrine of continuous voyage: Sub-sect. 2, A., B. & C.]*

**839. — Presumption against neutral trade.]—**

(1) In a prize ct. a neutral trader is not presumed to be acting innocently unless circumstances justifying, on the seizure of his goods as contraband, are proved beyond all doubt. The burden of proof is on him to show that there was no reasonable suspicion justifying the seizure, or to displace such suspicion as in fact exists.

(2) Circumstances of grave suspicion may afford sufficient reason for not accepting evidence of claimant which, but for such suspicion, would be sufficient to satisfy the burden.—*PROCURATOR-GENERAL v. NEW YORK & WEST INDIES TRADING CORPN., THE UNITED STATES (No. 2) (1921), 90 L. J. P. 177; 37 T. L. R. 430; 3 P. Cas. 843, P. C.*

**840. Evidence of enemy destination.]—**THE FALK, ETC., No. 1249, *post*.

**841. — Prior payment for goods by claimant on own behalf.]—**THE KIM (No. 4), THE ALFRED NOBEL (No. 3), THE BJORNSTJERNE BJORNSEN (No. 3), THE FRIDLAND (No. 2), No. 835, *ante*.

*B. Fraudulent Importation into Neutral Country.*

**Transfer of ownership—During hostilities.]—**See Part III., Sect. 4, sub-sect. 2, B. (b), *ante*.

**842. Liability to seizure not avoided.]—**THE CARL WALTER (1802), 4 Ch. Rob. 207; 165 E. R. 587.

*Annotations:—Refd. The Nayado (1802), 4 Ch. Rob. 251; The Bawean, [1918] P. 58; The Consul Olsson, [1920] P. 43; The Vesta, [1921] 1 A. C. 774.*

**843. Whether importation bona fide—Payment of duty—Cargo landed.]—**It is not my business to say what is universally the test of a *bona fide* importation: It is argued that it would not be sufficient, that the duties should be paid, & that the cargo should be landed. If these *criteria* are not to be resorted to, I should be at a loss to know what should be the test; & I am strongly disposed to hold, that it would be sufficient, that the goods should be landed & the duties paid (SIR WILLIAM SCOTT).—THE POLIX (1800), 2 Ch. Rob. 361; 1 Eng. Pr. Cas. 248; 165 E. R. 344.

*Annotations:—Consd. The William (1806), 5 Ch. Rob. 385. Dtd. The Balto (1917), 86 L. J. P. 83. Refd. The Johanna Kmiele (1854), Spinks, 12.*

**844. — — — — —.]—**The cargo was landed & entered at the custom house, & a bond was given for duties to the amount of 1,239 dollars. The cargo was reshipped, & a debenture for 1,211 dollars by way of drawback was obtained. All this passed in the course of a few days. The vessel arrived at Marblehead on May 29; on that day the bond for securing the duties was given. On May 30 & 31 the goods were landed, weighed, & packed. The permit to ship them is dated June 1, & on June 3 the vessel is cleared out as laden, & ready to proceed to sea. We are frequently obliged to collect the purpose from the circumstances of the transaction. The landing thus almost instantaneously followed by the reshipment, has little appearance of having been made with a view to actual importation; but it is not upon inference that the conclusion in this case is left to rest. Claimants instead of showing that they really did import this cargo, have, in their attestation, stated the reasons which determined them not to import it. They say, indeed, that when they ordered it to be purchased "it was with the single view of bringing it to the United States, & that they then had no intention or expectation of exporting it in the schooner to Spain." . . . It can never be contended, that an intention to import once entertained is equivalent

to importation. It would be a contradiction in terms to say that by acts done after the original intention has been abandoned, such original intention has been carried into execution. Why should a cargo, which there was to be no attempt to sell in America, have been entered at an American custom house, & voluntarily subjected to the payment of any, even the most trifling duty? Not because importation was, or in such a case could be intended, but because it was thought expedient that something should be done, which in a British prize ct. might pass for importation (SIR WILLIAM GRANT).—THE WILLIAM (1806), 5 Ch. Rob. 385; 1 Eng. Pr. Cas. 505; 165 E. R. 817.

*Annotations:—Consd. Seymour v. London & Provincial Marine Insee. (1872), 41 L. J. C. P. 193. Refd. The Kim, The Alfred Nobel, The Bjornstjerne Bjornson, The Fridland, [1915] 3 P. 215.*

**845. — — — Cargo not landed.]—**THE MERCURY (1802), cited in 5 Ch. Rob. at p. 400; 165 E. R. 823.

*Annotation:—Consd. The William (1806), 5 Ch. Rob. 385.*

**846. — Cargo landed—No intention to import asserted.]—**THE FREEPORT (1803), cited in 5 Ch. Rob. at p. 402; 165 E. R. 823.

*Annotation:—Consd. The William (1806), 5 Ch. Rob. 385.*

**847. — — — — —.]—**THE EAGLE (1803), cited in 5 Ch. Rob. at p. 401; 165 E. R. 823.

*Annotation:—Consd. The William (1806), 5 Ch. Rob. 385.*

**848. — Sale of cargo—Ostensible sale.]—**Spanish barilla going to France, ostensible sale & importation in the port of Lisbon, not held to break the continuity of the voyage.—THE THOMYRIS (1808), Edw. 17; 2 Eng. Pr. Cas. 6; 165 E. R. 1017.

*Annotation:—Consd. Seymour v. London & Provincial Marine Insee. (1872), 41 L. J. C. P. 193.*

**849. — — — Cargo not landed.]—**Continuous voyage. Part of cargo, consisting of salt laden in France, sold to a Portuguese merchant at Oporto but not landed, so as to break the continuity of the voyage, condemned as a shipment within the restrictions of Order in Council, Jan. 7, 1807. This order held to extend to the property of a vessel engaged in such a trade & lending herself to the exigencies of the enemy. Vessel condemned as lawful prize. Residue of cargo laden at Oporto, Portuguese property, restored.—THE DIE JUNGFER CHARLOTTA (1809), 1 Act. 171; 12 E. R. 65.

*C. Control of Destination of Cargo.*

**850. Intention of person able to control destination.]—**The Declaration of London, 1909, which was not ratified by Great Britain, by Art. 35 purported to abrogate the doctrine of continuous voyage in the case of conditional contraband. An Order in Council of Oct. 29, 1914 (1), by Clause 1 provided that the Declaration of London should be adopted during the present hostilities subject to certain modifications. Modification (iii) provided as follows: "Notwithstanding the provisions of Art. 35 of the said Declaration, conditional contraband shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned "to order," or if the ship's papers do not show who is the consignee of the goods, or if they show a consignee of the goods in territory belonging to, or in the occupation of, the enemy." In Mar. 1915, applts. who were neutrals, shipped conditional contraband goods, namely fodder stuffs, from the United States in neutral ships under bills of lading which purported to make the goods deliverable to named neutral traders at Swedish ports. Their Lordships, affirming the decision of the Prize Ct. found that applts. had acted in the transactions by the directions of an agent of the German Govt., & that the persons named as con-

signees in the bills of lading had no real interest in, or control over, the goods:—*Held*: (1) the persons to whom the bills of lading made the goods deliverable were not "the consignees of the goods" within the Order in Council, & the goods had been properly condemned as being destined for the German Government.

The consignee of goods must mean some person other than the consignor to whom the consignor parts with the real control of the goods (*per CUR.*).

(2) In considering, upon the principle of continuous voyage, what is the ultimate destination of goods which are conditional contraband, it is the intention of the person who is in a position to control the destination which is material.—*THE LOUISIANA*, [1918] A. C. 461; 87 L. J. P. 57; 118 L. T. 274; 34 T. L. R. 222; 14 Asp. M. L. C. 233, P. C.

*Annotations*:—*As to* (1) *Appld.* *The Hellig Olav*, [1919] A. C. 526. *Distd.* *The Kronprinsessu Victoria*, [1919] A. C. 261; *The Oranje Nassau*, [1919] P. 346. *Refd.* *The Kronprins Gustaf*, [1919] P. 182; *The Urna*, [1920] A. C. 899; *The United States* (1921), 90 L. J. P. 177. *As to* (2) *Distd.* *The Twee Ambt*, [1920] P. 413. *Refd.* *Larue v. Procurator-General*, *The Annie Johnson* (1921), 126 L. T. 614. *Generally, Refd.* *The Rdjn*, [1919] A. C. 546; *The Falk*, [1921] 1 A. C. 787.

851. —.]—*THE NOIRNE*, No. 836, *ante*.

852. Who is real consignee—Persons other than consignor.—To whom real control of goods imparted.]—*THE LOUISIANA*, No. 850, *ante*.

853. —.] —.] —.] —.] (1) *Applts.*, who carried on business in a neutral country, with branches in an enemy country, shipped a cargo of goods consigned to themselves, on board a vessel bound to a neutral port, without any guarantee or declaration according to a commercial agreement between Great Britain & the neutral country that the goods were for neutral consumption, & upon the cargo being seized, made no disclosure of the conditions on which they were carrying on their business:—*Held*: as the ship's papers did not show a consignee other than the consignor to whom the consignor had parted with the control of the goods, & the owners of the goods had not proved that their destination was innocent, as required by the Declaration of London Order in Council (No. 2), of Oct. 29, 1914, they were rightly condemned as prize.

In the present case there is no other person than the consignor to whom the consignor parts with the real control of the goods (*per CUR.*).

(2) Where a sum representing the value of the goods has been by agreement paid into ct., the ct. may condemn the goods for that sum, instead of condemning the goods themselves.—*THE HELLIG OLAV*, [1919] A. C. 526; 88 L. J. P. 23; 120 L. T. 98; 35 T. L. R. 127; 14 Asp. M. L. C. 380, P. C.

854. —. Necessity for *bonâ fide* commercial consignee.]—I am satisfied that the real owners of the goods at the time of seizure were Wilholm Boesch of Hamburg, & that Wadstrom knew this perfectly well. Wadstrom & co. therefore undertook the assertion of a false claim, & the assertion of a false claim by persons who were agents of the real owners, or who acted in contrivance with them, is enough to lead to condemnation . . . It was contended that the coffee in question being consigned to named consignees, was immune from seizure or capture under the operation of the Order in Council of Oct. 29, 1914, adopting with modifications Art. 35 of the Declaration of London. It is not easy to determine now the effect of Orders in Council purporting to adopt single provisions of the Declaration of London, which by its terms could not be ratified unless it was adopted in the whole. But, assuming the Order in Council of Oct. 29, 1914, to be valid in this regard, I repeat

the opinion I have expressed in other cases, that the named "consignee" must be a real & genuine consignee in the business & commercial sense. The fact that a person who happens to be in existence is named, if he be merely a nominee without any interest, or dummy consignee, is not enough. A cargo of conditional contraband might be consigned according to the ship's papers, to an existing person having a Christian & a surname, who might be the town crier or the grave digger, of a particular locality. But if he was not concerned *bonâ fide* as a commercial consignee, however substantial his existence in the flesh might be, & he was only used as a name, or as a conduit pipe or channel for the transmission of goods through a neutral port to enemy merchants, he would not be a "named consignee" within the meaning & tenor of the Order in Council referred to (*SIR SAMUEL EVANS*).—*THE SYDLAND*, *THE INDIANIC* (1916), [1917] P. 161, n.; 86 L. J. P. 183, n.

855. —. Assertion of false claim.—By person agents of real owners.]—*THE SYDLAND*, *THE INDIANIC*, No. 854, *ante*.

856. —. Named consignees having no real interest.]—*THE LOUISIANA*, No. 850, *ante*.

857. —.] —.] —.] —.] It is a question of fact in each case whether the Netherlands Oversea Trust are consignees within the Order in Council of Oct. 29, 1914, & the decisions thereunder, the effect of which was to modify the Declaration of London, 1909, Art. 35, & to provide that conditional contraband destined for the enemy should be liable to capture on board a vessel bound for a neutral port (*inter alia*) if the ship's papers did not show who was the consignee of the goods. If the Netherlands Oversea Trust were merely receiving conditional contraband goods as agents for the consignor to dispose of in accordance with his directions, then, if the goods had an ultimate enemy destination, they would be liable to condemnation; but if the Netherlands Oversea Trust were receiving the goods as agents for persons who had bought them & had the control over them, then, whatever their ultimate destination, the goods would not be liable to condemnation.—*THE ORANJE NASSAU*, [1919] P. 346; 89 L. J. P. 76; 122 L. T. 254; 14 Asp. M. L. C. 543.

858. —.] —.] —.] —.] Decree of the Prize Ct. condemning conditional contraband, foodstuffs, shipped to consignees at a neutral port affirmed on the grounds that the goods were destined for the supply of the enemy, & that the consignee named in the bill of lading was a mere instrument for carrying out that supply.—*THE RIJN*, [1919] A. C. 546; 88 L. J. P. 113; 120 L. T. 395; 14 Asp. M. L. C. 424, P. C.

*Annotations*:—*Refd.* *The Prins der Nederlanden*, [1920] P. 216; *The Vesta*, [1921] 1 A. C. 774.

859. —. Consignee as agent for sale.]—By an Order in Council of Oct. 29, 1914, Art. 35 of the Declaration of London, 1909, which abrogated the doctrine of continuous voyage in the case of conditional contraband, was adopted subject to modifications. Clause 1 (iii) provided that notwithstanding the provisions of Art. 35 conditional contraband should be liable to capture on board a vessel bound for a neutral port "if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods," such a person being construed in *The Louisiana*, No. 850, *ante*, as some person other than the consignor to whom the consignor has parted with the real control of the goods.

Conditional contraband, namely, coffee, was consigned by a Santos firm to a named consignee

*Sect. 4.—Doctrine of continuous voyage: Sub-sect. 2, C. Sects. 5 & 6: Sub-sects. 1 & 2.]*

at Gothenburg who was the consignor's agent for sale. The coffee was claimed by another Swedish firm who had bought it from the consignors through the agency of the consignee in order to resell it to a firm in Hamburg:—*Held*: under ordinary circumstances, an agent for sale being a person who had to act according to his principal's instructions, he was not such a consignee as would satisfy the requirements of the Order in Council, & the coffee was subject to condemnation.—*THE KRONPRINS GUSTAF*, [1919] P. 182; 88 L. J. P. 177; 121 L. T. 474; 14 Asp. M. L. C. 464.

**860.** ———.]—The Declaration of London Order in Council No. 2, of Oct. 29, 1914, provided (*inter alia*) that conditional contraband should be liable to capture on board a vessel bound for a neutral port "if the ship's papers do not show who is the consignee of the goods." Neutral applts. shipped conditional contraband goods from America to Copenhagen under a bill of lading making them deliverable to their selling agent at that port, who advanced to them 70 per cent. of the value of the goods. The evidence showed that the goods were destined for Germany. There was 'no evidence of any special arrangement between applts. & their agent precluding applts. from controlling the ultimate destination of the goods:—*Held*: the goods were properly condemned.—*THE URNA*, [1920] A. C. 899; 89 L. J. P. 203; 123 L. T. 481; 36 T. L. R. 652, P. C.

*Annotation*:—*Refd.* *The Norne*, [1921] 1 A. C. 765.

**861.** ——— *Consignee agent for purchaser.*]—*THE ORANJE NASSAU*, No. 857, *ante*.

**862.** No evidence of control passing from shipper.]—Silver, consigned by an enemy's shipper to his agent in Hamburg, for the purpose of answering drafts of a correspondent in America, without any letter of advice, or document, putting it out of his control, considered as the property of the shipper.—*THE JOSEPHINE* (1801), 4 Ch. Rob. 25; 165 E. R. 523.

**SECT. 5.—DOCTRINE OF INFECTION.**

**863.** Statement of doctrine.]—To escape from the contagion of contraband, the innocent articles must be the property of a different owner (*SIR WILLIAM SCOTT*).—*THE STAADT EMBDEN* (1798), 1 Ch. Rob. 26; 165 E. R. 82.

**864.** ———.]—One article of contraband quality will affect all the parts of the cargo on board belonging to the same proprietor (*SIR WILLIAM SCOTT*).—*THE CHARLOTTE* (1804), 5 Ch. Rob. 275; 165 E. R. 774.

**865.** ———.]—*THE TRENDE SOSTRE*, No. 787, *ante*.

**866.** ———.]—(1) The law of prize contains a long established rule, known as the doctrine of infection, which condemns, as if contraband, goods which though not condemnable themselves belong or are deemed to belong when captured to the same owner as other cargo in the same vessel, which cargo itself is liable to condemnation as contraband.

(2) In applying this rule, effect must be given to the further rule of prize, also long established, which refuses to recognise transfers of the ownership of movables afloat from an enemy transferor to a neutral transferee, when unaccompanied by actual delivery of the goods.

(3) In applying the doctrine of infection, the

ownership of the goods at the date of capture, & not the control of them, is the test.

(4) The doctrine does not rest upon the personal culpability or complicity of the owner to whose goods it is applied, & is applicable although he is not privy to the contraband enterprise.

(5) "Infected" goods in a neutral ship are not protected from condemnation by the Declaration of Paris. Consequently, where goods shipped by an enemy upon a neutral ship are liable to condemnation as having an enemy destination, & in the same ship (*Kronprinsessan Margareta*, first voyage) there are other goods purchased by a neutral from the enemy shipper, either after shipment, or before shipment upon f.o.b. terms payment against bill of lading, but the bill of lading has not been taken up until after the capture of the goods, then the purchased goods are liable to condemnation.

(6) The same result follows where (as in the case of the *Parana*) the goods have been purchased before shipment & are deliverable by the bill of lading to the purchaser, who has himself effected the insurance, but drafts drawn for the cost & freight price upon a confirmed bank credit established by the purchaser under the terms of the contract are not paid until after the capture. It cannot be inferred from these circumstances that the intention was that the property should pass before shipment.

(7) A Prize Ct. has not any discretion or authority to abrogate settled & binding rules of prize law on the ground that their application is inconvenient to, or inconsistent with, the smooth & regular working of modern commerce.—*THE KRONPRINSESSAN MARGARETA*, *THE PARANA*, [1921] 1 A. C. 486; 90 L. J. P. 145; 124 L. T. 609; 15 Asp. M. L. C. 170; *sub nom.* *THE HILDING* (PART CARGOES EX), 37 T. L. R. 199, P. C.; *affg.* *THE KRONPRINSESSAN MARGARETA*, *THE THAI*, [1917] P. 114.

*Annotations*:—*As to* (2) *Apld.* *The Antwerpen*, [1919] P. 252, n. *Consd.* *The Vesta*, [1921] 1 A. C. 774. *As to* (5) *Refd.* *The Annie Johnson*, *The Kronprinsessan Margareta*, [1918] P. 154. *As to* (6) *Refd.* *The Annie Johnson*, *The Kronprinsessan Margareta*, [1918] P. 154. *Generally*, *Refd.* *The Frogner*, [1919] P. 127. *Mentd.* *Hansson v. Hamel & Horley*, [1922] 2 A. C. 36.

**867.** Application of doctrine—Fraudulent representations as to ownership.]—*THE EENROM*, No. 1123, *post*.

**868.** ——— *Contraband goods landed before seizure.*]—*THE IMMANUEL*, No. 239, *ante*.

**869.** ——— *Order of restoration of "all other goods."*]—It is contended that the innocent parts of the cargo also, & the ship herself, will be subject to condemnation, on the known principle, that the infection of contraband extends also to all interests included in the same claim on behalf of the same proprietor. I could assent to that argument if the case stood only on the general law; but when I look to the order of Govt., I find "that all other goods are directed to be restored." So with regard to the ship: it has been uniformly held in general principles that the vessel belonging to the proprietor of contraband goods is liable to confiscation. But the order itself in directing the restitution of all other goods, implies that this class of cases is not to be decided, strictly, on the general principle of contraband (*SIR WILLIAM SCOTT*).—*THE NEPTUNUS* (1807), 6 Ch. Rob. 403; 165 E. R. 978.

*Annotation*:—*Consd.* *The Panagiellos* (1915), 84 L. J. P. 140.

**870.** ——— *Property in goods remaining in seller — Control parted with before seizure.*]—*THE ANTWERPEN*, [1919] P. 252, n.; 89 L. J. P. 26, n.

*Annotation*:—*Apld.* *The Parana*, [1919] P. 249.

871. — In relation to rule of transfer of goods in transitu.]—THE KRONPRINSESSAN MARGARETA, THE PARANA, No. 866, *ante*.

872. — Ownership, not control of goods material consideration.]—THE KRONPRINSESSAN MARGARETA, THE PARANA, No. 866, *ante*.

873. — Owner not privy to contraband enterprise.]—THE KRONPRINSESSAN MARGARETA, THE PARANA, No. 866, *ante*.

874. — Goods purchased after shipment.]—THE KRONPRINSESSAN MARGARETA, THE PARANA, No. 866, *ante*.

875. — Goods purchased before shipment—On f.o.b. terms—Bill of lading not taken up before capture.]—THE KRONPRINSESSAN MARGARETA, THE PARANA, No. 866, *ante*.

876. — Drafts for cost & freight not paid till after capture.]—THE KRONPRINSESSAN MARGARETA, THE PARANA, No. 866, *ante*.

## SECT. 6.—CONDEMNATION OF SHIP.

### SUB-SECT. 1.—IN GENERAL.

877. Whether ship liable to condemnation.]—ANDERSEN v. MARTEN, No. 264, *ante*.

878. — Usual penalty loss of freight & expenses.]—The carrying of contraband articles is attended only with the loss of freight & expenses; except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo, has been connected with other malignant & aggravating circumstances (SIR WILLIAM SCOTT).—THE RINGENDE JACOB (1798), 1 Ch. Rob. 89; 1 Eng. Pr. Cas. 60; 165 E. R. 107.

*Annotations* :—*Consol.* The Hakan, [1918] A. C. 148. *Refd.* The Prins der Nederlanden, [1921] 1 A. C. 754; The Zamora No. 2, [1921] 1 A. C. 801.

879. — Aggravating circumstances attending carrying of contraband.]—THE RINGENDE JACOB, No. 878, *ante*.

880. Neutral carrying war material to neutral port.]—THE HENDRIC & ALIDA (1777), Mart. 96; 165 E. R. 22.

881. Illegal voyage.]—If it should appear that she [the ship] was going under this special privilege, as being fitted out in a French port, & destined to return to a French port, the ship & cargo will be liable to confiscation, as engaged in a course of trade exclusively French. . . . I am induced to think that foreign ships were permitted to go to Senegal, for the purpose of a general trade, though there might be a monopoly of gum. The opening introduced by the French edict, 1793, seems to have applied only to the direct trade between Senegal & France, for I think it is sufficiently proved, that foreign vessels were permitted to resort thither before that edict for the general purposes of trade. I am of opinion, therefore, that there is nothing in this case which renders the voyage so illegal as to induce the consequences of condemnation (SIR WILLIAM SCOTT).—THE JULIANA (1803), 4 Ch. Rob. 328; 165 E. R. 629.

882. — From enemy colony to mother country.]—THE JONGE THOMAS (1801), 3 Ch. Rob. 233; 165 E. R. 447, P. C.

883. — Voyage not permitted in time of peace.]—The question in this case has been accurately stated to be, whether the ship & cargo were taken in a lawful trade, going from a colony in Spain to a port of Europe, not being a port of this kingdom, nor of the country to which either the ship or cargo belongs. . . . It has been repeatedly determined at this board, that neutrals are not

at liberty to engage in a trade with the colony of the enemy in time of war, which is not permitted to foreign vessels in time of peace (LORD ELDON, C.).—THE WILLELMINA (1801), cited in 4 Ch. Rob. App. 4; 165 E. R. 665.

884. — Reverse voyage.]—If an American vessel would not be permitted to trade from St. Domingo to Sweden, there can be no reason why the same rule should not be applied to a Swedish vessel, trading between the colony of the enemy & America (GRANT, M.R.).—THE LUCY (1802), cited in 4 Ch. Rob. App. 14; 165 E. R. 671.

885. — Illegal destination.]—Illegal destination of ship under Order in Council, Nov. 11, 1807. Ship condemned.—THE EXCHANGE (1808), Edw. 39; 2 Eng. Pr. Cas. 13; 165 E. R. 1025.

*Annotation* :—*Refd.* Baltazzi v. Ryder, The Panaghia Ithomba (1858), 12 Moo. P. C. C. 168.

886. Vessel fitted out for war—Sale to enemy intended.]—THE BRUTUS (1804), 5 Ch. Rob. 331, n.; 5 Ch. Rob. App. Additional Notes, No. I.; 165 E. R. 794.

887. Neutral meeting British vessel—Receiving prohibited goods.]—A neutral ship meeting by agreement a British vessel, in order to receive prohibited goods from her, is a sufficient ground of condemnation of the neutral, though the British ship should have a licence to export them for the purpose of trading with them.—GIBSON v. SERVICE (1814), 5 Taunt. 433; 1 Marsh. 119; 128 E. R. 757.

*Annotation* :—*Mentd.* Stewart v. Gibson (1840), 7 Cl. & Fin. 707.

### SUB-SECT. 2.—SHIP AND CARGO IN SAME OWNERSHIP.

888. Liability to condemnation.]—THE RINGENDE JACOB, No. 878, *ante*.

889. —.]—I am of opinion, then, that this cargo, consisting of some articles contraband in their own nature, & going to the enemy's port, under a total absence of that fair conduct which ought to have been maintained, in order to entitle it to the benefit of the more favourable rule, is subject to condemnation. With respect to the ship; if I was satisfied that the ship & cargo belonged to the same person, I must condemn that also, upon the ordinary rule, which extends the penalty of contraband to all the property of the same owner, involved in the same unlawful transaction (SIR WILLIAM SCOTT).—THE SARAH CHRISTINA (1799), 1 Ch. Rob. 238; 1 Eng. Pr. Cas. 125; 165 E. R. 162.

*Annotations* :—*Refd.* The Franklin (1801), 3 Ch. Rob. 217; The Axel Johnson, The Drottning Sophia, [1917] P. 234; The Prins der Nederlanden, [1921] 1 A. C. 754.

890. —.]—THE MINERVA, No. 256, *ante*.

891. —.]—THE NEUTRALITET, No. 918, *post*.

892. —.]—Innocent articles to France & her allies not held to protect naval stores to Amsterdam.

Where there are such articles [of contraband on board the taint extends to other parts of the cargo, & also to the vessel, being the property of the same owner (SIR WILLIAM SCOTT).—THE ELEONORA WILLELMINA (1807), 6 Ch. Rob. 331; 165 E. R. 951.

893. —.]—THE NEPTUNUS, No. 869, *ante*.

894. — Part owner.]—Contraband articles, unclaimed, but appearing by all the ship's papers to belong to a part owner of the ship, held to affect his share of the vessel.

Where the owner of the cargo has any interest in the ship, the whole of his property will be involved in the same sentence of condemnation;

**Sect. 6.—Condemnation of ship: Sub-sects. 2, 3, 4, 5 & 6.]**

for where a man is concerned in an illegal transaction, the whole of his property embarked in that transaction is liable to confiscation (SIR WILLIAM SCOTT).—THE JONGE TOBIAS (1799), 1 Ch. Rob. 329; 1 Eng. Pr. Cas. 146; 165 E. R. 194.

**Annotations:—**Consd. The Hakan, The Maracalbo, [1916] P. 266. Refd. The Prins de Nederlanden, [1921] 1 A. C. 754.

**SUB-SECT. 3.—FALSE DESTINATION OF SHIP.**

**895. Liability of ship to condemnation.]—**THE ELIZA (1794), cited in 1 Ch. Rob. at p. 91; 165 E. R. 108.

**Annotation:—**Expld. The Ringende Jacob (1798), 1 Ch. Rob. 89.

**896. —.]—**Where further proof is necessary by the practice of the ct., it will not be allowed to persons convicted of fraudulent conduct, or departing from a fair neutral character.

This ship . . . appears . . . to have been an English prize purchased in France. A claim has been given for E., but not till eight months had elapsed. . . E. claims simply for himself; but the pass, which is the only paper translated, describes the vessel to be the property of two persons: if that was the case, the claim should have been specific. . . It undertakes to describe the voyage, but runs only in this vague form, from — to —. This is an omission, which I hope I shall not see again; as the destination is a very material circumstance to be known. . . To make a voyage fairly alternative, it should appear on the papers to be so; for otherwise it must mislead the cruisers of the belligerent countries, & prevent them from forming a right judgment of their case. . . The master was to use his best endeavour to get to Ostend, & only to take another destination if he should be prevented from accomplishing the first. This is scarcely to be considered as an alternative destination; & besides, all the papers point to Hamburg only. . . There is in all these circumstances a *mala fides* in this case (SIR WILLIAM SCOTT).—THE JUFFROUW ANNA (1799), 1 Ch. Rob. 125; 1 Eng. Pr. Cas. 76; 165 E. R. 120.

**897. —.]—**THE CALYPSO (1799), 2 Ch. Rob. 154; 165 E. R. 272.

**898. —.]—**THE ROSALIE & BETTY (1800), 2 Ch. Rob. 343; 1 Eng. Pr. Cas. 246; 165 E. R. 338.

**Annotations:—**Consd. The Kim, The Alfred Nobel, The Bjornstjerne Bjornson, The Fridland, [1915] P. 215. Refd. The Sortarerren (1915), 85 L. J. P. 121.

**899. —.]—**THE FLOREAT COMMERCIIUM (1800), 3 Ch. Rob. 178; 165 E. R. 428.

**900. —.]—**Contraband with false destination, affects the ship as well as the cargo.

Anciently, the carrying of contraband, did, in ordinary cases, affect the ship, & although a relaxation has taken place, it is a relaxation, the benefit of which can only be claimed by fair cases. The aggravation of fraud justifies additional penalties; & the right of pre-emption, which would otherwise be defeated, must be secured by them. . . The carriage of contraband, with a false destination, will work a condemnation of the ship as well as the cargo. . . Confiscation of the vessel is the legal result of the carriage of contraband, under a false destination (SIR WILLIAM

SCOTT).—THE FRANKLIN (1801), 3 Ch. Rob. 217; 1 Eng. Pr. Cas. 298; 165 E. R. 441.

**Annotation:—**Consd. Hobbs v. Henning (1865), 17 C. B. N. S. 791.

**901. —.]—**THE NEUTRALITET, No. 918, *post*.

**902. —.]—**THE EDWARD, No. 801, *ante*.

**903. —.]—**THE CONVENIENTIA (1802), 4 Ch. Rob. 201; 165 E. R. 585.

**904. —.]—**I cannot but consider this attempt as a gross abuse of the instructions which will justly render the cargo subject to condemnation, & I think I am called upon to stigmatise this transaction as an act of ill faith, by condemning claimant in the expenses of the claim. I also condemn the vessel, as employed in carrying a cargo of sea stores to a place of naval equipment under false papers. It is described, I perceive, as an American vessel. But if the owner will place his property under the absolute management & control of persons who are capable of lending it in this manner to be made an instrument of fraud, in the hands of the enemy, he must sustain the consequence of such misconduct on the part of his agent (SIR WILLIAM SCOTT).—THE RANGER (1805), 6 Ch. Rob. 125; 165 E. R. 873.

**905. —.]—**Contraband with false papers, suppressing its shipment & the destination to the enemy's colony. Condemnation of ship & that part of the cargo belonging to the owners of the ship, the remainder being condemned as enemy's property. The rule holds notwithstanding the vessel may have performed various different voyages, & repeatedly changed her cargoes at these several ports to which she may have traded from the time of her departure from her original port to her return; nor is it necessary the return cargo should be part proceeds of the contraband on the former voyage.—THE MARGARET (1810), 1 Act. 333; 12 E. R. 130.

**Annotation:—**Consd. The Alwina, [1916] P. 131.

**906. —.]—**False destination on voyage previous to capture.]—THE RANDERS BYE (1807), 6 Ch. Rob. 382, n.; 165 E. R. 970.

**907. Attempt by master en route to divert ship to enemy port—Refusal of crew to agree.]—**THE TWEE AMBT, No. 817, *ante*.

**SUB-SECT. 4.—CONTRABAND CARRIED ON VOYAGE PREVIOUS TO CAPTURE.**

**908. Liability to confiscation on return voyage—Contraband carried on outward voyage.]—**

Although a ship on her return is not liable to confiscation, for having carried a cargo of contraband on her outward voyage, yet it would be a little too much to say that all impression is done away; because if it appears that the owner had sent such a cargo under a certificate obtained on a false oath, that there was no contraband on board, it could not but affect his credit at least & induce the ct. to look very scrupulously to all the actions & representations of such a person. The master says, "That there was not more than was necessary for the ship's use"; but this practice is, even with this apology, sufficiently alarming, because it has appeared that other ships have been employed in carrying naval stores to Batavia in the same manner, not as principal cargoes, but in moderate quantities, under pretence of stores for the ship's own use, but which, nevertheless, were sold, as these were on their arrival at Batavia; it is

**PART VII. SECT. 6, SUB-SECT. 4.**

**908 I. Liability to confiscation on return voyage—Contraband carried on outward voyage.]—**Ship & return cargo

condemned, ship having on outward voyage carried contraband to a French colony under false papers.—THE SUCCESS (1805), Stewart, 77.

**q. —.]—**THE HAPPY COUPLE (1805), Stewart, 65.

**r. —.]—**THE UNITED STATES (1807), Stewart, 116.



apparent that the enemy may be supplied in this mode to a very great amount. What the master says in another place, is rather contradictory to this pretence; he says, "That there was not more than would be wanting for another ship which he had a design of purchasing at Batavia." Now, I must say that it could by no means be allowed, that neutrals shall be at liberty to carry out a larger quantity of articles of this nature than are wanting for their own ship's use under a speculation of purchasing other ships, & that when they are there, the speculation shall be relinquished, & the contraband articles be then sold as stores in the colonies of the enemy. If the speculation was originally really & *bond fide* entertained, on failure of it, the surplus should either be brought back again, or sold in some neutral port of that quarter of the world; for neutrals can have no right to carry out double stores of this description for a contingent purpose & then dispose of them to the enemy at their pleasure (SIR WILLIAM SCOTT).—THE MARGARETHA MAGDALENA (1799), 2 Ch. Rob. 139; 105 E. R. 267.

909. ———.]—Parties having been convicted of sending out articles of a contraband nature to Batavia, *i.e.* a settlement of the enemy in the East Indies, with false papers for Tranquebar, & concerted instructions to conceal the real destination, are not permitted to give further proof of the returned cargo, being the proceeds of the contraband articles.

It is said . . . in cases of contraband, the return voyage has not usually been deemed connected with the outward. In European voyages of no great extent when the master goes out on one adventure, & receives, at his delivering ports, new instructions & further orders, in consequence of advice, obtained of the state of the markets, & other contingent circumstances, that rule has prevailed; but I do not think that in distant voyages to the East Indies, conducted in the manner this has been, the same rule is fit to be applied. In such a transaction, the different parts are not to be considered as two voyages, but as one entire transaction, formed upon one original plan, conducted by the same persons, & under one set of instructions, *ab ovo usque et ad mala*. . . Parties setting out on such expedition with ill faith, & pursuing that measure of ill faith up to its consummation, in the delivery, are implicated in the consequences of such a conduct throughout the whole sequel of that transaction (SIR WILLIAM SCOTT).—THE NANCY (1800), 3 Ch. Rob. 122; 165 E. R. 408.

Annotation :—*Refd.* The Alwina, [1916] P. 131.

910. ———.]—Concealed contraband on the outward cargo renders the vessel on her return subject to condemnation.—THE BALTIC (1809), 1 Act. 25; 12 E. R. 10.

Annotation :—*Consd.* The Alwina, [1916] P. 131.

911. ———.]—Contraband outwards on board a Portuguese vessel trading with the enemy's colonies enures to her condemnation on the return voyage.—THE SANTISSIMA CORACAO DE MARIA (1811), 2 Act. 91; 12 E. R. 190.

912. ———.]—Not delivered to enemy.—THE ALWINA, No. 560, *ante*.

#### SUB-SECT. 5.—CONTRABAND AS SUBSTANTIAL PART OF CARGO.

913. General rule.—Ship liable to condemnation.]—A neutral vessel carrying contraband cargo, which cargo by value, weight, volume, or freight forms more than one-half of the whole, is subject

to confiscation, & to condemnation as good & lawful prize, even when bound to a neutral port, if such cargo is destined ultimately for an enemy country, either by transshipment or land transit.

There is no need for the captors to prove that the shipowner was aware of the ultimate destination of the contraband cargo.—THE MARACAIBO, [1916] P. 266, 284; 86 L. J. P. 7; 115 L. T. 639; 33 T. L. R. 48; 61 Sol. Jo. 87; 13 Asp. M. L. C. 522; 2 P. Cas. 294.

Annotations :—*Consd.* The Zamora No. 2, [1921] 1 A. C. 801. *Refd.* The Dirigo, The Hallingdal, etc., [1919] P. 204.

914. Knowledge of master or owner.—Of enemy destination of cargo.—Necessity for proof.]—THE MARACAIBO, No. 913, *ante*.

915. ———.]—THE DIRIGO, THE HALLINGDAL, ETC., No. 214, *ante*.

916. Neutral ships bound for neutral port.—Cargo ultimately destined for enemy.]—THE MARACAIBO, No. 913, *ante*.

917. Mistaken interpretation of international agreement.]—(1) An agreement made between the United States of America & Norway on Apr. 30, 1918, & assented to by Great Britain, did not, upon its true construction, amount to a licence to Norway to export the quantity of fish & fish products therein referred to free from the belligerent right of capture.

A neutral ship carrying a complete cargo of conditional contraband to an enemy base of supply condemned, although the shipowners had *bond fide*, but erroneously, believed that the agreement above referred to amounted to an unqualified sanction by Great Britain of the export of the goods.

(2) An enemy port found to have been a base of supplies during actual hostilities, was held to have continued to be so during the armistice in the absence of evidence to the contrary.—THE RANNVEIG, [1922] 1 A. C. 97; 91 L. J. P. 28; 126 L. T. 199; 38 T. L. R. 120; 15 Asp. M. L. C. 382; 3 P. Cas. 1013, P. C.

#### SUB-SECT. 6.—KNOWLEDGE OF CARRIAGE OF CONTRABAND.

918. Knowledge of shipowner.]—The modern rule of the law of nations is, certainly, that the ship shall not become subject to condemnation for carrying contraband articles. . . But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers, these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, & to continue them under the ancient one. . . The ship was freighted at Altona to go to Archangel, for the purpose of carrying a cargo of tar to Holland which is a commerce expressly prohibited by the Danish treaty. Tar is an article which a Danish ship cannot lawfully carry to an enemy's port, even when it was the produce & manufacture of Denmark. The ship goes to a foreign port to effect that which she was prohibited from doing, even for the produce of her own country . . . with the full privity of the asserted owner, who is the person entering into the charterparty. . .

The known ground on which the relaxation was introduced, the supposition that freights of noxious or doubtful articles might be taken, without the personal knowledge of the owner, entirely fails & the active guilt of the parties was aggravated by the circumstances of its being a criminal traffic in foreign commodities & in breach of explicit & special



*Secl. 6.—Condemnation of ship: Sub-secl. 6. Part VIII. Sects. 1 & 2.]*

obligations (SIR WILLIAM SCOTT).—THE NEUTRALITEZ (1801), 3 Ch. Rob. 295; 1 Eng. Pr. Cas. 309; 105 E. R. 469.

*Annotations:—Expld.* The Hakan, [1918] A. C. 148. *Refd.* The Dirigo, The Hallingdal, etc., [1919] P. 204; The Kim, The Björnstjerne Björnson, The Alfred Nobel, [1920] P. 319; The Prins der Nederlanden, [1921] 1 A. C. 754; The Zamora No. 2, [1921] 1 A. C. 801.

**919. — Ship let on time charter—Carriage of goods requisitioned by enemy government.]—THE HAKAN, No. 792, ante.**

**920. — Goods having ultimate enemy destination.]—(1) A neutral ship carrying to a neutral port a contraband cargo which has an ultimate enemy destination is liable to condemnation if the shipowner has knowledge that the cargo is contraband so destined.**

(2) Knowledge of the destination may be inferred if the shipowner, knowing facts which would cause a reasonable person to suspect the intended destination, refrains from making inquiries.—THE HILLEROD, [1918] A. C. 412; 87 L. J. P. 94; 118 L. T. 208; 14 Asp. M. L. C. 190, P. C.

**921. —.]—Three Norwegian steamships were chartered in 1912 & 1913 to the Gans Steamship Line, an American corpn., for periods of nine & ten years. After the outbreak of war with Germany the Gans Line loaded the vessels with foodstuffs consigned to Copenhagen, & a large proportion of each of the cargoes was subsequently condemned as conditional contraband destined for an enemy base of supply. The evidence showed that the Gans Line organised the sailings to Copenhagen as a means of furnishing the German Govt. with supplies; that the masters of the vessels, who were appointed & paid by the owners, knew that they were engaged on a contraband transaction; & that the owners were aware that their vessels were bound to Copenhagen, a port to which they had not previously gone, & that they were carrying cargoes of foodstuffs.—Held: having regard to the broad facts of the whole transaction, the knowledge of the charterers, & the knowledge of the masters, the vessels were subject to condemnation.—THE KIM, THE BJÖRNSTJERNE BJÖRNSEN, THE ALFRED NOBEL, [1920] P. 319; 90 L. J. P. 1; 125 L. T. 124; 36 T. L. R. 562; 15 Asp. M. L. C. 296.**

*Annotation:—Refd.* The Twee Ambt, [1920] P. 413.

**Where contraband substantial part of cargo.]—See No. 913, ante.**

**922. Knowledge of charterer—Whether owner affected—Charter for single voyage—From one neutral port to another.]—The owner of a Norwegian vessel chartered her to an American firm for a single voyage from New York to Scandinavian ports. The vessel loaded a miscellaneous cargo, including some aluminium & a small quantity of rubber which was manifested as gum. The aluminium & rubber were seized as prize & condemned as contraband destined for Germany. In an action to condemn the vessel on the grounds that she was carrying contraband & sailing with "false papers" by reason of the misdescription of the rubber as gum:—Held: even assuming the charterers knew that the rubber was misdescribed for the purpose of sending it on to Germany, inasmuch as it had not been shown that either the shipowner or the master had any knowledge of the misdescription or was aware that any of the cargo had an enemy destination, the shipowner was not affected with the charterers' knowledge, & the ship was not liable to condemnation.—THE RAN, [1919] P. 317; 89 L. J. P. 53; 122 L. T. 245; 14 Asp. M. L. C. 486.**

*Annotation:—Consd.* The Kim, The Björnstjerne Björnson, The Alfred Nobel, [1920] P. 319.

**923. —.]—THE KIM, THE BJÖRNSTJERNE BJÖRNSEN, THE ALFRED NOBEL, No. 921, ante.**

**924. Knowledge of master.]—THE KIM, THE BJÖRNSTJERNE BJÖRNSEN, THE ALFRED NOBEL, No. 921, ante.**

**925. Evidence or inference of knowledge—Facts causing suspicion in reasonable person—If inquiries made.]—THE HILLEROD, No. 920, ante.**

**926. — Lump-sum freight paid in advance.]—Neutral steamship carrying a complete cargo of contraband goods condemned, the large lump-sum freight paid in advance for the charter of the ship, combined with the shipowners' conduct in refraining to make inquiries with regard to the venture, & other circumstances, establishing as a fact that they knew of its contraband character.—THE ZAMORA No. 2, [1921] 1 A. C. 801; 90 L. J. P. 259; 125 L. T. 204; 37 T. L. R. 515; 15 Asp. M. L. C. 266; 3 P. Cas. 919; 8 Lloyd, Pr. Cas. 367, P. C.; affg. (1919), 8 Lloyd, Pr. Cas. 347.**

*Annotations:—Refd.* The Dirigo, The Hallingdal, etc., [1919] P. 204; The Kim, The Björnstjerne Björnson, The Alfred Nobel, [1920] P. 319.

**927. — Failure to make inquiries.]—THE ZAMORA No. 2, No. 926, ante.**

## Part VIII.—Condemnation.

### SECT. 1.—IN GENERAL.

**928. Capture in course of illegal trade—Condemnation to Crown not individual captor.]—THE ETRUSCO (1803), 4 Ch. Rob. 262, n.; 105 E. R. 606.**

*Annotations:—Distd.* The Ocean Bride (1854), 2 Ecc. & Ad. 9. *Refd.* The Diana (1803), 5 Ch. Rob. 60.

**929. Ground of condemnation—No evidence offered by claimant.]—Total defect of evidence is**

on the general rule a legal ground of condemnation, especially where the party has been indulged with the opportunity of supplying the defect (SIR WILLIAM SCOTT).—THE MAGNUS (1798), 1 Ch. Rob. 31; 105 E. R. 85.

*Annotation:—Consd.* The Johanna Emilie (1854), 1 Ecc. & Ad. 317.

**930. — Unexplained deviation from course.]—THE MENTOR (1810), Edw. 207; 165 E. R. 1084.**

### PART VIII. SECT. 1.

*t. Effect of condemnation.]—The effect of condemnation is to divest an enemy subject of his ownership as from the time of seizure & to transfer it as from date to the Crown, & the fact that a ship is no longer in the custody of the Marshal, & even the fact of a ship being sunk, does not prevent, in an appropriate case, an*

order being made for its condemnation.—THE PFALZ, [1922] V. L. R. 286.

*a. Ground of condemnation—Proof of joint property with enemy country.]—THE ZULEMA (1810), C. R. 3 A. C. 320.*

*b. — Property in goods not passed—Before declaration of war.]—Where dealings with bills of lading in respect to certain goods sold by an enemy firm were only to secure the*

contract price, & the consignee had not accepted the draft or paid the amount thereof before the declaration of war:—Held: the goods must be condemned.—PRIZE COURT, [1915] J. D. R. cited at p. 170.

*c. Prize a trust—Before condemnation.]—A prize, before condemnation, is a trust, & cannot be alienated, without the consent of all parties, or*

**931. Condemnation with compensation—Declaration of London—Vessel unaware of declaration of contraband.]**—By the Declaration of London Order in Council No. 2, 1914, dated Oct. 29, 1914, it was declared that during the present hostilities the convention known as the Declaration of London should, subject to certain additions & modifications therein specified, be adopted & put into force by His Majesty's Govt. Art. 43 of the Declaration of London, which provides (*inter alia*) that if a vessel is encountered at sea while unaware of the declaration of contraband which applies to her cargo the contraband cannot be condemned except on payment of compensation, was not excepted by the terms of the Order in Council. By the said order chrome ore was declared to be absolute contraband. In the prize proceedings for condemnation of a cargo of chrome ore shipped in June, 1914, from a foreign port on a Norwegian sailing vessel chartered by a German co., under a contract entered into in 1913 between an English co. & a German co., two claims were put in, one by the English co., the sellers, & the other by the Swedish co., which alleged that the ore had been purchased by them from the German co. No claim was made on behalf of the German co. The board approved the view of the President that art. 43 did not exclude the general rule applying that contraband belonging to an enemy on board a neutral vessel remained liable to condemnation without compensation. Accordingly the appeal of the Swedish co. was dismissed & that of the English co. withdrawn on the terms agreed between them & the Crown, which terms the board were prepared to approve.—**THE SORFAREREN** (1917), 117 L. T. 259; 33 T. L. R. 526; 14 Asp. M. L. C. 195, P. C.

*Annotations:—***Refd.** The Axel Johnson, The Drottning Sophia, [1917] P. 234; The Parchim, [1918] A. C. 157.

**932. What may be condemned—Proceeds of sale of enemy goods—Goods liable to condemnation if remaining in specie.]**—The proceeds of enemy goods discharged in port, which would have been subject to seizure & condemnation had they remained in specie, are, when nothing has intervened to change their ownership, also subject to seizure & condemnation.—**THE GLENROY**, [1918] P. 82; 87 L. J. P. 55; 118 L. T. 318; 34 T. L. R. 190; 62 Sol. Jo. 292; 14 Asp. M. L. C. 207; 3 P. Cas. 161.

*Annotation:—***Apld.** The Achilles, [1919] P. 340.

**933. ———.]**—After the outbreak of war with Austria, several British vessels arrived at British ports with goods consigned to, & belonging to, an Austrian co. with a branch at Manchester. The branch was placed under a controller appointed by the Board of Trade, who took possession of the goods at the respective ports, &, in the ordinary course of business, sold them to various Lancashire merchants & remitted the proceeds to the Public Trustee acting as the custodian of enemy property. The Public Trustee handed over the proceeds to the Admiralty Marshal, who seized them as prize & paid them into the Prize Ct. for adjudication:—**Held:** the goods having been sold by the controller, not as agent for the enemy firm, but as an officer of the High Ct., the proceeds were held

*in medio* to be dealt with according to the order of the Ct. & as the proceeds of enemy property seized in port were liable to seizure & condemnation as prize.—**THE ACHILLES**, [1919] P. 340; 89 L. J. P. 59; 122 L. T. 252; 14 Asp. M. L. C. 541; 3 P. Cas. 632.

**Insurable interest of captors in prize.]**—See **INSURANCE**, Vol. XXIX., p. 115, Nos. 694–704.

## SECT. 2.—IN WHAT COURT.

**934. Competent court of capturing country.]**—A prize should be brought *infra præsidia* of the capturing country, where, by being so brought, it may be considered, as incorporated into the mass of national stock. The greatest extension that has been allowed has not carried the rule beyond the ports or places of security, belonging to some friend or ally in the war, who has a common interest in defending the acquisitions of the belligerent, made from the common enemy of both. In later times, an additional formality has been required, that of a sentence of condemnation, in a competent ct., decreeing the capture to have been rightly made, *jure belli*; it not being thought fit, in civilised society, that property of this sort should be converted without the sentence of a competent ct., pronouncing it to have been seized as the property of an enemy, & to be now become *jure belli* the property of the captor (**SIR WILLIAM SCOTT**).—**THE HENRICK & MARIA** (1799), 4 Ch. Rob. 43; 1 Eng. Pr. Cas. 339; 165 E. R. 529; *affd.* (1807), 6 Ch. Rob. 138, n., P. C.

*Annotations:—***Apld.** The Comet (1804), 5 Ch. Rob. 285; The Purissima Conception (1805), 6 Ch. Rob. 45. **Consd.** The Gauntlet (1871), L. R. 3 A. & E. 381. **Mentd.** R. v. Keyn (1876), 2 Ex. D. 63.

**935. ———.]**—(1) Another question has arisen in this case, upon which a great deal of argument has been employed; namely, whether the sentence of condemnation which was pronounced by the French consul, is of such legal authority as to transfer the vessel, supposing the purchase to have been *bond fide* made? . . . I apprehend that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; & that a neutral purchaser in Europe, during war, does not look to the legal sentence of condemnation as one of the title deeds of the ship if he buys a prize vessel. I believe there is no instance in which a man having purchased a prize vessel of a belligerent, has thought himself quite secure in making that purchase, merely because the ship had been in the enemy's possession twenty-four hours, or carried *infra præsidia*: the contrary has been more generally held, & the instrument of condemnation is amongst those documents which are most universally produced by a neutral purchaser (**SIR WILLIAM SCOTT**).

(2) Now, in what form have these adjudications constantly appeared? They are the sentences of cts. acting & exercising their functions in the belligerent country; & it is for the very first time in the world, that in the year 1799, an attempt is made to impose upon the ct. a sentence of a tribunal not existing in the belligerent country,

unless perishable.—**THE CURLEW** (1812), Stewart, 312.

**d. Necessity for sentence of condemnation.]**—A sentence of condemnation is necessary to prevent the former owner of a captured vessel from recovering her out of the hands of a neutral purchaser.—**WAKE v. HILLARY BAUERMAN & SON** (1801), Mor. Dict.

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## App. No. 1.

**e. Procedure as to condemnation.]**—On an application by the Admiralty for directions as to procedure in regard to goods suspected of belonging to the enemy, which had been found on neutral & friendly ships & detained by the customs, the ct. directed that, where appearance had not been

entered within eight days on the writ for condemnation, application could be made for condemnation on the writ only without supporting documents & that, where appearance had been entered, the Admiralty should have ten days to file their affidavit or petition, or both.—**Ex p. THE ADMIRALTY**, [1914] W. R. 820.

T T

*Sect. 2.—In what court. Sect. 3: Sub-sects. 1, 2 & 3. Sects. 4 & 5.]*

but of a person pretending to be authorised within the dominions of a neutral country; in my opinion, if it could be shown, that regarding mere speculative general principles, such a condemnation ought to be deemed sufficient; that would not be enough; more must be proved; it must be shown that it is conformable to the usage & practice of nations. . . . Now, it having been the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions within the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal might act in the neutral country, I must take my stand on the ancient & universal practice of mankind; & say that as far as that practice has gone, I am willing to go; & where it has thought proper to stop, there I must stop likewise. . . . Having thus declared that there must be an antecedent usage upon the subject, I should think myself justified in dismissing the matter without entering into any further discussion. I see no sufficient ground to say that on mere general principles such a sentence could be sustained (SIR WILLIAM SCOTT).

(3) Proceedings upon prize are proceedings *in rem*; & it is presumed, that the body & substance of the thing is in the country which has to exercise the jurisdiction (SIR WILLIAM SCOTT).—THE FLAD OYEN (1799), 1 Ch. Rob. 135; 1 Eng. Pr. Cas. 78; 165 E. R. 124.

*Annotations:—As to (1) Distd. The Christopher (1799), 2 Ch. Rob. 209. As to (2) Expi. Oddy v. Bovill (1802), 2 East, 473. As to (3) Reifd. Cammell v. Sewell (1860), 6 Jur. N. S. 918. Generally, Reifd. The Perseverance (1799), 2 Ch. Rob. 239.*

**936. Condemnation while prize in neutral country.]—THE FLAD OYEN, No. 935, ante.**

**937. —.]—**Under peculiar circumstances the ct. will condemn a prize which has been taken into & lies in a neutral port & allow it to be sold there.

I have no hesitation in condemning them, & looking at the fact deposed to, that they are not in a fit state to be brought to England, & the consent to the Prussian Govt. to their sale at Memel, the ct. will allow that course in the present case, but with a proviso that the wishes of the Prussian Govt. shall be fully observed with respect to the sale (DR. LUSHINGTON).—THE POLKA (1854), 1 Ecc. & Ad. 447; Spinks, 57; 5 L. T. 775; 2 Eng. Pr. Cas. 301; 164 E. R. 257.

*Annotation:—Consd. The Gauntlet (1871), L. R. 3 A. & E. 381.*

**Condemnation of British ships.]—See Sect. 6, sub-sect. 1, post.**

### SECT. 3.—PROPERTY IN PRIZE.

#### SUB-SECT. 1.—BEFORE CONDEMNATION.

**938. No property passes until condemnation.]—**If a ship be taken by piracy, or if by letters of mart, & be not brought *infra præsidia* of that King by whose subject it was taken, it is no lawful prize, & the property not altered, & therefore the sale void (*per Cur.*).—ANON. (1641), March, 110; 82 E. R. 434.

**939. —.]—**If a ship insured be taken by the enemy, & after a possession of nine days, but before she is carried *infra præsidia*, be retaken by an English man of war, the property is not changed.

—ASSEVEDO v. CAMBRIDGE (1712), 10 Mod. Rep. 77; 88 E. R. 634.

*Annotations:—Consd. Goss v. Withers (1758), 2 Burr. 688. Reifd. R. v. Majaval, etc. (1845), 6 L. T. O. S. 188.*

**940. —.]—THE LUCRETIA, No. 945, post.**

**941. —.]—**No right is vested by any of the Prize Acts in the captors of an enemy's ship & cargo in war, before the ultimate adjudication of the cts. of prize.—HOME v. CAMDEN (EARL) (1795), 2 Hy. Bl. 533; 6 Bro. Parl. Cas. 203; 126 E. R. 687, H. L.; *affg.* S. C. *sub nom.* CAMDEN (LORD) v. HOME (1791), 4 Term Rep. 382.

*Annotations:—Consd. Egyptian Bonded Warehouses Co. v. Yeyasu Goshi Kaisha, (1922) 1 A. C. 111. Reifd. The St. Tudno, [1918] P. 174. Mentd. Gare v. Gapper (1803), 3 East, 472; Gould v. Gapper (1804), 5 East, 345; Veley v. Burder (1841), 12 Ad. & El. 265; Re Appledore Commutation (1845), 8 Q. B. 139; Wadsworth v. Spain (Queen), De Haber v. Portugal (Queen) (1851), 17 Q. B. 171; R. v. Greenwioh County Court Judge (1888), 60 L. T. 248.*

**942. —.]—THE NOSTRA SIGNORA DE LOS ANGELOS (1801), 3 Ch. Rob. 287; 165 E. R. 466.**

**943. —.]—STEVENS v. BAGWELL, No. 946, post.**

**944. —.]—**Proceeds of capture by a conjoint British & Sicilian force, not distributable as prize, without a sentence of condemnation.—*Re* ANGLO-SICILIAN CAPTURES (1835), 3 Hag. Adm. 192; 166 E. R. 377.

**945. Captors have possessory right—Of qualified nature.]—**In regard to the general law, no property of any prize vests in the captors until condemnation. All prize of war vests originally in the state, or in its great representative, wherever representation resides, till it is granted to the captor; & the possessory right, as was observed by one of the advocates, is only *sub modo* (*per Cur.*).—THE LUCRETIA (1778), Marr. 227; 165 E. R. 52.

**Capture of British ship—Right of foreign purchaser.]—See Sect. 6, sub-sect. 2, post.**

#### SUB-SECT. 2.—AFTER CONDEMNATION.

**946. Property passes—As from date of capture.]—**No interest completely vested in prize before condemnation; but upon condemnation it is considered the property of the captor from the time of the capture. The Crown in prize grants puts what is strictly bounty upon the footing of right.—STEVENS v. BAGWELL (1808), 15 Ves. 139; 33 E. R. 707.

*Annotations:—Consd. Alexander v. Wellington (1831), 2 Russ. & M. 35. Apld. Anderson v. Marten, [1907] 2 K. B. 248. Mentd. Stanley v. Jones (1831), 7 Bing. 369; Reynell v. Sprye, Sprye v. Reynell (1852), 1 De G. M. & G. 656; Willock v. Noble (1875), L. R. 7 H. L. 580; James v. Kerr (1889), 40 Ch. D. 449.*

**947. —** If condemnation before competent court—& prize lawful.]—To trespass for taking a ship, a plea that deft. was the captain of a man of war, & that he took her on the high seas as a prize, & carried her into a port abroad, where she was condemned in the Admty. Ct. as prize, is no justification; for it does not appear that she was lawful prize; or before whose ct., or by what judge she was condemned.—BEAKE v. TIRRELL (1688), 1 Show. 6; Carth. 31; Comb. 120; Holt, K. B. 47; 89 E. R. 411; *sub nom.* BEAK v. THYRWIT, 3 Mod. Rep. 194.

*Annotation:—Mentd. Omychund v. Barker (1744), 1 Atk. 21.*

#### SUB-SECT. 3.—CONDEMNATION OF BRITISH SHIP.

*See Sect. 6, sub-sect. 2, post.*

## SECT. 4.—CONCLUSIVENESS OF SENTENCE.

948. Sentence of English court—As to fact of capture.]—The sentence of the Ct. of Admty. condemning certain goods as captured from the enemy, is conclusive evidence that they were so captured.—*STIRLING v. VAUGHAN* (1809), 2 Camp. 225; 170 E. R. 1137, N. P.; *subsequent proceedings*, 11 East, 619.

949. — As to engagement of ship in illegal transaction.]—(1) A sentence of condemnation of a neutral, by a British Vice-Admty. Ct. abroad, is sufficient evidence, from which to presume that the ship condemned had been engaged in some illegal transaction; though the ground of condemnation do not appear in the sentence.

(2) A neutral meeting by agreement a British vessel, for the purpose of receiving gunpowder & arms, is illegal, though the latter should have had a licence to export them for the purposes of trade.—*GIBSON v. MAIR* (1813), 1 Marsh. 39.

Sentence of foreign court.]—See CONFLICT OF LAWS, Vol. XI., pp. 465, 466, Nos. 1202-1214; ESTOPPEL, Vol. XXI., pp. 154-156, Nos. 165-190; INSURANCE, Vol. XXIX., pp. 182-184, Nos. 1404-1423.

## SECT. 5.—DETENTION OF MERCHANT SHIPS IN LIEU OF CONDEMNATION.

See Hague Convention, 1907, No. 6, Arts. 1-4.

950. What are merchant ships—Racing yacht.]—A racing yacht is not a merchant ship within the Hague Convention, No. 6, Arts. 1, 2 (1), & consequently is not entitled to the immunity from confiscation accorded to merchant ships thereunder. An enemy racing yacht seized in a British port immediately upon the outbreak of war is, therefore, subject to condemnation as prize according to the ordinary rule applied to enemy property seized in port.—*THE GERMANIA*, [1917] A. C. 375; 86 L. J. P. 94; 116 L. T. 362; 33 T. L. R. 273; 61 Sol. Jo. 444; 13 Asp. M. L. C. 588, P. C.

Annotation.—*Apld.* Procurator in Egypt v. Deutsches Kohlen Depot Gesellschaft, [1919] A. C. 291.

951. — Coaling vessels.]—Enemy tugs & lighters employed in coaling ships in the Suez Canal & its ports of access are not within the Hague Conventions, No. 6, Arts. 1, 2, or No. 11, Art. 3, not being "merchant ships"—(*navire de commerce*), nor "vessels exclusively engaged in local navigation," & are not immune from seizure; & a seizure arranged on shore by consent is not the "exercise of a right of war in the canal" within Art. 4 of the Suez Canal Convention, 1888; & being enemy property lawfully seized in port, they are liable to condemnation.—*PROCURATOR IN EGYPT v. DEUTSCHES KOHLEN DEPOT GESELLSCHAFT*, [1919] A. C. 291; 88 L. J. P. C. 37; 120 L. T. 102; 35 T. L. R. 159; 14 Asp. M. L. C. 384, P. C.

Annotations.—*Apld.* *Re* The Anichab, [1919] P. 329. *Refd.* The Orteric, [1920] A. C. 724; The Blonde, [1922] 1 A. C. 313.

952. Enemy ships in British port at outbreak of war.]—*THE ST. TUDNO*, No. 111, *ante*.

953. — Permission to leave within days of grace—Inability to leave through unavoidable circumstances.]—*THE R. C. RICKMERS* (1914), *Times*, Sept. 25.

954. — — — — — What are unavoidable circumstances.]—(1) An enemy merchant ship is not entitled to receive an unconditional pass under Art. 1 of the Hague Convention No. 6 of 1907, & conditions attached to the offer of a pass

which are manifestly reasonable do not invalidate it.

(2) The expression "*force majeure*" in Art. 2 has reference to circumstances which render the ship unable to leave the port within the days of grace allowed her, & does not include the circumstance that the owners have not provided the master with sufficient funds to continue the voyage.—*THE CONCORDORO*, [1916] 2 A. C. 199; 85 L. J. P. C. 156; 114 L. T. 962; 32 T. L. R. 465; 13 Asp. M. L. C. 355, P. C.

Annotations.—*As to* (1) *Refd.* The Pindos, The Helgoland, The Rostock (1916), 32 T. L. R. 489. *Generally, Mentd.* Lebeaupin v. Grispin, [1920] 2 K. B. 714.

955. — — — — —]—Upon the outbreak of war an enemy ship was seized in a port of New South Wales; her papers & charts were removed, & a watchman placed on board. After the seizure a proclamation was made granting enemy ships a period in which to depart. The master was not informed by the proclamation, or otherwise, that upon his applying for a pass the ship would be put in a position to depart:—*Held*: the ship was unable to leave by "circumstances beyond its control," *force majeure*, within the Hague Convention No. 6, Art. 2, & consequently was not liable to condemnation.—*THE TURUL*, [1919] A. C. 515; 88 L. J. P. C. 43; 120 L. T. 393; 35 T. L. R. 217; 14 Asp. M. L. C. 423, P. C.

Annotation.—*Refd.* The Blonde, [1922] 1 A. C. 313.

956. — — — — — Doubt as to liability to condemnation—Detention until further order.]—By Art. 1 of the Hague Convention, 1907, No. 6, relative to the status of enemy merchant ships at the outbreak of hostilities, it is stated to be desirable that such a ship belonging to one of the belligerent powers in an enemy port should be allowed to depart within a reasonable number of days of grace, & by Art. 2, if, owing to circumstances beyond her control, the merchant ship has been unable to leave the enemy port within that period, or has not been allowed to leave, the vessel may not be confiscated but merely detained.

A German vessel arrived at the East Bute Dock, Cardiff, on Aug. 4, 1914, some hours before the outbreak of hostilities between Great Britain & Germany. She was, on the following day, detained by the Collector of Customs, & a writ was subsequently issued by the Procurator General for her condemnation:—*Held*: the vessel was properly seized by the officers of the Crown, but in view of the difficulty of ascertaining whether any days of grace had been agreed upon by Germany, the vessel would, on the application of counsel for the Crown, be detained by the marshal until further order, with liberty to apply & all questions of costs reserved.—*THE CHILE*, [1914] P. 212; 84 L. J. P. 1; 112 L. T. 248; 31 T. L. R. 3; 58 Sol. Jo. 852; 12 Asp. M. L. C. 598.

Annotations.—*Apld.* The Tommt, The Rothersand, [1914] P. 251. *Foll.* The St. Tudno, [1916] P. 291. *Apprv.* The Gutenfels, [1916] 2 A. C. 112; The Prinz Adalbert, [1918] A. C. 500. *Consd.* The Blonde, [1922] 1 A. C. 313. *Refd.* The Marie Glaeser, [1914] P. 218; The Germania, [1916] P. 5; Horlock v. Beal (1916), 114 L. T. 193; The Matli (1918), 34 T. L. R. 582. *Mentd.* The Mogileff (No. 2), [1922] P. 122.

957. — — — — —]—Art. I. of Convention No. 6 of the Hague Convention, 1907, provides that "when a merchant-ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately or after a reasonable number of days of grace, & to proceed, after being furnished with a pass, direct to the port of destination or any

*Sect. 5.—Detention of merchant ships in lieu of condemnation. Sect. 6: Sub-sect. 1.]*

other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war & has entered a port belonging to the enemy while still ignorant that hostilities have broken out." Art. 2 provides that "a merchant-ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the previous article, or which was not allowed to leave, may not be confiscated. The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."

A German merchant ship arrived at Port Said on Aug. 5, 1914, in ignorance that hostilities had broken out between Great Britain & Germany. From Aug. 5 to Aug. 14, she was not free to leave, but on Aug. 14 she was told that she could go if she liked. She neither asked for, nor was offered, a pass, & remained in port until Oct. 13, when the Egyptian Govt. took possession of her. On Oct. 16 she was taken out to sea & conducted to a British cruiser, which seized her as prize. These events took place before war was declared between Gt. Britain & Turkey & before Egypt had been declared a British Protectorate:—*Held*: after the outbreak of war between Great Britain & Germany, Port Said, as regards Germany, was an enemy port; assuming that the Convention applied to Egypt & was operative at the time, the question whether Art. 2, or any part of it, was obligatory, or whether, if the course referred to as "desirable" in Art. 1 were not taken, Art. 2 had any application to an enemy vessel which found itself in an enemy port at the outbreak of hostilities, or which subsequently entered without knowledge of the outbreak of hostilities, was a question of law arising on an international document involving a reciprocal obligation performable only at the end of the war; therefore the vessel must be detained until further order, leaving the ultimate rights between the parties to be determined after the war.—*THE GUTENFELS*, [1916] 2 A. C. 112; 60 Sol. Jo. 477; 2 P. Cas. 36; *sub nom.* *THE GUTENFELS*, *THE BARENFELS*, *THE DERFFLINGER*, 85 L. J. P. C. 146; 114 L. T. 953; 32 T. L. R. 433; 13 Asp. M. L. C. 346, P. C.; *affy.*, 1 P. Cas. 643.

*Annotation*.—*Apld.* *The Achala*, [1916], 85 L. J. P. C. 155; *The Conadoro* (1916), 32 T. L. R. 465. *Distd.* *The Germania*, [1917] A. C. 375. *Refd.* *The Eumacus* (1916), 85 L. J. P. 130; *The Marquis Bacquehem*, [1916] 2 A. C. 186; *The Pindos*, *The Helgoland*, *The Rostock*, [1916] 2 A. C. 193; *The Prinz Adalbert*, [1918] A. C. 500; *The St. Tudno*, [1918] P. 174; *The Sudmark*, [1918] A. C. 475; *The Blonde*, [1922] 1 A. C. 313. *Mentd.* *Casdagli v. Casdagli*, [1919] A. C. 145.

958. ————*]*—The preamble to the Sixth Hague Convention states that the contracting parties "anxious to ensure the security of international commerce against the surprises of war, & wishing, in accordance with modern practice, to protect as far as possible operations undertaken in good faith & in process of being carried out before the outbreak of hostilities, have resolved to conclude a Convention to this effect." By Art. 1 of the Convention it was stated to be desirable that a merchant ship in an enemy port at the outbreak of hostilities should be allowed to depart freely either immediately or after a reasonable number of days of grace; & by Art. 2, that if, owing to circumstances beyond her control, the ship had not been able to leave the port within that period, or had not been allowed to

leave she might not be confiscated but merely detained.

On Aug. 3, 1914, a German liner bound from Philadelphia to Hamburg with passengers & cargo, having heard of the outbreak of war between France & Germany, put into Falmouth for orders. On the morning of Aug. 4, the master was told by the customs authorities that his vessel would not be allowed to leave. About 4 p.m. on that day he was told that the vessel was unconditionally released, but no steps were taken by the master indicating an intention to leave. From 11 p.m. on Aug. 4, a state of war existed between Great Britain & Germany; on the following morning the vessel was seized as prize. She was subsequently condemned on the ground that the Convention did not apply, as the vessel had entered the port in order to avoid French cruisers & not for any commercial purpose:—*Held*: their Lordships not proposing to decide at the present time what was the effect of the preamble of the Sixth Convention upon Arts. 1 & 2 an order should be advised similar to that in *The Chile*, No. 956, *ante*, so as to preserve all rights intact until the conclusion of the war.—*THE PRINZ ADALBERT*, [1918] A. C. 500; 87 L. J. P. 145; 118 L. T. 161; 34 T. L. R. 229; 14 Asp. M. L. C. 298, P. C.

*Annotations*.—*Refd.* *The Blonde* (1922), 126 L. T. 769; *The Mogloff* (No. 2), [1922] P. 122.

959. ————*Imposition of reasonable conditions.*—*THE CONCADORO*, No. 954, *ante*.

960. ————*Act of grace.*—In the absence of reciprocal agreement to the contrary, merchant ships of a belligerent found in an enemy port at the outbreak of hostilities are subject to confiscation; & the practice whereby in modern times such ships have been allowed to depart freely within a given fixed time, as provided by Hague Convention No. 6, 1907, constitutes an act of grace & not a rule of international law obligatory upon all civilised states.—*THE MARIE LEONHARDT*, [1921] P. 1; 90 L. J. P. 113; 37 T. L. R. 24.

*Annotation*.—*Apld.* *The Blonde*, [1921] P. 155.

961. ————*Refusal to leave.*—A merchant ship, which was in an enemy port at the outbreak of hostilities, was given a reasonable time to leave the port, & was offered a pass to a neutral port, but elected not to avail herself of it, but to remain where she was:—*Held*: she was not protected by Arts. 1 & 2 of the Hague Conference, 1907, Convention No. 6, & was liable to confiscation & condemnation as prize.—*THE ACHALA*, [1916] 2 A. C. 198; 85 L. J. P. C. 155; 114 L. T. 956; 13 Asp. M. L. C. 349; 1 P. Cas. 242, P. C.

*Annotation*.—*Refd.* *The Pindos*, *The Helgoland*, *The Rostock*, [1916] 2 A. C. 193.

962. ————*Ship lying in open roadstead.—Within limits of fiscal port.*—Arts. 1 & 2 of Convention No. 6 of the Second Hague Peace Conference, 1907, relative to the status of a belligerent merchant ship in an enemy port at the outbreak of hostilities, are applicable only to vessels within a "port" in the ordinary mercantile sense of the word, & have no application to vessels merely within the limits of a fiscal port.—*THE BELGIA*, [1916] 2 A. C. 183; 85 L. J. P. 106; 114 L. T. 957; 32 T. L. R. 435; 60 Sol. Jo. 457; 13 Asp. M. L. C. 350; 2 P. Cas. 32, P. C.

*Annotation*.—*Refd.* *The Prinz Adalbert*, [1916] P. 81.

963. ————*Ship entering with knowledge of war.—Knowledge gained from enemy warship.*—A merchant vessel belonging to a belligerent power which enters an enemy port with knowledge that hostilities have broken out is subject to condemnation, although she has derived that knowledge

from an enemy warship which has allowed her to proceed on her voyage.

An Austrian vessel which, after being stopped at sea by a British warship & told of the outbreak of hostilities, was allowed to continue her voyage, entered the Port of Suez, apparently in the belief that it would be treated as a neutral port. She was prevented from entering the canal & was detained. Subsequently she was taken out to sea & conducted to a British warship which seized her as prize:—*Held*: the vessel must be condemned.—THE MARQUIS BACQUEHEM, [1916] 2 A. C. 186; 85 L. J. P. C. 151; 114 L. T. 958; 32 T. L. R. 462; 13 Asp. M. L. C. 351, P. C.

**964. Ship or cargo of power not signatory to article of convention.]**—THE MARIE GLAESER, No. 1106, *post*.

**965.** ———.] — Apart from international convention, enemy merchant ships, captured on the high seas in ignorance of the outbreak of hostilities are liable to condemnation. Art. 3 of Convention No. 6, of the Hague Conference, 1907, which provides for the detention, instead of confiscation, of enemy vessels which left their last port of departure before the commencement of war & are encountered on the high seas while still ignorant of the outbreak of war, has no application to German vessels, the German Empire, when signing the convention, having refused its assent to this Art.—THE PERKEO (1914), 84 L. J. P. 149; 112 L. T. 251; 58 Sol. Jo. 852; 12 Asp. M. L. C. 600.

*Annotation*:—*Refd.* The Marie Glaeser (1914), 112 L. T. 251.

**966.** ———.] — THE MARQUIS BACQUEHEM, No. 963, *ante*.

**967.** ———.] — After war had broken out between Great Britain & Germany, a German merchant vessel was seized by one of His Majesty's ships of war & taken, with her cargo, owned by Austrian subjects, into Plymouth. A writ was issued against the cargo some hours before the outbreak of hostilities between Great Britain & Austria, & a second writ was subsequently issued against the cargo which remained in the custody of the customs authorities until, by consent, sold by the Marshal & the proceeds paid into ct.:—*Held*: the goods, or their proceeds in ct., must be condemned as good & lawful prize, for the goods were, & were intended to be, held by the authorities on behalf of the Crown after the outbreak of war between Great Britain & Austria-Hungary, & therefore, although unliveried from the vessel in port, these goods were subject to seizure, & must be regarded as enemy property not protected by the Hague Convention No. 6, as Germany had declined to accede to Art. 3 in respect to the protection to be afforded to a merchant ship, & article is supplemented by Art. 4 in respect of the cargo.—THE SCHLESSEN, [1916] P. 225; 86 L. J. P. 14; 115 L. T. 555; 13 Asp. M. L. C. 510.

*Annotations*:—*Distd.* The Orteric, [1920] A. C. 724. *Refd.* The Palm Branch, [1919] A. C. 272.

**968. Preservation of property detained.]** — THE HANS HEMSOOTH (1914), *Times*, Nov. 24.

## SECT. 6.—CONDEMNATION OF BRITISH SHIPS.

### SUB-SECT. 1.—IN WHAT COURT.

**969. Court of capturing country—Ship taken to neutral port.]**—THE COMET (1804), 5 Ch. Rob. 285; 165 E. R. 778.

**970.** ———.] — This case involves a question as to the validity of sentences of condemnation pronounced in a belligerent country on prizes carried into neutral ports. . . . It appeared to

me that the acknowledged practice of this country must have the effect of making those sentences valid, whilst that practice continued. For there could be no equity on which we could deny the validity of that title to neutrals purchasing of the enemy, at the same time that they were invited to take them from ourselves (SIR WILLIAM GRANT). —THE HENRICK & MARIA (1807), 6 Ch. Rob. 138, n.; 165 E. R. 878, P. C.; *affg.* (1799), 4 Ch. Rob. 43.

*Annotations*:—*Refd.* The Comet (1804), 5 Ch. Rob. 285; The Purissima Conception (1805), 6 Ch. Rob. 45; The Gauntlet (1871), L. R. 3 A. & E. 381; R. v. Keyn (1876), 2 Ex. D. 63.

**971. Consular court — Enemy consul in neutral country.]**—A sentence of condemnation of a British ship, which had been captured by a French privateer, & carried into Bergen, in Norway, by the French consul at Bergen, is an illegal sentence. If after such a sentence, the owner repurchase his ship at a public auction at Bergen, he cannot recover the money so paid from the underwriter. Such a contract is a ransom, & illegal.—HAVELOCK v. ROCKWOOD (1799), 8 Term Rep. 268; 101 E. R. 1382.

**972.** ———.] — THE FLAD OYEN, No. 935, *ante*.

**973.** ———. **Condemnation sustained by court of belligerent country.]**—(1) Condemnation in Norway before a French consul, invalid, not helped by a sentence of a Ct. of Prize in the enemy's country, decreeing restitution to the neutral claimant, on the circumstances of a subsequent capture.

Among the many novelties that the French have introduced into the world, the condemnation of prize vessels in neutral ports, under the authority of consular courts sitting there is not the least extraordinary. These condemnations, sustained by the tribunals of France, may be good & valid against French subjects on a second capture by French cruisers or in any other way in which they may come before them in transactions amongst their own subjects as considered by the law of their own country, but they are not binding on other countries. . . . There is nothing to show that the reversal of the second condemnation, passed upon any ground, that had a connection with the first condemnation in Norway, or, that affirmed that sentence, upon any view of its particular merits. If it affirmed it in any manner, I presume it would do so, only on the general ground, that these consular condemnations were to be sustained; in which it would be just as good, as that condemnation, & no better. But in truth, I presume it must have turned upon other questions, totally foreign to it; it never could have been, that the validity of such a condemnation had been disallowed by the inferior French ct., so as to make it necessary for the superior tribunal to support it by a reversal. I think, therefore, that these second proceedings in France add nothing to the real authority of the first proceedings in Norway; & as those proceedings cannot sustain the title of the neutral purchaser, I must overrule his protest, & admit the claim of the original proprietor (SIR WILLIAM SCOTT).

(2) As to ordinary repairs, the ct. does not usually take any notice of them, the use of the ship being set off against them. . . . The proper rule for the registrar & merchants to pursue, would be to consider the *quantum* on the improved state in which the ship comes into the hands of the original proprietors. As to that part, it is not a restitution to them, but a new acquisition (SIR WILLIAM SCOTT).—THE KIERLICHETT (1800), 3 Ch. Rob. 96; 1 Eng. Pr. Cas. 258; 165 E. R. 399.



*Sect. 6.—Condemnation of British ships: Sub-sects. 1 & 2. Part IX. Sect. 1: Sub-sect. 1, A.]*

974. — — — — —.]—The ship had been carried into Leghorn, where the French consul assumed a jurisdiction, & passed a sentence of condemnation on the ship & cargo. If the matter had rested there, on the validity of the consular sentence at Leghorn, this ct. . . . would not have held that title to be sufficient. But there has been also a sentence of the *Conseil des Prises* at Paris; . . . the *Conseil des Prises* at Paris, as now constituted, is a ct. of original jurisdiction, & also a ct. of appeal. It exercises a power of evocation, by which it can call before it causes from the inferior cts., which appear to exercise but a very limited jurisdiction. . . . Here, cases of common condemnations . . . pass on a view of the evidence of the case. The enemy proprietor is necessarily absent by operation of law, & yet the sentence is completely valid, as well against him as against all the world. . . . It is said that the claimant, having purchased under the original sentence, cannot cure the defect of that title by a subsequent sentence, passed after many changes of property, & when the vessel herself was no longer amenable, as a subject of prize proceedings, to the jurisdiction of the belligerent country, I cannot accede to that position. In our cts. it happens unavoidably, as to ships taken in the East Indies, that long before the case comes to the adjudication, the property may have passed to other hands. If the title is impeached before the sentence takes place, it may be vitiated; but when a valid sentence comes, it must be considered as operating retroactively, so as to rehabilitate the former title. A valid sentence has confirmed the title before any objection had been taken to it, & that title, derived from the original purchaser, has been properly conveyed to the neutral claimant (SIR WILLIAM SCOTT).—THE FALCON (1805), 6 Ch. Rob. 194; 165 E. R. 899.

*Annotation:—Consd. The Mowe, [1915] P. 1.*

975. — — — — — *Effect of intervention of peace.*]—THE SCHOONE SOPHIE (1805), 6 Ch. Rob. 138; 165 E. R. 878.

976. *Court of Admiralty in neutral country—Sitting under commission from belligerent power.*]—The sentence of a Ct. of Admty., sitting under a commission from a belligerent power, in a neutral country, will not be recognised in our cts.; & that is to be considered a neutral country for this purpose, in which the forms of an independent neutral government are preserved, although the belligerent may have such a body of troops stationed there, as in reality to possess the sovereign authority.—DONALDSON v. THOMPSON (1808), 1 Camp. 429; 170 E. R. 1010, N. P.

*Annotations:—Refd. Hobbs v. Henning (1865), 5 New Rep. 406. Mentd. Cremlid v. Powell, The Gerasimo (1857), 11 Moo. P. C. C. 88.*

SUB-SECT. 2.—RIGHTS OF PURCHASER.

977. *Valid sentence of condemnation.*]—THE BETSY (1800), 2 Ch. Rob. 210, n.; 165 E. R. 291.

*Annotation:—Apld. Oddy v. Bovill (1802), 2 East, 473.*

978. — — — — —.]—Condemnation in France of a British ship, taken by a French privateer into a Spanish port, & lying there at the time of condemnation, held valid.

In such cases there is nothing to prevent the government from proceeding to that last act of hostility; there is a common interest between them on the subject; & both govts. may be presumed to authorise any measures conducing to

give effect to their arms, & to consider each other's ports as mutually subservient. I am therefore inclined to hold such a condemnation sufficient, in regard to property taken in the course of the operations of a common war. As the facts of purchase appear to be sufficiently proved on the further proof that has been exhibited, I shall decree restitution of this ship for the claimants (SIR WILLIAM SCOTT).—THE CHRISTOPHER (1799), 2 Ch. Rob. 209; 1 Eng. Pr. Cas. 225; 165 E. R. 291.

*Annotation:—Consd. Oddy v. Bovill (1802), 2 East, 473.*

979. — — — — — *British character divested.*]—The vessel was captured, & carried into a port of the enemy, by which act duly pursued, the best title in the world might be extinguished, & by which a strong ground of presumption is laid that the right of the former proprietor has, in fact, been legally divested, in a regular & effective manner, for the presumption is, that being so carried, the vessel was subjected to a legal condemnation. Under these circumstances, I think the former proprietor is not at liberty to take on himself the character of owner until he can prove his title has not been legally divested. . . . When the case comes to proof, he says, . . . I will call upon the other side, to make out every step of the purchase, & the *onus* lies with him. Certainly it does not, under such circumstances, but if it did, there is a bill of sale on board, & a sentence of condemnation in the Prize Ct. of France, proof sufficient to establish a good title in all ordinary cases, even of prize. It would be going beyond the bounds which this Instance Ct. of Admiralty has hitherto prescribed to its practice, to call on claimant to support the *prima facie* evidence of a good title, which is already exhibited (SIR WILLIAM SCOTT).—THE COUNTESS OF LAUDERDALE (1802), 4 Ch. Rob. 283; 165 E. R. 613.

980. — — — — —.]—If under the authority of a sentence in the enemy's Ct. of Prize there has been a sale of the vessel to a neutral, that sale which transfers the property to the neutral purchaser will bar the claim of the original British owners against the neutral holder (SIR WILLIAM SCOTT).—THE CORNELIA (1810), 1 Edw. 244; 165 E. R. 1097.

981. — — — — —.]—THE PURISSIMA CONCEPTION, No. 1417, *post*.

982. — — — — —.]—British ship captured by the French, & carried to Spain & condemned. Afterwards seized by the Junta as French property & sold. Title of purchaser good against former British owner.—THE VICTORIA (OTHERWISE THE ALFRED THE GREAT) (1809), Edw. 97; 165 E. R. 1045.

983. *Sentence of condemnation by incompetent court.*]—HAVELOCK v. ROCKWOOD, No. 971, *ante*.

984. — — — — —.]—THE FLAD OYEN, No. 935, *ante*.

985. — — — — —.]—THE KIERLIGHETT, No. 973, *ante*.

986. — — — — — *Effect of intervention of peace.*]—THE SCHOONE SOPHIE (1805), 6 Ch. Rob. 138; 165 E. R. 878.

987. — — — — — *Subsequent validation by competent court—No objection to title before confirmation.*]—THE FALCON, No. 974, *ante*.

988. *No condemnation.*]—Amelioration, as to ships purchased under an illegal title, without condemnation, allowed under the circumstances of the case. Notice that such allowance will not be continued.

Neutral merchants must observe, that this is an allowance which the court will not think itself bound to continue, after the invalidity of these titles has been so generally made known by the decrees of this court, & of the Superior Court.



If persons will accept ships in this manner, after such a notice, it must be at their own peril that they proceed to lay out money upon a title so notoriously invalid (*per Cur.*).—THE NOSTRA DE CONCEICAS (1804), 5 Ch. Rob. 294; 165 E. R. 781.

**989. No sentence by any competent court.]**—The seizure & sale of a vessel by a neutral state, no sentence of condemnation by any competent ct. being shown does not change the property.—WILSON v. FORSTER (1815), 6 Taunt. 25; 1 Marsh. 425; 128 E. R. 941.

**990. Civil condemnation & sale during peace—Subsequent hostilities—Right of former owner on capture.]**—Restitution to former British owners under Prize Act is confined to captures during the war; not to be extended to a vessel, confiscated in time of peace, for a violation of the revenue laws of France.

It is not in the power of the ct. to give this relief. The provisions of Prize Act apply to goods taken by the enemy as prize; & direct, with regard to such property, that, on recapture, it shall revert to the former British owner. This ship was seized for an alleged violation of the revenue laws of France, in a time of absolute & entire peace. . . . The seizure & condemnation, in time of peace, will have the effect of working an entire defeasance of the British title; & the ship must be condemned to the captor, as property of the enemy taken in the ordinary course of prize (SIR WILLIAM SCOTT).—THE JEUNE VOYAGEUR (1803), 5 Ch. Rob. 1; 165 E. R. 676.

**991. Legal condemnation as title deed.]**—THE FLAD OYEN, No. 935, *ante*.

**Capture & recapture—Salvage claim by original owner.]**—See Part XII., *post*.

## Part IX.—Jurisdiction of Prize Courts.

### SECT. 1.—HIGH COURT OF JUSTICE.

#### SUB-SECT. 1.—NATURE OF JURISDICTION.

##### A. Exclusive Jurisdiction.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 23, 56 (3).

**992. General rule.]**—Where the Admty. has jurisdiction, their sentence binds the party, & at common law, ct. must take it according to their determination.—BROOM'S CASE (1697), 1 Salk. 32; 91 E. R. 34; *sub nom.* R. v. BROOM, 5 Mod. Rep. 340; 12 Mod. Rep. 134; Carth. 398; *sub nom.* R. v. BROME, Comb. 444.

*Annotations:*—**Refd.** *Shermoulin v. Sands* (1697), 1 Ld. Raym. 271; *Le Caux v. Eden* (1781), 2 Doug. K. B. 594.

**993. —.]**—KEY & HUBBARD v. PEARSE (1742), cited in 2 Doug. K. B. at p. 606; 99 E. R. 381.

*Annotations:*—**Consd.** *Le Caux v. Eden* (1781), 2 Doug. K. B. 594; *Netherlands American Steam Navigation Co. v. Procurator General*, [1926] 1 K. B. 84. **Refd.** *Ex p. Lynch* (1815), 1 Madd. 15.

**994. —.]**—Many persons, in the same case, under the same circumstances, upon the same ground, have severally applied for a prohibition, to stop the judges of the Admty. from proceeding upon a monition, issued in the usual form, in order to the condemnation of goods, wares, merchandises, arms, stores & ammunition, taken & seized, by his Majesty's land & sea forces, under the command of Admiral Rodney & General Vaughan, at the island of St. Eustatius, & its dependencies, upon the surrender of the said island of St. Eustatius, & its dependencies, on or about Feb. 3, last; & citing all persons to show cause, why they should not be pronounced to have belonged, at the time of the capture & seizure, to our enemies, & as goods of enemies, or otherwise liable to confiscation, be adjudged, & condemned as good & lawful prize. . . . The taking a ship upon the high sea is triable at law to repair *pltf.* in damages; but a taking on the high sea, as prize, is not triable at law to repair *pltf.* in damages. The nature of the ground of the action, prize or not prize, not only authorises the Prize Ct., but excludes the common law. . . . By the law of nations, & treaties, every nation is answerable to the other for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, & the consent of nations, have established a system of procedure, a code of law, & a ct. for the trial of prize. Every country sues in these cts. of the others, which are

all governed by one & the same law, equally known to each. The claimant is not obliged to sue the captors for damages, & undergo all the delay & vexation to which he may think himself liable, if he sues by a form of litigation, of which he is totally ignorant, & subjects his property to the rules & authority of a municipal law, by which he is not bound. . . . We are all of opinion, that the rule should be discharged (LORD MANSFIELD).—LINDO v. RODNEY (1782), 2 Doug. K. B. 613, n.; 99 E. R. 385.

*Annotations:*—**Consd.** *Anthon v. Fisher* (1782), 3 Doug. K. B. 166. **Ald.** *Smart v. Wolff* (1789), 3 Term Rep. 325. **Consd.** *The Corsican Prince*, [1916] P. 195; *The Roumanian*, [1916] 1 A. C. 124; *The Zamora*, [1916] 2 A. C. 77; *Re Certain Craft Captured on the Victoria Nyanza*, [1919] P. 83. **Refd.** *Menotone v. Gibbons* (1789), 3 Term Rep. 267; *Camden v. Home* (1791), 4 Term Rep. 382; *Ex p. Lynch* (1815), 1 Madd. 15; *Schoacht v. Otter*, *The Ostsee* (1855), 9 Moo. P. C. C. 150; *The Anchab*, [1921] P. 218; *The Marie Leonhardt*, [1921] P. 1; *The Blonde*, [1922] 1 A. C. 313; *Netherlands American Steam Navigation Co. v. Procurator General*, [1926] 1 K. B. 84. **Mentd.** *Bodrochund v. Elphinstone* (1830), 2 State Tr. N. S. 379; *Remington v. Dolby* (1844), 9 Q. B. 176.

**995. —.]**—It is established upon the authority of a regular series of decisions, that the question of prize or no prize cannot be tried at common law, but must be tried before the judge of the High Ct. of Admty.; & that the jurisdiction depends not upon the locality, or upon the parties, but upon the nature of the question, which is such as cannot be tried by any rules of the common law, but by a more general law, viz. the law of nations, which is administered by forms best adapted to the subject of its jurisdiction, & the interests of the parties.—MITCHELL v. RODNEY (1783), 2 Bro. Parl. Cas. 423; 1 E. R. 1039, H. L.

**996. —.]**—The Prize Cts., & Cts. of Lords Comrs. of Appeals, have the sole & exclusive jurisdiction over the question of prize or no prize, & who are the captors, notwithstanding any of the Prize Acts; & if they pronounce a sentence of condemnation, adjudging also who are the captors, the cts. of common law cannot examine the justice or propriety of it, even though perhaps they would have put a different construction on the Prize Acts. The same Cts. have power to enforce their decrees. Therefore where the Lords Comrs. had issued a monition after sentence to a navy agent, employed by persons supposed to be entitled to the prize, requiring him to bring the produce of it into Ct. to be distributed among the persons declared

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to be entitled by their sentence, this Ct. refused to grant a prohibition.—**CAMDEN (LORD) v. HOME** (1791), 4 Term Rep. 382; 100 E. R. 1076; *affd. sub nom. HOME v. CAMDEN* (EARL) (1795), 6 Bro. Parl. Cas. 203, H. L.

**Annotations:—***Consd.* Egyptian Bonded Warehouses Co. v. Yeyasu Goshi Kaisha, [1922] 1 A. C. 111. *Refd.* The St. Tudno, [1918] P. 174. *Mentd.* Gare v. Gapper (1803), 3 East, 472; Gould v. Gapper (1804), 5 East, 345; Veley v. Burder (1841), 12 Ad. & El. 265; *Re* Appledore Tithe Commutation (1845), 8 Q. B. 139; Wadsworth v. Spain (Queen) (1851), 17 Q. B. 171; *R. v. Greenwich County Court Judge* (1888), 60 L. T. 248.

**997. —[**(1) The Ct. of Admty. will exercise a jurisdiction over a foreign ship rescued from the enemy, if there is any British subject concerned in the rescue who prays to be rewarded here.

Although it is meritorious to rescue, by force of arms, from an enemy; it is quite the reverse to rescue from a neutral, from whom the owner would have a right to claim costs & damages for an unjust seizure & detention. . . . British born subjects returning to their own country [in an American ship], without any engagement or intention to go back to America, & without having any domicile there, & merely working their passage homeward on board this ship . . . are not at all in the condition of American subjects; neither are they so to be considered in this act, even if hired as mariners on board this American vessel; for this act was no part of their general duty as seamen; they were not bound by their general duty as mariners to attempt a rescue; nor would they have been guilty of a desertion of their duty in that capacity, if they had declined it. It is a meritorious act to join in such attempts; . . . but it is an act perfectly voluntary, in which each individual is a volunteer, & is not acting as a part of the crew of the ship in discharge of any official duty either ordinary or extraordinary (**SIR WILLIAM SCOTT**).

(2) Salvage is a question of the *jus gentium*, & materially different from the question of a mariner's contract; which is a creature of the particular institutions of each country to be applied & construed & explained, by its own particular rules (**SIR WILLIAM SCOTT**).

. . . (3) I know no other definition of prize goods than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy; & there is no axiom more clear than that such goods, when they come on shore, may be followed by the process of this ct. In such cases the common law cts. hold they have no jurisdiction, & are even anxious to disclaim it. . . . If the goods are removed before proceedings are commenced they are still liable to be called in by a monition (**SIR WILLIAM SCOTT**).

(4) Being of opinion that M. [one of the British subjects in the American ship] was in reality a passenger, & that his services had been very instrumental in effecting the rescue, the ct. pronounced that he should be rewarded equally with the master (**SIR WILLIAM SCOTT**).—**THE TWO FRIENDS** (1799), 1 Ch. Rob. 271; 1 Eng. Pr. Cas. 130; 165 E. R. 174.

**Annotations:—***As to* (1) *Distd.* The Cosmopolite (1801), 3 Ch. Rob. 333. *As to* (2) *Refd.* The Johann Friederich (1839), 1 Wm. Rob. 35. *As to* (3) *Consd.* The Roumanian, [1916] 1 A. C. 124. *Refd.* Bedreechund v. Elphinstone (1830), 2 State Tr. N. S. 379. *Generally, Mentd.* The Ida (1860), Lush. 6.

**998. —[**(1) Prohibition refused, to judge of the Prize Ct., to enjoin him from proceeding in a case involving a question of prize.

(2) It is clear . . . that the Prize Ct. has a sole

& exclusive jurisdiction in all cases of prize (**PLUMER, V.-C.**).

(3) It is not necessary to determine how long the jurisdiction of the Prize Ct. continues after the cessation of hostilities. Undoubtedly, the Prize Ct. must, after the cessation of hostilities, have jurisdiction to determine upon captures made during the war (**PLUMER, V.-C.**).—*Ex p. LYNCH* (1815), 1 Madd. 15; 56 E. R. 6; *sub nom. THE HARMONY, Coop. G. 325; 2 Dods. 78.*

**999. —[**(1) A custom's officer having wrongfully seized a neutral vessel on her arrival at Leith, on the ground of an alleged breach of the blockade of Archangel, condemned in damages & costs. The general rule is "that a party unjustly deprived of his property ought to be put as nearly as possible in the same state as he was before the deprivation took place."

(2) There is a distinction between commissioned & non-commissioned captors, & cts. are astute in discovering reasons to release commissioned captors from liability.

(3) The only evidence produced of the date of the blockade is the *Gazette*, & that is only *prima facie*, not conclusive, evidence.

(4) The sole jurisdiction in all matters concerning prize is vested in the High Ct. of Admty.

(5) More leniency with respect to claims must be shown to a neutral than to a British subject.—**THE ELIZE (OTHERWISE THE ELISE WILHELMINE)** (1854), 2 Ecc. & Ad. 31; Spinks, 88; 2 Eng. Pr. Cas. 327; 24 L. T. O. S. 170; 1 Jur. N. S. 95; 164 E. R. 290.

**Annotations:—***As to* (1) *Refd.* The Leucade (1855), 2 Ecc. & Ad. 228. *As to* (2) *Apprvd.* Schacht v. Otter, The Ostsee (1855), 9 Moo. P. C. C. 150. *Refd.* The Caroline (1855), Spinks, 252. *Generally, Refd.* The Edna, [1921] 1 A. C. 735.

**1000. No right of action at common law.]—****VANDERWOODST v. THOMPSON** (1780), cited in 2 Doug. K. B. at p. 609; 99 E. R. 383.

**Annotations:—***Consd.* Le Caux v. Eden (1781), 2 Doug. K. B. 594. *Apld. Ex p. Lynch* (1815), 1 Madd. 15.

**1001. —[**An action will not lie at common law for false imprisonment, where the imprisonment was merely in consequence of taking a ship as prize, although the ship has been acquitted.

Admty. has jurisdiction, not only of the question prize or not prize, but of all its consequences (**BULLER, J.**).—**LE CAUX v. EDEN** (1781), 2 Doug. K. B. 594; 99 E. R. 375.

**Annotations:—***Apld.* Faith v. Pearson (1815), 4 Camp. 357; *Ex p. Lynch* (1815), 1 Madd. 15. *Consd.* The Corsican Prince, [1916] P. 195. *Refd.* Smart v. Wolff (1789), 3 Term Rep. 323; Newcastle v. Clark (1818), 8 Taunt. 602; Obicini v. Bligh (1832), 8 Bing. 335; Dobree v. Napier (1836), 2 Bing. N. C. 781; The Sylph (1867), L. R. 2 A. & E. 24; Horlock v. Beal (1915), 85 L. J. K. B. 602; The Roumanian, [1916] 1 A. C. 124; *Re* Certain Craft captured on the Victoria Nyanza, [1919] P. 83; Egyptian Bonded Warehouses Co. v. Yeyasu Goshi Kaisha, [1922] 1 A. C. 111; The Wilhelmina, [1923] P. 112; Netherlands American Steam Navigation Co. v. Procurator General, [1926] 1 K. B. 84. *Mentd.* Bedreechund v. Elphinstone (1830), 2 State Tr. N. S. 379; Stockdale v. Hansard (1840), 3 State Tr. N. S. 723; Houlden v. Smith (1850), 19 L. J. Q. B. 170; London Corp. v. Cox (1867), L. R. 2 H. L. 239; Dawkins v. Paulet (1869), 9 B. & S. 768.

**1002. —[****DUCKWORTH v. TUCKER**, No. 1523, *post*.

**1003. —[**A Frenchman domiciled at Lisbon consigns a cargo which is his property to Nantes, under the name of a native Portuguese, who acts as "neutralizer." The ship being taken & brought into an English port, the cargo is libelled in the Ct. of Admty. The Portuguese, with the privity of the Frenchman, claims it, & it is decreed to be delivered up to him as neutral property.—*Held*: an action at law could not afterwards be maintained by the Frenchman against the Portuguese to recover the proceeds of the cargo.—**DE METRON v.**

DE MELLON (1810), 2 Camp. 420; 170 E. R. 1203, N. P.; *subsequent proceedings*, 12 East, 234.  
*Annotation*.—*Mentd.* Bowes v. Foster (1858), 2 H. & N. 779.

1004. —.]—Where a ship is *bond fide* seized as prize, the owner cannot sustain an action in a ct. of common law, for the seizure, though she be released without any suit being instituted against her; his remedy, if any, being in the Ct. of Admty.—*FAITH v. PEARSON* (1816), 6 Taunt. 439; 2 Marsh. 133; 4 Camp. 357; 128 E. R. 1105.

*Annotations*.—*Refd.* The Athol (1842), 6 Jur. 376; The Corsican Prince, [1916] P. 195.

1005. Prohibition will not lie.]—*TOMPSON v. SMITH* (1867), 1 Sid. 320; 82 E. R. 1132.

1006. —.]—(1) The Ct. of K. B. will not grant a prohibition to the Ct. of Admty. before appearance.

(2) *Qu.*: whether the captain of a captured vessel who ransoms her at sea, & becomes hostage may libel in the Ct. of Admty. against the ship & cargo for the payment of the ransom.—*TRANTOR v. WATSON* (1703), 6 Mod. Rep. 11; 2 Ld. Raym. 931; 1 Salk. 35; 87 E. R. 776.

*Annotations*.—*Generally*. *Refd.* The Gratitude (1801), 3 Ch. Rob. 240. *Mentd.* Pole v. Fitzgerald (1750), Will. 641; Yates v. Hall (1785), 1 Term Rep. 73.

1007. —.]—*KEY & HUBBARD v. PEARSE* (1742), cited in 2 Doug. K. B. at p. 606; 99 E. R. 381.

*Annotations*.—*Consd.* Le Caux v. Eden (1781), 2 Doug. K. B. 594; *Ex p. Lynch* (1815), 1 Madd. 15. *Refd.* Netherlands American Steam Navigation Co. v. Procurator General, [1926] 1 K. B. 84.

1008. —.]—*LINDO v. RODNEY*, No. 994, *ante*.

1009. —.]—*SMART v. WOLFF*, No. 1056, *post*.

1010. —.]—As to granting a prohibition, the argument supposes that the Admty. is proceeding to condemn a vessel, as prize which was before vested in the Crown as contraband. Deft. here, by putting in his claim denies her being forfeited as contraband, & therefore it is not open to him now to suggest in this motion anything which negatives his own defence. The only way in which the question could have been raised, would have been upon an application by the A.-G. for a prohibition; but that has not been made (*per Cur.*).—*A.-G. v. APPLEBY* (1797), 3 Anst. 863; 145 E. R. 1063.

1011. —.]—Appl. from a decision of condemnation by the Admiralty Ct. is not bound to adhere to the security given; but may follow the property or the proceeds in the hands of an agent. The prize jurisdiction extends to the question, whether a person, who received & sold the property, received it as consignee for valuable consideration, or as prize agent. A prohibition therefore against a monition to bring in the property or the proceeds was refused.—*THE NOYSOMHED* (1802), 7 Ves. 593; 32 E. R. 239, L. C.

1012. —.]—*Ex p. LYNCH*, No. 998, *ante*.

1013. Restraint by statute.]—When not restrained by any statute, the Prize Ct. has absolute jurisdiction over prizes & all matters relating thereto. But that jurisdiction is now limited by statute.—*THE AINA* (1855), Spinks, 242.

1014. — Indemnity Act, 1920 (c. 48).]—A neutral ship was stopped upon the high seas by one of His Majesty's Naval Patrols under the belligerent right of visit & search, an armed guard was put on board, & she was ordered to proceed in company with a warship to a British port for better examination. Her master was not given any formal notice of seizure. On arrival at the port she was searched &, no contraband being found, she was released :—*Held*: (1) those facts

sufficiently amounted to a seizure or capture of the ship in prize to give jurisdiction to the Prize Ct. to entertain a claim for compensation for her compulsory diversion & detention.

(2) The exclusive character of the Prize Ct.'s jurisdiction in all cases in which it exists at all has not been affected by the provisions of Indemnity Act, 1920 (c. 48).—*NETHERLANDS AMERICAN STEAM NAVIGATION CO. v. PROCURATOR GENERAL*, [1926] 1 K. B. 84; 95 L. J. K. B. 227; 134 L. T. 233; 42 T. L. R. 81; 70 Sol. Jo. 209; 16 Asp. M. L. C. 594, C. A.

#### B. Application of International Law.

1015. Prize court as international court.]—*THE MARIA*, No. 495, *ante*.

1016. —.]—*THE MADONNA DEL BURSO*, No. 8, *ante*.

1017. —.]—This [Prize] ct. is properly & directly a ct. of the law of nations. . . . A British Ct. of Admty. was bound to take notice of a violation of an Act of Parliament, appearing on the face of the claim, & a British claimant cannot entitle himself in such a ct., to a restitution of that property, happening to fall by accident into the hands of a British captor, which by his own showing appeared to have been employed in an illegal trade. . . . The Ct. of Admty. is bound to take notice of an illegal practice, evidently appearing in the conduct of a British subject, though the illegality arises from a violation of some law merely municipal; & it is bound to reject the claim of any British subject, whose property had found its way into the hands of a British captor, if the transaction in which that property had been employed was a transaction contrary to British law (*SIR WILLIAM SCOTT*).—*THE WALSINGHAM PACKET* (1799), 2 Ch. Rob. 77; 1 Eng. Pr. Cas. 189; 165 E. R. 244.

*Annotation*.—*Distd.* The Ocean Bride (1854), 2 Eco. & Ad. 8.

1018. —.]—This [Prize Ct.] is a ct. of the law of nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own, & what foreigners have a right to demand from it, is the administration of the law of nations simply, & exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which they have at all times expressed no inconsiderable repugnance. In the case of a British subject it is different. To him it is a British tribunal, as well as a ct. of the law of nations; & if he has been trampling on the known laws of his country, it is no injustice to say, that a person coming into any of the cts. of his own country, to which he is naturally amenable, on such a transaction, can receive no protection from them (*SIR WILLIAM SCOTT*).—*THE RECOVERY* (1807), 6 Ch. Rob. 341; 165 E. R. 955.

1019. —.]—It has been established by recent decisions of the Supreme Ct., that the Ct. of Prize, though properly a ct. purely of the law of nations, has a right to notice the municipal law of this country in the case of a British vessel which, in the course of a prize proceeding, appears to have been trading in violation of that law, & to reject a claim for her on that account. That principle has been incorporated into the prize law of this country within the last twenty years, & seems now fully incorporated (*SIR WILLIAM SCOTT*).—*THE FORTUNA* (1811), 1 Dods. 81; 1 Eng. Pr. Cas. 193, n.; 165 E. R. 1240.

*Annotations*.—*Mentd.* Madrazo v. Willes (1820), 3 B. & Ald. 353; *R. v. Bjornsen* (1865), Le. & Ca. 545; *The Hamborn*, [1919] A. C. 993.

*Sect. 1.—High Court of Justice: Sub-sect. 1, B. & C.; sub-sect. 2, A., B. & C.]*

**1020.** — *Limitation by municipal law—Affecting one of the parties.*—With reference to the Swedish Trade Law of Apr. 1916, which it was alleged precluded appts. from making full discovery of their trading books, their lordships observed that it was impossible for a Prize Ct., an international tribunal, to allow its investigation of the truth of matters brought before it to be limited by the restrictions of the municipal law affecting one of the parties.—*THE KRONPRINZESSIN VICTORIA*, [1919] A. C. 261; 88 L. J. P. 17; 120 L. T. 75; 35 T. L. R. 74; 14 Asp. M. L. C. 391, P. C.

*Annotations:—Mentd.* *The Kronprins Gustaf*, [1919] P. 182; *The Noordam*, [1919] P. 57; *The Kronprinsessan Margareta, The Parana, etc.*, [1921] 1 A. C. 486.

**1021.** — *Right of court to abrogate binding rules of international law—In interests of commerce.*—*THE KRONPRINZESSAN MARGARETA, THE PARANA, ETC.*, No. 866, *ante*.

### C. Application of Municipal Law.

**1022.** *To claim by British subject—Where municipal law violated.*—*THE WALSINGHAM PACKET*, No. 1017, *ante*.

**1023.** — — — — — *THE ETRUSCO* (1803), 4 Ch. Rob. 202, n.; 105 E. R. 606.

*Annotations:—Distd.* *The Ocean Bride* (1854), Spinks, 66. *Reid.* *The Diana* (1803), 5 Ch. Rob. 60.

**1024.** — — — — — *THE RECOVERY*, No. 1018, *ante*.

**1025.** — — — — — *THE FORTUNA*, No. 1019, *ante*.

**1026.** — — — — — *Colourable violation to protect British property.*—*THE OCEAN BRIDE*, No. 121, *ante*.

*Limitation of court by municipal law—Affecting one of parties.*—*See* No. 1020, *ante*.

## SUB-SECT. 2.—EXTENT OF JURISDICTION.

### A. In General.

*See* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 23, 56 (3).

**1027.** *All ports within dominions of Crown.*—*THE CAREL & MAGDALENA*, No. 1082, *post*.

**1028.** *Prize or no prize.*—*TOMPSON v. SMITH* (1667), 1 Sid. 320; 82 E. R. 1132.

**1029.** — — — — — *TURNER & CARY v. NEELE* (1668), 1 Lev. 243; 2 Keb. 300, 364; 83 E. R. 388; *sub nom.* *TURNER & CARY v. SMITH*, 1 Sid. 367.

*Annotations:—Consd.* *Le Caux v. Eden* (1781), 2 Doug. K. B. 594. *Reid.* *R. v. Broom* (1697), 12 Mod. Rep. 134; *Ex p. Lynch* (1815), 1 Madd. 15.

**1030.** — — — — — *Prize or no prize is within the jurisdiction of the Admty.*—*BROWN v. FRANKLYN* (1698), Carth. 474; 90 E. R. 873.

*Annotations:—Consd.* *Le Caux v. Eden* (1781), 2 Doug. K. B. 594. *Reid.* *Lindo v. Rodney* (1782), 2 Doug. K. B. 612, n.; *The Roumanian*, [1916] 1 A. C. 124; *The Anichab*, [1921] P. 218.

## PART IX. SECT. 1, SUB-SECT. 2.—A.

**1. Condemnation of enemy goods—Seized on wharf.**—*The Prize Ct.* has jurisdiction to condemn enemy goods which have been landed & are seized on the wharf.—*Re RYGJA*, [1915] V. L. R. 179.

**2. Right to preserve property in its custody.**—*The Prize Ct.* has jurisdiction, both statutory & inherent, to take all necessary steps to preserve property in its custody, & therefore, an order will be made that the cargo of a seized ship should be unloaded, inventoried & warehoused to protect

it from damage by damp & heat. This jurisdiction begins from the "moment of seizure," & may be exercised before the issue of the writ.—*THE OREGON* (No. 1), [1917] 1 W. W. R. 139.

**h. Transfer of cause—To English prize court—When allowed.**—By virtue of Imperial Prize Courts Act, 1915 (c. 57), a Canadian prize ct. will order, at the instance of the Crown, the transfer of a prize case to an English prize ct. for the purpose of the more convenient conduct of the proceedings.—*THE HOCKING* (N. S.) (1916), 17

**1031.** — — — — — *ROUS v. HASSARD* (1750), cited in 2 Doug. K. B. at p. 602; 90 E. R. 379.

*Annotations:—Consd.* *Le Caux v. Eden* (1781), 2 Doug. K. B. 594. *Reid.* *Netherlands-American Steam Navigation Co. v. Procurator-General* (1925), 42 T. L. R. 81.

**1032.** — — — — — *LE CAUX v. EDEN*, No. 1001, *ante*.

**1033.** — — — — — *MITCHELL v. RODNEY*, No. 995, *ante*.

**1034.** — — — — — *CAMDEN (LORD) v. HOME*, No. 996, *ante*.

**1035.** — — — — — *EGYPTIAN BONDED WAREHOUSES Co. v. YEYASU GOSHI KAISHA*, No. 1053, *post*.

**1036.** *Goods claimed by warden of Cinque Ports.*—*THE OOSTER EEMS* (1784), 1 Ch. Rob. p. 284, n.; 1 Eng. Pr. Cas. 106, n. 165 E. R. 178, P. C.

*Annotations:—Distd.* *The Two Friends* (1799), 1 Ch. Rob. 271. *Consd.* *The Progress* (1810), Edw. 210; *Bedreechund v. Elphinstone* (1830), 2 State Tr. N. S. 379. *Expld.* *The Roumanian*, [1916] 1 A. C. 124. *Reid.* *Re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. 107.

**1037.** *Matters occurring after effective release of goods to claimant.*—*THE JEFFERSON*, No. 1382, *post*.

**1038.** — — — — — *EGYPTIAN BONDED WAREHOUSES Co. v. YEYASU GOSHI KAISHA*, No. 1053, *post*.

**1039.** *Legality of condemnation by enemy—Of neutral ship.*—There has been no case in which this ct. has proceeded to examine the legality of a condemnation passed on an American ships in consequence of capture by the French (SIR WILLIAM SCOTT).—*THE COSMOPOLITE* (1801), 3 Ch. Rob. 333; 1 Eng. Pr. Cas. 321; 165 E. R. 484.

**1040.** *Proceeds of contraband goods—Goods delivered prior to seizure.*—*THE CHARLOTTE* (1808), 6 Ch. Rob. 386, n.; 165 E. R. 971.

*Annotation:—Reid.* *The Roumanian*, [1916] 1 A. C. 124.

**1041.** *After cessation of hostilities—By treaty of peace.*—*Ex p. LYNCH*, No. 998, *ante*.

**1042.** — — — — — *Ex p. LYNCH*, No. 998, *ante*.

**1043.** — — — — — *Proceedings commenced after cessation.*—The ct. has jurisdiction to entertain prize proceedings commenced after the cessation of war. In a case of alleged wrongful detention, the proper course is to apply to the ct. for a monition against the captor to proceed to adjudication.

The ct. will not entertain proceedings to recover damages for a wrongful detention, unless commenced within a reasonable time; & ignorance of the law on the part of claimant will not excuse delay.

Delay of six years held a bar to proceeding, & application for a monition against the captor to pay damages dismissed with costs.—*THE KATHARINA (CARGO EX)* (1860), Lush. 142; 1 Mar. L. C. 9; 30 L. J. P. M. & A. 21; 3 L. T. 597; 167 E. R. 68.

**1044.** *Disputes not involving consideration of jus belli.*—*EGYPTIAN BONDED WAREHOUSES Co. v. YEYASU GOSHI KAISHA*, No. 1053, *post*.

### B. Matters Incidental to Prize.

**1045.** *Court has jurisdiction.*—*TURNER & CARY v. NEELE* (1668), 1 Lev. 243; 2 Keb. 360, 364;

*Exch. C. R. 226.*

**k. Interference with Marshal—Contempt of court.**—*THE MARSHAL v. PORT CAPTAIN OF CAPE TOWN*, [1914] W. R. 696.

**l. Grant of authority to Admiralty—To requisition prize.**—On application made by the Admiralty the ct. granted an order authorising the requisitioning of a captured enemy ship for the service of His Majesty on the Union Govt. undertaking to pay its value to any parties who might be entitled to it.—*LODS OF ADMIRALTY v. THE RUFIJJI*, [1914] W. R. 697.

83 E. R. 388; *sub nom.* TURNER & CARY v. SMITH, 1 Sid. 367.

*Annotations*.—*Consd.* Le Caux v. Eden (1781), 2 Doug. K. B. 594; *Ex p.* Lynch (1815), 1 Madd. 15. *Refd.* R. v. Broom (1897), 12 Mod. Rep. 134.

1046. —.]—Where the Ct. of Admlty. has jurisdiction of the principal matter, it has jurisdiction of everything else dependent upon it.—RADLEY v. EGGLEFIELD (1870), 2 Saund. 259; 2 Keb. 828; 1 Vent. 173; 85 E. R. 1050; *sub nom.* RIDLY v. EGGLEFIELD, 2 Lev. 25.

*Annotations*.—*Consd.* Le Caux v. Eden (1781), 2 Doug. K. B. 594; The Hercules (1819), 2 Dods. 353. *Refd.* Shermoulin v. Sands (1896), 1 Ld. Raym. 271; R. v. Broom (1897), 12 Mod. Rep. 134; Rlgdon v. Hodges (1898), 12 Mod. Rep. 246; R. v. McCleverty, The Telegrapho (or Restauracion) (1871), L. R. 3 P. C. 673.

1047. —.]—ROUS v. HASSARD (1750), cited in 2 Doug. K. B. at p. 602; 99 E. R. 379.

*Annotations*.—*Appld.* Le Caux v. Eden (1781), 2 Doug. K. B. 594. *Refd.* Netherlands American Navigation Co. v. Procurator General, [1926] 1 K. B. 84.

1048. —.]—LE CAUX v. EDEN, No. 1001, *ante*.

1049. —.]—Questions arising upon grants of the nature of prize when referred to this ct. must be considered on the principles of prize.—*Re* NAPLES GRANT (1818), 2 Dods. 273; 165 E. R. 1485; *affd.* (1819), 2 Dods. n.

1050. —.]—THE AINA, No. 1013, *ante*.

1051. —.]—When once the Prize Ct. has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents, with the result that its jurisdiction will be exclusive as to the allowance of freight, damages, expenses, & costs in all cases of seizure & capture, although there may have been a voluntary release of the cargo, or its proceeds, before the incidental question arose.—THE CORSICAN PRINCE, [1916] P. 195; 84 L. J. P. 121; 112 L. T. 475; 31 T. L. R. 257; 59 Sol. Jo. 317; 13 Asp. M. L. C. 29; 1 P. Cas. 178.

*Annotations*.—*Apprvd.* Egyptian Bonded Warehouses Co. v. Yeyasu Goshi Kaisha, [1922] 1 A. C. 111. *Refd.* The Iolo, [1916] P. 206.

1052. —.]—The jurisdiction of the Prize Ct. attaches in every case in which there has been a seizure in prize, & in exercising its jurisdiction the ct. can deal with all incidental matters, including questions of freight & compensation in lieu of freight. But where a British ship on a voyage to an enemy port abandoned the voyage on hearing of the outbreak of war, & proceeded to a British port, where part of her cargo was seized as prize, but was subsequently released on it appearing that the property in it had not passed from the neutral owners:—*Held*: the voyage having been abandoned as unlawful before the seizure & all possibility of earning the freight having been lost, there were no circumstances giving rise to a claim to compensation in lieu of freight.—THE ST. HELENA, [1916] 2 A. C. 625; 86 L. J. P. 20; 115 L. T. 465; 32 T. L. R. 726; 61 Sol. Jo. 8; 13 Asp. M. L. C. 488; 2 P. Cas. 287, P. C.

*Annotations*.—*Consd.* Egyptian Bonded Warehouses Co. v. Yeyasu Goshi Kaisha, [1922] 1 A. C. 111. *Appld.* The Lisa (1924), 40 T. L. R. 252.

1053. —.]—After the release of certain goods captured as prize, they went astray by some mistake & the Japanese owners sued the Prize Ct. marshal in Egypt for negligence, & the marshal served on applt. co. a third-party notice, claiming to be indemnified by them for the mishap. The Prize Ct. in Egypt, after deciding that it had jurisdiction, heard the case & gave judgment for

the Japanese owners for damages & for the marshal on the question of indemnification:—*Held*: the Prize Ct.'s jurisdiction is confined to questions of prize or no prize & incidental matters, for prizes are acquisitions *jure belli*, & *jus belli* is to be determined by the law of nations & not by the municipal law of any country. There is no jurisdiction in the Prize Ct. to decide disputes not involving the consideration of the *jus belli* & arising on facts which have occurred after an effective release of goods to a claimant.—EGYPTIAN BONDED WAREHOUSES Co. v. YEYASU GOSHI KAISHA, [1922] 1 A. C. 111; 91 L. J. P. C. 60; 126 L. T. 196; 38 T. L. R. 110; 15 Asp. M. L. C. 384; 3 P. Cas. 1023, P. C.

1054. What matters are incidental—Costs.]—ROUS v. HASSARD (1750), cited in 2 Doug. K. B. at p. 602; 99 E. R. 379.

*Annotations*.—*Consd.* Le Caux v. Eden (1781), 2 Doug. K. B. 594; Netherlands American Navigation Co. v. Procurator General, [1926] 1 K. B. 84.

1055. —.]—THE CORSICAN PRINCE, No. 1051, *ante*.

1056. — Freight.]—(1) The Admlty. Ct. has jurisdiction over the question of freight, claimed by a neutral master against the captor, who has taken the goods as prize.

(2) A monition having issued, after the goods were condemned & decreed to be delivered to the captors, at the suit of such master against plfts. as owners or agents of the prize goods to bring into ct. the produce remaining in their hands to answer the feight, this ct. refused a prohibition; though no fidejussory caution had been taken before the goods were delivered to the captor, but the question of freight had been reserved by the terms of the decree for future consideration.—SMART v. WOLFF (1789), 3 Term Rep. 323; 100 E. R. 800.

*Annotations*.—*As to* (1) *Consd.* Willis v. Appeals in Prize Causes Comrs. (1804), 5 East, 22; The Alna (1855), Spinks, 242; The Wilhelmina, [1923] P. 112. *Refd.* Home v. Camdon (1795), 2 Hy. Bl. 533; The Teutonia (1871), L. R. 3 A. & E. 394; The St. Tudno, [1918] P. 174; The Consul Olsson, [1920] P. 43; Netherlands American Steam Navigation Co. v. Procurator General, [1926] 1 K. B. 84. *Generally, Mentd.* The Evangelina (1860), 2 L. T. 137.

1057. —.]—THE CORSICAN PRINCE, No. 1051, *ante*.

1058. — Compensation in lieu thereof.]—THE ST. HELENA, No. 1052, *ante*.

1059. — Whether vendor of property consignee or prize agent.]—THE NOYSOMMED, No. 1011, *ante*.

1060. — Interest on proceeds in hands of agent of captors.]—The prize ct. of appeals has jurisdiction to decree that one who was co-agent of the captors in whose hands the proceeds of the prize after condemnation & sale were placed, should, after a decree of restitution with interest pronounced against the captors, pay interest on such proceeds while in his hands to claimant.—WILLIS v. APPEALS IN PRIZE CAUSES COMRS. (1804), 5 East, 22; 1 Smith, K. B. 339; 102 E. R. 977.

*Annotations*.—*Refd.* The Brig Louis (1804), 5 Ch. Rob. 146; The Consul Olsson, [1920] P. 43. *Mentd.* Harrington v. Hoggart (1830), 1 B. & Ad. 677.

1061. — Damages & expenses.]—THE CORSICAN PRINCE, No. 1051, *ante*.

#### C. Proceeds of Prize.

1062. Whether court has jurisdiction.]—I am yet to learn, that the proceeds of prize, illegally converted & to any extent, & at any distance from

#### PART IX. SECT. 1, SUB-SECT. 2.—C.

1062.1. Whether court has jurisdiction.]—The Ct. of Admiralty has the power,

which it has repeatedly exercised, of issuing monitions to require persons to bring in so much of the proceeds of prize as remain in their hands, as

having the possession of the proceeds by whatever means they may have been obtained.—THE HERKIMER (1898), Stewart, 128.

*Sect. 1.—High Court of Justice: Sub-sect. 2, C. & D. Sect. 2. Part X. Sects. 1 & 2.]*

the original form of the subject-matter of the prize taken, are entitled to the privileges of prize property, so as to retain the right of being so considered, at the instance of the persons who have illegally or unjustifiably converted it. Over proceeds lawfully or justifiably converted, the ct. has jurisdiction; the property in that case continues prize (*SIR WILLIAM SCOTT*).—*L'EOLIE* (1805), 6 Ch. Rob. 220; 185 E. R. 908.

1063. —[The Ct. of Admty. has jurisdiction over the proceeds of prize or booty taken by a conjoint British & allied force, & brought within British territory.—*Re FRENCH GUIANA* (1817), 2 Dods. 151; 185 E. R. 1445.

1064. —[Limitation of jurisdiction by statute.]—*THE AINA*, No. 1013, *ante*.

1065. —[Proceeds transferred to Exchequer.]—At the hearing of a motion to set aside a decree of condemnation in prize it appeared that in execution of the decree the proceeds of sale had already been transferred from the Prize Ct. to the Exchequer:—*Held*: there being no fund to which the jurisdiction of the ct. could attach, the ct. must decline to exercise jurisdiction & the motion must be dismissed.—*THE HORSFOS*, [1923] P. 23; 92 L. J. P. 98.

#### D. Effect of Orders in Council.

##### 1066. Power to prescribe or alter prize law.]—

The Queen of England has supreme power, with the advice of her Council, to relax her belligerent rights, & so far to make law for the Prize Cts.—*THE FENIX* (OTHERWISE *THE PHOENIX*) (1854), 1 Ecc. & Ad. 306; Spinks, 1; 2 Eng. Pr. Cas. 238; 23 L. T. O. S. 210; 18 Jur. 656; 164 E. R. 177.

*Annotations*:—*Refd.* *The Argo* (1854), 1 Ecc. & Ad. 375; *The Mario Glaeser* (1914), 112 L. T. 251.

1067. —[*THE ARGO*, No. 825, *ante*.

1068. —[*THE PROTON*, No. 94, *ante*.

1069. —[*THE LEONORA*, No. 327, *ante*.

1070. —[Analogy to common law courts & Parliament.]—The King in Council possesses legislative rights over this ct. & has power to issue orders & instructions which it is bound to obey & enforce: & these constitute the written law of this ct. . . . The constitution of this ct., relatively to the legislative power of the King in Council is analogous to that of the cts. of common law relatively to that of the Parliament of this kingdom (*SIR WILLIAM SCOTT*).—*THE FOX* (1811), 1 Edw. 311; 2 Eng. Pr. Cas. 61; 165 E. R. 1121.

*Annotations*:—*Consd.* *The Franciska* (1855), 2 Ecc. & Ad. 113. *Overd.* *The Zamora*, [1916] 2 A. C. 77. *Consd.* *The Leonora*, [1918] P. 182; *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. *Refd.* *The Stigstad*, [1919] A. C. 279.

1071. —[The Crown has no power by Order in Council to prescribe or alter the law which Prize Cts. have to administer, even where that law is imperfectly ascertained & defined; but when an Order in Council mitigates the rights of the Crown in favour of enemies or neutrals it is the duty of the Prize Ct. to act upon it.

(2) The ct. will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal, & will give the utmost weight to every such Order short of treating it as a binding declaration of law. Thus, an Order declaring a blockade will *prima facie* justify the condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to show that the blockade is ineffective, & therefore unlawful; & an Order authorising

reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, but it will not preclude the right of the ct. to hold that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable in all the circumstances of the case.

(3) The inherent power of the Prize Ct. to sell or realise property in its custody pending adjudication is confined to cases in which the preservation of the property is impossible or difficult.

A belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Ct., but subject to the following limitations: (a) the property must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security; (b) there must be a real question to be tried, so that it would be improper to order immediate release; (c) the Prize Ct. must decide judicially whether, under the particular circumstances, the right is exercisable.

(4) In proceedings to which, under the new practice in prize, the Crown, instead of the actual captors, is a party, damages & costs may be awarded against the Crown or the officer who represents the Crown.

(5) A neutral vessel, bound to Stockholm with a contraband cargo (copper) consigned to a Swedish co., was stopped at sea by a British cruiser & taken to a British port. A writ having been issued in prize, a summons was taken out by the Procurator-General on behalf of the War Dept. to requisition the cargo under Order XXIX. of the Prize Ct. Rules, as authorised by an Order in Council of Apr. 29, 1916. Order XXIX., rule 1, provides that if it is made to appear to the judge that it is desired to requisition property in the custody of the Prize Ct. in respect of which no final decree of condemnation has been made, he shall, upon an undertaking to pay the appraised value into ct., deliver the property to the Crown. The judge made the order accordingly:—*Held*: Order XXIX., rule 1, construed as an imperative direction to the ct., was not binding; & as the judge had no satisfactory evidence before him that the copper was urgently required, the order must be set aside.—*THE ZAMORA*, [1916] 2 A. C. 77; 85 L. J. P. 89; 114 L. T. 626; 32 T. L. R. 436; 60 Sol. Jo. 416; 13 Asp. M. L. C. 330, P. C.; *reversg.*, [1916] P. 27.

*Annotations*:—*As to* (1) *Consd.* *The Wilhelmina*, [1923] P. 112. *Refd.* *The Kim*, *The Alfred Nobel*, *The Bjørnerne Bjørnson*, *The Fridland*, [1915] P. 215; *The Hakau*, [1916] P. 266; *The Alwina*, [1918] A. C. 444; *The Proton*, [1918] A. C. 578; *The Oscar II.*, [1920] A. C. 748. *As to* (2) *Apld.* *The Stigstad*, [1919] A. C. 279. *As to* (3) *Apld.* *The Canton*, [1917] A. C. 102; *The Pellworm*, [1920] P. 347. *Consd.* *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508. *Refd.* *Netherlands American Steam Navigation Co. v. Procurator General*, [1926] 1 K. B. 81. *As to* (4) *Consd.* *The Oscar II.*, [1920] A. C. 748. *Refd.* *The Pindos*, *The Helgoland*, *The Rostock*, [1916] 2 A. C. 193; *The Valeria*, [1920] P. 81. *As to* (5) *Refd.* *Commercial & Estates Co. of Egypt v. Ball* (1920), 36 T. L. R. 526; *Commercial & Estates Co. of Egypt v. Board of Trade*, [1925] 1 K. B. 271. *Generally, Refd.* *The Leonora*, [1919] A. C. 974; *Hudson's Bay Co. v. MacLay* (1920), 36 T. L. R. 469.

1072. —[Law imperfectly ascertained.]—*THE ZAMORA*, No. 1071, *ante*.

1073. [Waiver by Crown of belligerent rights.]—*THE FENIX* (OTHERWISE *THE PHOENIX*), No. 1066, *ante*.

1074. —[*THE ARGO*, No. 825, *ante*.

1075. —[*THE ZAMORA*, No. 1071, *ante*.

1076. —[*THE PROTON*, No. 94, *ante*.

—[Release of prize.]—*See* Part IV., Sect. 8, *ante*.

1077. [Prescribing test for neutrality.]—*THE PROTON*, No. 94, *ante*.

**1078. Imposition of unreasonable inconvenience on neutrals.]—**THE ZAMORA, No. 1071, *ante*.

**1079. —.]—**THE LEONORA, No. 327, *ante*.

**1080. —.]—**When an Order in Council of a retaliatory character recites that the enemy has committed breaches of international law which justify retaliatory measures, the Order is conclusive that just cause for such measures exists. It is, however, open to a person aggrieved to contend, & the right of the Prize Ct. to hold, that the measures adopted are unlawful in that they entail on neutrals a degree of inconvenience which is unreasonable, considering all the facts of the case. An Order in Council of Mar. 11, 1915, recited that the German Govt. had issued certain Orders which gave His Majesty an unquestionable right of retaliation, & provided, *inter alia*, that every merchant ship on her way to a port other than a German port, carrying goods with an enemy destination, might be required to discharge the goods at a British port. The Order made no provision for compensation.

A neutral ship on her way to Rotterdam with goods destined for Germany was required to discharge at a British port; no unreasonable delay or expense in carrying out the provision of the Order was incurred:—*Held*: the Order in Council did not entail unreasonable inconvenience on neutrals & was valid, & that the neutral ship-owner was not entitled to damages for the detention of the ship or to expenses.—THE STIGTAD, [1919] A. C. 279; 88 L. J. P. 33; 120 L. T. 106; 35 T. L. R. 176; 14 Asp. M. L. C. 388, P. C.

*Annotations*:—*Apld.* The Helm, [1919] P. 237; The Leonora, [1919] A. C. 974. *Consd.* The Noordam (No. 2), [1919] P. 255. *Refd.* The Donald, [1920] P. 56; The Bornisse, The Elve, [1921] 1 A. C. 458; Netherlands American Steam Navigation Co. v. Procurator General, [1926] 1 K. B. 84.

**1081. Validity of blockade.]—**THE ZAMORA, No. 1071, *ante*.

## SECT. 2.—VICE-ADMIRALTY COURTS.

**1082. Jurisdiction local—Confined to adjudication of property within own limits.]—**It can never be maintained that the sentence of the Ct. of Martinique upon a prize not brought within the

sphere of its jurisdiction is a valid sentence. It is a known distinction between the Cts. of Vice-Admty. & the High Ct. of Admty., that the former have only a local jurisdiction, confined to the adjudication of property brought within their own limits, whilst the authority of the High Ct. of Admty., in prize matters extends over the whole of His Majesty's dominions, & operates in every port belonging to them (*per CUR.*).—THE CAREL & MAGDALENA (1800), 3 Ch. Rob. 58; 1 Eng. Pr. Cas. 257; 165 E. R. 384.

**1083. Process aided by High Court—To prevent failure of justice—Cession of territory in jurisdiction of court.]—**Jurisdiction of the High Ct. of Admty. applied to carry into effect the sentence of a Vice-Admty. Ct., which had been abolished, previous to the final execution of its sentence.

The Ct. of Admty. appears to me to have general jurisdiction sufficient to aid the process of the Vice-Admty. Ct. in order to prevent a total failure of justice (*per CUR.*).—THE PICIMENTO (1803), 4 Ch. Rob. 360; 1 Eng. Pr. Cas. 406; 165 E. R. 640.

*Annotation*:—*Refd.* La Madonna Della Lettera (1829), 2 Hag. Adm. 289.

**1084. Action remitted to High Court—Order as to costs—Enforcement in jurisdiction of Vice-Admiralty Court.]—**Pltfs. brought an action in prize in the Vice-Admty. Ct. at Gibraltar against the Crown by its proper officers in respect of the detention of pltfs.' steamship. The action was remitted to the Prize Ct. in London & eventually was dismissed with costs. Part of the costs remaining unpaid, defts. took out a summons for a declaration that the decree of the Prize Ct. as to costs was enforceable in Gibraltar, where it was believed pltfs. had assets:—*Held*: by the combined effect of the provisions of Naval Prize Act, 1864 (c. 25), & the Prize Courts Act, 1915 (c. 57), the decree was enforceable in the Ct. at Gibraltar; the power to make the declaration was not discretionary; but even if the power were discretionary it must be exercised judicially, & as the decree was valid & uncomplied with, the Ct. was obliged to make the declaration as prayed.—THE REGINA D'ITALIA, [1925] P. 123; 95 L. J. P. 34; 134 L. T. 30; 41 T. L. R. 648; 16 Asp. M. L. C. 556.

## Part X.—Claims.

### SECT. 1.—IN GENERAL.

**1085. Where no claim made—& ship restored—Procedure.]—**THE DE JONGE JOSLERS (1778), Marr. 148; 165 E. R. 34.

*Annotation*:—*Refd.* The Zamora, [1916] P. 27.

**1086. Where property of small amount—Restitution without formal claim.]—**Property of small amount is restored without the expense of a formal claim. The rule being framed to the extent of £100, was refused to 100 guineas.—THE MERCURIUS (1804), 5 Ch. Rob. 127; 165 E. R. 721.

**1087. When claim may be made—Claim by joint captor—Whether at any time during suit.]—**THE PADRELANDET (1804), 5 Ch. Rob. 120; 165 E. R. 719.

**1088. — Not after restitution—Accepted with-**

**out reservation—Claim for costs & damages.]—**THE MARIA POWLONA, No. 554, *ante*.

**1089. Amendment of claim.]—**THE SAN SPIRIDIONE, No. 1098, *post*.

**Lapse of time as bar to right.]—**See Sect. 5, *post*.

### SECT. 2.—FORM OF CLAIM.

**1090. Variation in exceptional circumstances.]—**LE SPARCK (1798), cited in Spinks at p. 340; 164 E. R. 472.

*Annotation*:—*Consd.* The Panaja Drapaniotisa (1856), Spinks, 336.

**1091. Must be specific.]—**THE JUFFROUW ANNA, No. 896, *ante*.

### PART IX. SECT. 2.

**m. Regulation of fees—**41 Geo. 3, c. 96.]—THE HIRAM (1813), Stewart, 553.

### PART X. SECT. 2.

**n. Necessity for petition or statement of claim.]—**Where parties appear & make claim to a cargo seized as a prize, claimants are to commence their

action by a petition or statement of claim, in the form of pleadings, to which the Crown pleads by what is technically called under the rules, an answer.—*Re* THE SANDEFJORD (Cargo Ex) (N. S.) (1918), 17 Exch. C. R. 238.



**Sect. 2.—Form of claim. Sect. 3: Sub-sects. 1, 2, 3 & 4.]**

**1092. Enemy interest must be negatived—Claim by person trading under licence.]—**Terms of the licence respecting Spanish wool to A. importer & holder of his bills of lading, are not meant to exempt a claimant under licence from negativing enemy's interest in his claim.—**THE BEURSE VAN KONINGSBERG** (1800), 2 Ch. Rob. 169; 165 E. R. 278.

**Annotation:—***Refd.* **The Palm Branch** (1916), 86 L. J. P. 17.

**1093. — Claim by subject of friendly or neutral state.]—****THE PANAJA DRAPANIOTISA**, No. 1310, *post*.

**1094. Whether name of person must be specified—On whose behalf claim made.]—****THE PORT MARY** (1801), 3 Ch. Rob. 233; 165 E. R. 448.

**1095. Must contain statement of what can be proved—Not enter on proof.]—**(1) A claim for one-third of the proceeds of the ship founded on a mtge. deed, on behalf of a citizen of Lubeck resident at Helsingfors, in Finland, as consul of the King of the Netherlands disallowed; a neutral, resident as merchant & consul in the enemy's country, loses his neutral character during such residence. Foreigners cannot set up a mtge. deed on the ship against captors, though, under certain circumstances the lien of British merchants may be allowed. A neutral continuing to reside in the enemy's country during war loses neutral privileges.

(2) The practice with regard to claims is, in the first instance, to state what can be proved, not to enter upon the proof.—**THE AINA** (1854), 1 Ecc. & Ad. 313; Spinks, 8; 2 Eng. Pr. Cas. 247; 23 L. T. O. S. 211; 18 Jur. 681; 164 E. R. 181.

**Annotations:—***As to* (1) *Consd.* **The Marie Glaesser**, [1914] P. 218. *Refd.* **The Odessa**, **The Woolston**, [1916] 1 A. C. 146. *Generally*, **Mentl. Tingley v. Müller**, [1917] 2 Ch. 144.

**1096. Claimant's residence must be shown—In affidavit accompanying claim.]—****THE PANAJA DRAPANIOTISA**, No. 1310, *post*.

**1097. Locus standi must be shown.]—****THE PANAJA DRAPANIOTISA**, No. 1310, *post*.

**1098. Must be supported by ship's papers.]—**Claim given for ship & cargo on behalf of an asserted Ionian subject, resident at Mitylene, a Turkish possession, & carrying on trade in partnership with his son, resident at Constantinople. The ship was captured on a voyage to Galatz, then in possession of Russia, during war carried on by England, France, Turkey & Sardinia against Russia:—*Held*: (1) restitution cannot pass where the claim is unsupported by the ship's papers, & contradicted by the evidence of master & crew on interrogatories; (2) property can be restored only in conformity with the claim, which can be amended only by permission of the court, where some venial error has appeared at the outset of the proceedings.—**THE SAN SPIRIDIONE** (1856), 23 L. T. O. S. 205; 2 Jur. N. S. 1238; 5 W. R. 102.

### SECT. 3.—WHO MAY CLAIM.

#### SUB-SECT. 1.—IN GENERAL.

**1099. Persons having interest in ship or cargo—Persons settling claims under duress.]—****THE KINDERS KINDER**, No. 547, *ante*.

**1100. —.]—****THE FORTUNE** (1800), 2 Ch. Rob. 92; 165 E. R. 250.

**1101. Person retaining enemy master in command of ship.]—****THE BENEDICT**, No. 141, *ante*.

#### SUB-SECT. 2.—ALIEN ENEMY.

*See, generally*, **ALIENS**, Vol. II., pp. 154 *et seq.*

**1102. Whether allowed to claim.]—**These persons cannot be admitted to claim. They are to be considered as mariners; & this proportion of the proceeds of the voyage, as their wages. Then can a claim be sustained for wages, on board an enemy's ship? The vessel is avowedly a French ship; & these persons must be taken to be French sailors. There is indeed less reason for any relaxation of the general principle in this branch of navigation, than in any other; because the ratio of wages is a material part of the trade itself, being the ordinary mode of carrying on that particular species of commerce (**SIR WILLIAM SCOTT**).—**THE FREDERICK** (1803), 5 Ch. Rob. 8; 165 E. R. 678.

**1103. — On return of peace—Rights not forfeited during war.]—**Rights of claimant revive on the return of peace, no step being taken during the interval of war, declaratory of the forfeiture of those rights to the crown.

I am clearly of opinion that the objection is not sustainable, it is true that the intervention of hostilities puts the property of the enemy in such a situation that confiscation may ensue, but unless some step is taken for that purpose, unless there is some legal declaration of the forfeiture, the right of the owner revives on the return of peace . . . & I am, therefore, of opinion that the rights of the Spanish proprietor do revive (**SIR WILLIAM SCOTT**).—**THE NEUSTRA SENORA DE LOS DOLORES** (1809), Edw. 60; 165 E. R. 1032.

**1104. — Claim under Order in Council or licence—Specific order must be stated.]—**When an enemy claims he must show a *persona standi in judicio*, the law being that an alien enemy is not entitled in any way to sue in the Prize Ct., or any other ct., if the party claims under the Orders in Council, he must state the specific order by which he claims to be protected.—**THE TROIJA** (1854), 1 Ecc. & Ad. 342; 164 E. R. 198; *sub nom.* **THE FROIJA**, Spinks, 37.

**Annotation:—***Apld.* **The Marie Glaesser**, [1914] P. 218.

**1105. — On affidavit.]—****THE PANAJA DRAPANIOTISA**, No. 1310, *post*.

**1106. — Special circumstances must be shown—By affidavit.]—**A German merchant steamship, owned by a German limited co. resident in Germany, left a British port some hours before war commenced between this country & Germany, & was captured at sea while still ignorant of the outbreak of hostilities. Art. 3 of Convention 6 of the Second Hague Peace Conference, 1907, provides that enemy merchant ships which left their last port of departure before the commencement of war, & are encountered on the high seas while still ignorant of the outbreak of hostilities, may not be confiscated, but are merely liable to be detained, etc. This convention was signed by Great Britain, but, when signed by Germany, Art. 3 was reserved. As regards this vessel, first on behalf of the Crown, a decree of condemnation as prize was claimed; secondly, on behalf of the owners, it was contended that they were entitled to appear against this claim in the Prize Ct., though the affidavit filed on their behalf did not show any special circumstances entitling them to appear; thirdly, on behalf of certain shareholders in the vessel, & other claimants who had paid disbursements or rendered services in respect of the vessel, it was contended that they had some rights in the Prize Ct. in respect of the vessel; fourthly, on behalf of neutral mortgagees of the vessel, it was contended that the amount due under the mortgage should be paid out of the proceeds of

the vessel when sold:—*Held*: (1) Art. 3 of Convention 6 did not apply in the circumstances, & the vessel must be condemned as prize & not merely detained; (2) the German owners had no right to appear in the Prize Ct., as no special circumstances were shown entitling them to appear; (3) the shareholders, & claimants in respect of disbursements, etc., had no rights in the Prize Ct. in respect of the vessel but could only apply to the bounty of the Crown; & (4) the claim of the mtgees. must be rejected.

The ct. has no hesitation in pronouncing that upon the authorities, upon principle, & upon grounds of convenience & practice, the claim of the neutral mtgees. of this captured vessel must be rejected. The same conclusion would be arrived at if the claim were by British subjects. It need scarcely be added that the Crown, being entitled to captured property, may out of its bounty deal favourably with any such claims (SIR SAMUEL EVANS, P.).—THE MARIE GLAESER, [1914] P. 218; 84 L. J. P. 8; 112 L. T. 251; 31 T. L. R. 8; 59 Sol. Jo. 8; 12 Asp. M. L. C. 601.

*Annotations*:—*As to* (2) *Consd.* The Möwe, [1915] P. 1. *Reid.* The Vesta, [1921] 1 A. C. 774. *As to* (4) *Reid.* The Sortareren (1915), 85 L. J. P. 121; The Odessa, The Woolston, [1916] 1 A. C. 145. *Generally, Mentd.* Horlock v. Beal (1916), 114 L. T. 193.

**1107. — Protection claimed under international convention.**—THE PINDOS, THE HELGOLAND, THE ROSTOCK, No. 282, *ante*.

**1108. — Grounds must be stated on affidavit.**—THE MÖWE, No. 289, *ante*.

**1109. — Claim by neutral shippers—On behalf of enemy underwriters.**—Goods seized as prize in a British ship were, at the date of seizure, the property of a neutral firm. The goods were insured against war risks, nearly the whole of the insured amount being underwritten by Germans at Hamburg. After seizure, the German underwriters paid a total loss, & it was thereupon agreed that they should become owners of the goods. The neutral firm subsequently claimed in the prize proceedings, the claim being really on behalf of the German underwriters. The Prize Ct. dismissed the claim, & condemned the goods:—*Held*: the claim was properly dismissed; but, without deciding that the condemnation was wrong & the Crown consenting, the condemnation should be set aside, the proceeds of the goods remaining in the Prize Ct. until further order.—THE PALM BRANCH, [1919] A. C. 272; 88 L. J. P. 13; 120 L. T. 101; 35 T. L. R. 163; 14 Asp. M. L. C. 382, P. C.

*Annotations*:—*Reid.* The Zaanland, [1918] P. 303; The Kronprinzessin Cecilie, [1919] A. C. 964.

—*See* ALIENS, Vol. II., pp. 142, 155, Nos. 168, 169, 253.

#### SUB-SECT. 3.—PART OWNERS.

**1110. Whether allowed to claim.**—CONRADUS OF COLON'S CASE (1276), Y. B. 4 Edw. 1 Memoranda in Scaccario, fo. 5.

*Annotations*:—*Reid.* Tobin v. R. (1864), 4 New Rep. 274; Feather v. R. (1865), 6 B. & S. 257.

**1111. — Person claiming as sole owner—Others appearing to have interest.**—THE ERNST MERCK, No. 117, *ante*.

**1112. — — — — —**—THE NINA, No. 76, *ante*.

**1113. — Claimant trustee for share—Necessity**

for joining cestui que trust.]—THE ERNST MERCK, No. 117, *ante*.

**1114. — Bounty of Crown.**—THE MARIE GLAESER, No. 1106, *ante*.

**1115. Whether respective shares need be specified—Partnership.**—(1) The claim is given generally "for the owner & the master," without distinguishing their respective shares. The ct. was left to suppose they were claimants of undivided shares; in that case the claim would have been proper. . . . But where the proprietors are not partners, it is certainly not proper to claim in that manner, but the respective interest should be specifically set forth (SIR WILLIAM SCOTT).

(2) Although it is the ordinary form of clearing out from a belligerent country to bear an ostensible destination to a neutral port, yet no one imputes that as a fraud, nor is it considered as such an act as would justly subject neutral property, on board neutral ships, to be molested on that account (SIR WILLIAM SCOTT).

(3) Spoliation is not, alone, in our cts. of Admty., a cause of condemnation; but if other circumstances occur to raise suspicion, it is not too much to say of a spoliation of papers, that the person guilty of that act shall not have the aid of the ct., or be permitted to give further proof, if further proof is necessary (SIR WILLIAM SCOTT).—THE RISING SUN (1799), 2 Ch. Rob. 104; 165 E. R. 254.

*Annotations*:—*As to* (3) *Consd.* The Johanna Emilie (1854), 1 Ecc. & Ad. 317. *Reid.* *Re* The Stephen Hart (1864), 11 L. T. 52.

#### SUB-SECT. 4.—PERSONS HAVING MORTGAGES AND OTHER CHARGES.

**1116. Mortgagees—Neutral mortgagee.**—THE AINA, No. 1095, *ante*.

**1117. — — — — —**—THE MARIE GLAESER, No. 1106, *ante*.

**1118. — British mortgagee.**—THE MARIE GLAESER, No. 1106, *ante*.

**1119. — Agent for sale on commission.**—The rights of mortgagees of enemy goods captured as prize are not regarded in a prize ct., even though the goods have been consigned to a British port & the mtgees. are persons who have arranged to sell them on commission in this country.—THE LINARIA (PART CARGO EX) (1915), 31 T. L. R. 396; 59 Sol. Jo. 530.

**1120. Pledgees.**—THE MARIANNA, No. 143, *ante*.

**1121. — — — — —**—The Prize Ct. does not recognise the claim of a pledgee of cargo captured at sea, the legal property in which was at the time of capture in an enemy subject.—THE ODESSA, THE WOOLSTON, [1916] 1 A. C. 145; 85 L. J. P. C. 49; 114 L. T. 10; 32 T. L. R. 103; 60 Sol. Jo. 292; 13 Asp. M. L. C. 215, P. C.; *affg.*, [1915] P. 52.

*Annotations*:—*Apld.* The Clan Grant (Part Cargo Ex) (1915), 31 T. L. R. 321; The Eumaeus (1915), 85 L. J. P. 130; The Linaria (Part Cargo Ex) (1915), 31 T. L. R. 396. *Consd.* The Parohim, [1918] A. C. 157. *Apld.* The Dirigo, The Hallingdal, [1919] P. 204. *Consd.* The Urna, [1920] A. C. 899. *Reid.* The Sortareren (1915), 85 L. J. P. 121; The Zamora, [1916] 2 A. C. 77; The Derfflinger (No. 2) (1918), 87 L. J. P. C. 195; The Lützow, [1918] A. C. 435; The Palm Branch, [1919] A. C. 272; The Hilding (Part Cargo Ex) (1920), 37 T. L. R. 199; The Orterle, [1920] A. C. 724; The Kronprinzessin Margareta, The Parana, [1921] 1 A. C. 486.

**1122. — — — — —**—THE MANNINGTRY, No. 1222, *post*.

**1123. Persons having lien.**—(1) It will not be necessary to enter into the question whether a

#### PART X. SECT. 3, SUB-SECT. 4.

*o. Persons having lien.*—PARRY LEON & HAYDOE, LTD. v. STORMVOGEL WHALING CO., [1914] C. P. D. 837; [1914] W. R. 699.

*Sect. 3.—Who may claim: Sub-sects. 4 & 5. Sect. 4: Sub-sects. 1, 2, 3 & 4.]*

claim can be given on account of a mere lien on a captured ship. Though I am of opinion, for the moment, that it is not such an interest as is regarded & protected by the prize law (SIR WILLIAM SCOTT).

(2) If such an intention [intention to mislead British Cts. as to ownership of the cargo] can be proved in the agent, let the interests of his employers in Denmark be what they may, they must be affected by his conduct & the consequence will attach on them to confiscate their property so engaged (SIR WILLIAM SCOTT).—THE EENROM (1799), 2 Ch. Rob. 1; 1 Eng. Pr. Cas. 118; 165 E. R. 218; *affd.* (1802), 6 Ch. Rob. ix.

*Annotations:—As to (2) Refd. The Sortfæren (1915), 85 L. J. P. 121; The Axel Johnson, The Drottning Sophia, [1917] P. 234.*

1124. —.]—THE MARIANNA, No. 143, *ante*.

1125. —.]—THE AINA, No. 1095, *ante*.

1126. —.]—(1) It is a rule of the ct., that where there are contradictory papers, the *onus probandi* lies on claimant to show that belligerent rights are not thereby affected.

(2) Colourable papers having been used for fraudulent purposes, claimant is bound by the act of his agent, & is barred of further proof.

(3) It is the established law of the Prize Ct. that no lien on a ship can be recognised.

(4) It is not usual, except under very peculiar circumstances, to condemn a neutral in costs.—THE IDA (1854), 1 Ecc. & Ad. 331; Spinks, 26; 2 Eng. Pr. Cas. 268; 23 L. T. O. S. 308; 18 Jur. 752; 164 E. R. 191.

*Annotations:—As to (3) Apld. The Odessa, The Cape Corso, [1915] P. 52. Refd. The Miramohi, [1915] P. 71.*

1127. —.]—SORENSEN *v.* R., THE ARIEL, No. 120, *ante*.

1128. Holders of bottomry bonds.]—It is wholly contrary to the usage of this ct. to take notice of either a mtge. or bottomry bond (DR. LUSHINGTON).—THE OCEAN BRIDE (1854), Spinks, 66; 2 Ecc. & Ad. 8; 24 L. T. O. S. 99; 18 Jur. 1031; 164 E. R. 277.

1129. — For ordinary repairs.]—THE KIERLIGHETT, No. 973, *ante*.

1130. — Given in time of peace.]—THE TOBAGO (1804), 5 Ch. Rob. 218; 1 Eng. Pr. Cas. 456; 165 E. R. 754.

*Annotations:—Consd. The Ida (1854), 1 Ecc. & Ad. 331; The Marie Glaeser, [1914] P. 218; The Odessa, The Woolston, [1916] 1 A. C. 145. Refd. The Belvidere (1813), 1 Dods. 353; Sorensen *v.* R., The Ariel (1857), 11 Moo. P. C. C. 119; The Sortfæren (1915), 85 L. J. P. 121.*

**SUB-SECT. 5.—WHERE PROPERTY TRANSFERRED AFTER SEIZURE.**

1131. Whether person acquiring rights may claim.]—THE GOTHLAND, [1916] P. 230, n.; 86 L. J. P. 23, n.; 2 P. Cas. 293, n.

*Annotation:—Distd. The Palm Branch, [1916] P. 230.*

1132. —.]—Persons who were not the owners of goods at the time of their seizure in prize cannot maintain an appeal against their condemnation, & have no *locus standi* to ask either that the proceedings should be amended by making the owners parties, or that the Board should vary an apparently incorrect decree appealed from.—THE KRON-PRINZESSIN CECILIE, [1919] A. C. 964; 88 L. J. P. 161; 121 L. T. 457; 35 T. L. R. 638; 14 Asp. M. L. C. 458, P. C.

1133. —.]—Although the date of seizure is the date at which the *status* of goods seized as prize must be determined, apart from such questions as may arise as regards enemy property or the doctrine

of infection, it is not necessary for persons claiming goods in the Prize Ct. to have the property in them at the date of seizure; provided claimants have the property in the goods at the date of the claim & at the time of the hearing, they are entitled to assert their claim.—THE FROGNER, [1919] P. 127; 88 L. J. P. 143; 121 L. T. 280; 14 Asp. M. L. C. 442.

**1134. Persons parting with rights cannot claim.]**

—(1) A claimant to goods seized as prize must prove his right thereto at the date when he comes before the ct. as owner; it is not sufficient that he was owner at the date of the seizure.

(2) When shippers of goods discount a draft upon the consignee & authorise the discounters to hand to him a bill of lading, to the order of, & indorsed by, the shippers, upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding, is that the ownership of the goods is to pass to the consignee when he accepts the draft. That inference may be modified or rebutted, by particular arrangements between the shippers & the consignee, & is subject to the rules which arise out of a state of war existing, or imminent at the beginning of the transaction. The transfer of the property upon the acceptance of the draft is consistent with the consignee being either a purchaser from the shippers or their agent for the sale of the goods.—THE PRINZ ADALBERT, [1917] A. C. 586; 86 L. J. P. C. 165; 116 L. T. 802; 33 T. L. R. 490; 61 Sol. Jo. 610; 14 Asp. M. L. C. 81, P. C.

*Annotations:—As to (1) Apld. The Frogner, [1919] P. 127. Consd. The Palm Branch, [1919] A. C. 272. Refd. The Zaanland, [1918] P. 303. Generally, Refd. The Orteric [1920] A. C. 724.*

1135. —.]—Where claimants to goods seized as prize have after seizure parted with their rights to the goods to other persons, whether insurers or not, & have so ceased to be the owners of the goods their claim fails & the ct. will not order the release of the goods to them.—THE ZAAANLAND, [1918] P. 303; 88 L. J. P. 9; 119 L. T. 494; 14 Asp. M. L. C. 367.

**SECT. 4.—IN RESPECT OF WHAT MATTERS CLAIMS ALLOWED.**

**SUB-SECT. 1.—ADVANCES.**

1136. Whether claim allowed.]—Delivery of proceeds, under restitution, cannot be demanded by the agent of claimant, in opposition to the principal, or his assignees; though the ct. will protect his interest, to the amount of sums expended in prosecuting the claim.

In prosecuting the business in the ct., if it should appear that the agent had made considerable advances for such purposes, the ct. would be justified in refusing to let the restitution pass the seal until such advances had been repaid (SIR WILLIAM SCOTT).—THE FRANKLIN (1803), 4 Ch. Rob. 404; 165 E. R. 655.

1137. —.]—THE CONSTANTIA HARLESSEN (1810), Edw. 232; 165 E. R. 1093.

*Annotations:—Refd. The Belvidere (1813), 1 Dods. 353; The Aina (1854), 1 Ecc. & Ad. 313; The Odessa, The Woolston, [1916] 1 A. C. 145.*

1138. — Advances by British merchants.—For ship becoming enemy ship.]—The claim of British merchants for advances made by them for the use of an American ship seized by the govt. upon the breaking out hostilities with that country, cannot be allowed upon the mere averment of the parties themselves that the ship was put into their hands as a security for the debt so contracted; & the case is still more unfavourable if the money was

advanced not for the immediate outfit of the vessel, but for the general mercantile transactions of the American owners.—*THE BELVIDERE* (1813), 1 Dods. 353; 2 Eng. Pr. Cas. 183; 165 E. R. 1339.  
*Annotations* :—*Expld.* *The Aina* (1854), 1 Ecc. & Ad. 313.  
*Reid.* *The Odessa*, *The Woolston*, [1916] 1 A. C. 145.

## SUB-SECT. 2.—BROKERAGE.

1139. *Claim allowed.*]—*THE MADOC* (1817), cited in 10 Moo. P. C. C. at p. 85, n.; 14 E. R. 423.

*Annotation* :—*Consd.* *The Franciska* (1856), 10 Moo. P. C. C. 74.

1140. —.]—Prize property imposes much responsibility. The management of prize concerns brings with it a great deal of occupation that does not belong to brokers upon ordinary occasions, in which merchants act pretty much for themselves; & who are, therefore, entitled to curtail the brokerage fees; but on war sales, conducted as they are almost exclusively by brokers, a commission of 1 per cent. upon the proceeds, seems long to have been established (*LORD STOWELL*).—*THE HARREGAARD* (1822), 1 Hag. Adm. 22; 166 E. R. 8.

## SUB-SECT. 3.—DEMURRAGE.

1141. *In respect of captured ship.*]—*THE COPENHAGEN*, No. 1193, *post*.

1142. —.]—*THE ROUMANIAN*, No. 1176, *post*.

1143. —.]—*THE KATWIJK*, No. 788, *ante*.

1144. —.]—*THE HEIM*, No. 1173, *post*.

1145. —.]—*Delay in proceeding to adjudication*—*Ship restored.*]—Demurrage given against a captor for unjustifiable detention & delay, in proceeding to adjudication.—*THE CORIER MARITIMO* (1799), 1 Ch. Rob. 287; 1 Eng. Pr. Cas. 137; 165 E. R. 179.

1146. —.]—The claim was given on Sept. 10; the captors consented to restitution, but not till Nov. 30. . . . The wrong doing here is not the original seizure, but the detention. . . . Why was not consent given before? No explanation is offered of this want of due & necessary diligence. The whole time is two months & twenty days. I shall allow the twenty days for preparing & giving the claim & considering its effect, & give two months' demurrage (*per CUR.*).—*THE ZEE STAR* (1801), 4 Ch. Rob. 71; 165 E. R. 539.

1147. —.]—*Rate of demurrage.*]—*THE LOUISA ALBERTINA* (1804), 6 Ch. Rob. 12, n.; 165 E. R. 832.

*Annotation* :—*Expld.* *The Anna Catharina* (1805), 6 Ch. Rob. 10.

## SUB-SECT. 4.—DETENTION.

1148. *Suspicious detention.*]—Application for expenses & damages incurred by detention under circumstances apparently of a suspicious nature, refused, although these circumstances appeared to be so far consistent with the letter of His Majesty's licence, as to induce the ct. below to restore the vessel.—*THE ST. ANTONIUS* (1809), 1 Act. 113; 12 E. R. 43.

1149. *Detention due to exercise of belligerent rights*—*Claim by British or allied owner.*]—As

indicated in the judgment in *The Juno*, No. 1151, *post*, British shipowners, in war time, are not permitted to claim for any delay or inconvenience incurred by reason of the diversion or detention of their vessel for the purpose of seizure & making unlively of confiscable enemy property. The loss, if any, to the shipowner results from the war & must be submitted to, just as he is not entitled to bring into the estimation of the freight any alleged excess in the cost of discharging at the port at which the vessel actually delivered the cargo, & the cost at the port to which she was originally destined.—*THE TREDEGAR HALL*, [1916] P. 217; 32 T. L. R. 9; 60 Sol. Jo. 45; 1 P. Cas. 492.

1150. —.]—When the cargo in a British or allied ship is seized as prize & owing to the want of discharging facilities it remains warehoused in the ship until after it has been sold under an order for condemnation, the shipowners are not entitled in law to compensation for the detention of the ship, but the ct. may authorise the Admty. Marshal to give them a reasonable sum out of the proceeds of the cargo.—*THE CUMBERLAND* (1915), 31 T. L. R. 198.

1151. —.]—*Absence of special & exceptional circumstances.*]—A British vessel, shortly before the outbreak of war between Great Britain & Germany, left Bristol for Amsterdam with three parcels of cargo ultimately destined for Germany, & put into Swansea to load other cargo. Whilst there, & after the outbreak of war the three parcels were seized by the customs authorities & subsequently condemned as lawful prize. The shipowners thereupon raised a claim for freight, & also for expenses incurred by reason of the detention of the vessel owing to the seizure of the goods:—*Held*: the claim to some freight, & to the items for extra costs of discharging & shifting the goods at Swansea, should be allowed against the cargoes, & in ascertaining the total amount, the following general rule would assist the registrar & merchants in this & similar cases: such a sum to be allowed for freight as is fair & reasonable in all the circumstances, regard being had to the rate of freight originally agreed, though this is not necessarily conclusive, to the extent to which the voyage has been made, to the labour & cost expended, or any special charges, incurred in respect of the cargo seized before its seizure & unlivery, & to the benefit accruing to the cargo from the carriage on the voyage up to the seizure & unlivery; but no sum to be allowed, unless there be some special & exceptional circumstances, in respect of any inconvenience or delay attributable to the war or to the consequent diversion, detention, & seizure, as such matters are the unfortunate results of a state of war to which those engaged in shipping must submit.—*THE JUNO*, [1916] P. 169; 84 L. J. P. 154; 112 L. T. 471; 31 T. L. R. 131; 59 Sol. Jo. 251; 13 Asp. M. L. C. 15; 1 P. Cas. 151.

*Annotations* :—*Apld.* *The Sortareren* (1915), 85 L. J. P. 121; *The Tredegar Hall*, [1916] P. 217. *Reid.* *The Iolo*, [1916] P. 206; *The Katwijk*, [1916] P. 177; *The Roumanian*, [1916] 1 A. C. 124; *The Jeanne*, *The Vera*, *The Forsvik*, *The Albania*, [1917] P. 8; *The Stigstad*, [1919] A. C. 279.

1152. —.]—*Claim by neutral owner.*]—*THE HEIM*, No. 1173, *post*.

1153. —.]—In chartering a Swedish vessel to convey resin through Sweden to Russia, the regulations issued by the Swedish govt. forbidding, to the knowledge of the parties, the

inconvenience & delay resulting from the seizure of enemy cargo on board.—*THE CRAIGISLA*, [1915] J. D. R. 678.

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*p. Whether allowed.*]—*THE CRETIO* (1921), 3 P. Cas. 967.  
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*q. Detention due to exercise of belligerent rights*—*Claim by neutral owner.*]—The owner of a neutral ship is not entitled to any damages for

**SECT. 4.—In respect of what matters claims allowed:**  
**Sub-sects. 4, 5 & 6, A., B. & C.]**

export of resin from Sweden, & also its transit within that Kingdom without a licence, arrests & restraints of princes, rulers, & people were excepted. The vessel was detained by the British customs authorities in the United Kingdom for ten weeks, having failed to procure a licence from the Swedish authorities to take the cargo through Sweden. The owners brought a claim against the charterers in respect of such detention. The Prize Ct. decided in the owners' favour & awarded them damages for ten weeks' detention:—*Held*: where a voyage is put an end to by an excepted peril, as when it comes to an end by some unanticipated external cause, the loss has to be borne where it falls, & there was no legal ground for making the charterers bear any portion of the owners' loss.—*THE LISA* (1924), 40 T. L. R. 252, P. C.

**1154. ——— Unreasonable delay or inconvenience.]—THE REMONSTRANT**, No. 1219, *post*.

**1155. ———.]—THE STIGSTAD**, No. 1080, *ante*.

**1156. ——— In absence of cargo owner.]—THE RIO DE JANEIRO**, [1919] P. 242, n.; 89 L. J. P. 23, n.; 3 P. Cas. 464, n.

*Annotations*:—*Consd.* *The Helm*, [1919] P. 237; *The Domald*, [1920] P. 56.

**1157. ——— Ship & cargo innocent.]—THE EINAR JARL**, [1920] P. 64, n.; 89 L. J. P. 172, n.; 3 P. Cas. 539.

*Annotation*:—*Apld.* *The Domald*, [1920] P. 56.

**1158. ———.]—**Through the seizure in prize of various parcels of cargo laden on board a neutral steamship, her owners sustained losses & expenses due to her detention. The proceedings in prize resulted in the release of the cargo. A claim by the shipowners against the Crown for costs & damages having failed, they sought to recover the amount of their losses & expenses from the cargo owners on the ground (*inter alia*) that the deviation & detention of the ship were due to the suspicion attaching to the cargo:—*Held*: as the cargo owners were innocent & had not concealed from the shipowners any material facts, & as the loss arose solely from the justifiable exercise of belligerent rights, it must lie where it fell.—*THE DOMALD*, [1920] P. 56; 89 L. J. P. 168; 3 P. Cas. 539.

**SUB-SECT. 5.—EXPENSES.**

**1159. Whether claim allowed.]—**Expenses allowed on corn ships, of which the cargoes had been taken by govt.; but only where the original evidence of property was complete.—*THE MINERVA* (1800), 2 Ch. Rob. 302; 165 E. R. 324.

**1160. ———.]—THE RESOLUTION** (1802), 4 Ch. Rob. 166; 165 E. R. 573.

*Annotation*:—*Apld.* *The United States*, [1920] P. 430.

**1161. ——— Expenses of poundage.]—**A party having a decree for costs & damages is to be protected against the expense of poundage (*per CUR.*).—*THE DRIVER* (1804), 5 Ch. Rob. 146, n.; 165 E. R. 728.

*Annotation*:—*Refd.* *The Ostsee* (1855), 2 Eoc. & Ad. 170.

**1162. ——— Expenses of providing securities.]—THE JAMES & WILLIAM**, No. 565, *ante*.

**1163. ——— Expenses of insurance.]—THE JAMES & WILLIAM**, No. 565, *ante*.

**1164. ——— Expenses of sale.]—THE MADOC** (1817), cited in 10 Moo. P. C. C. at p. 85, n.; 14 E. R. 423.

*Annotation*:—*Apld.* *The Franciska* (1856), 10 Moo. P. C. C. 74.

**SUB-SECT. 6.—FREIGHT.**

**A. In General.**

**1165. Shipowner also cargo owner.]—**Mode of estimating 10 per cent. on the invoice price does not include the charge of freight; the ship & cargo belonging to the same person.

If 10 per cent. is not more than a fair mercantile profit on the cargo, claimant is further entitled to be considered in the character of owner of the ship. He is entitled to his profits in that character as well as in the character of owner of the cargo. He has not actually paid freight, because he unites both characters in himself. If the freight was paid separately, where the owner of the ship was not the owner of the cargo, it is equally due where the one person is owner of both (*per CUR.*).—*THE LUCY* (1800), 3 Ch. Rob. 209; 165 E. R. 438.

**1166. Ship sailing with false papers.]—THE AMERICA**, No. 736, *ante*.

**1167. Deduction of freight—From salvage paid.]—THE RACEHORSE** (1800), 3 Ch. Rob. 101; 165 E. R. 401.

*Annotation*:—*Consd.* *Cox v. May* (1815), 4 M. & S. 152.

**1168. ——— Freight already paid.]—THE ANNA CATHARINA** (1805), 6 Ch. Rob. 10; 165 E. R. 832.

*Annotation*:—*Distd.* *The Stigstad*, [1919] A. C. 279.

**1169. Ship brought to inconvenient port.]—**The merchant whose goods were seized had a right under the general law of nations, to an adjudication of his property, in the country where it was carried; & the property had been conveyed to Europe, under an application of a novel policy, framed for the particular convenience of the British govt., the expense of that transmission, & every expense that was intended to render it secure, must fall upon the party for whose convenience this was done, & the neutral claimant should be protected therefrom (*SIR WILLIAM SCOTT*).—*THE NARCISUS* (1802), 4 Ch. Rob. 17; 165 E. R. 520.

*Annotations*:—*Consd.* *The United States*, [1920] P. 430. *Refd.* *The Malta* (1828), 2 Hag. Adm. 159, n. *Menid.* *The Buenos Ayres* (1811), 1 Dods. 28.

**1170. Rate of freight—Not necessarily measured by charterparty.]—**The charterparty is not the measure by which the captor in all cases is bound, even where no fraud is imputed to the contract itself. When, by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not necessarily bound to that inflated rate of freight. When no such circumstance exists, when a ship is carrying on an ordinary trade, the charterparty is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, & takes with that specific lien upon it. But a very different rule is to be applied, when the trade is subjected to extraordinary risk & hazard, from its connection with the events of war, & the redoubled activity & success of the belligerent cruisers. This is a case of that kind (*SIR WILLIAM SCOTT*).—*THE TWILLING RIGET* (1804), 5 Ch. Rob. 82; 1 Eng. Pr. Cas. 430; 165 E. R. 705.

*Annotations*:—*Refd.* *The Corsican Prince*, [1916] P. 195; *The Iola*, [1916] P. 206.

**1171. Freight given to Crown—Succeeding to rights of enemy owner.]—**Freight given to the Crown as succeeding to the rights of the enemy ship-owners—though not decreed prior to the breaking out of hostilities.—*THE PROSPER*, *THE HOLSTEIN* (1809), Edw. 72; 2 Eng. Pr. Cas. 25; 165 E. R. 1037.

*Annotations*:—*Refd.* *The Juno*, [1916] P. 169; *The Prins der Nederlanden*, [1921] 1 A. C. 754.

**1172. Award of freight to captor—Claim for deduction—Improper stowage of goods—No objection**

at time of restitution.]—Application for a deduction of freight, pronounced to be due to the captor, alleging that damage had arisen in consequence of improper stowage of articles, restored by the sentence of the ct. below. Application refused, it appearing to the ct. that no objection had been made at the time of delivery. Application to further proof as to the exact time of making the objection refused, in consequence of culpable neglect & delay.—*THE SANTO THOMAS* (1811), 2 Act. 86; 12 E. R. 188.

1173. Goods seized under reprisal order—Sale by order of court—Neutral owner entitled to freight from proceeds.]—Neutral shipowners are entitled to freight, but not to damages for detention or demurrage, against funds in ct. representing the proceeds of enemy goods seized under the Reprisals Order in Council of Mar. 11, 1915, & sold under an order of the ct.—*THE HEIM*, [1919] P. 237; 89 L. J. P. 20.

Annotation:—*Distd.* *The Domald*, [1920] P. 56.

### B. Enemy Goods in British Ship.

1174. Freight allowed.]—*THE TANAGRA* (1914), *Times*, Sept. 25.

1175. — As compensation by Crown.]—*THE AVON (PART CARGO EX)* (1914), *Times*, Nov. 17.

1176. — Without admitting liability.]—A cargo of refined petroleum oil in bulk, owned by a German co., was shipped at Port Arthur, Texas, on board a British vessel bound for Hamburg. The vessel reached the English Channel after the outbreak of hostilities between Great Britain & Germany, & at the suggestion of the Lords Comrs. of the Admty., her owners diverted her to a port in the United Kingdom, Dartmouth, for orders. From there they ordered her to proceed to Purfleet & there discharge the oil into tanks of the British co. owning the wharf. When the larger part of the cargo had been so discharged an officer of the customs gave the master of the vessel notice in writing that the whole of the cargo was "placed under detention." On an application by the Crown for the condemnation of the cargo as lawful prize seized in port, & objection taken that the tanks were "on land" & therefore, not within the jurisdiction of the Prize Ct.:—*Held*: (1) the tanks were, in effect, oil warehouses, & warehouses were included in the definition of a "port." The case, therefore, was within the jurisdiction of the ct., & the whole of the oil cargo was maritime prize subject to seizure as & where it was, at the time the notice was given, whether on board the ship or in the tanks.

(2) The Crown without admitting liability consented to pay the owners of the vessel such *pro rata* freight as the registrar & merchants should find to be reasonable as well as the charges of the owners of the oil tanks for landing & storage.

(3) The claims for demurrage at Dartmouth & for coal consumed are disallowed (*SIR SAMUEL EVANS*).—*THE ROUMANIAN*, [1915] P. 26; 84 L. J. P. 65; 112 L. T. 464; 31 T. L. R. 111; 59 Sol. Jo. 206; 13 Asp. M. L. C. 8; *on appeal*, [1916] 1 A. C. 124, P. C.

Annotations:—As to (1) *Apld.* *The Eden Hall*, [1916] P. 78; *The Schlesien*, [1916] P. 225; *The Achilles*, [1917] P. 218; *The Batavier II.*, [1918] P. 86, n. *Consd. Re Certain Craft Captured on the Victoria Nyansa*, [1919] P. 83. *Distd.* *The Anichab*, [1922] 1 A. C. 235. *Reid.* *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)*, [1918] 2 A. C. 307; *The Odessa*, *The Woolston*, [1916] 1 A. C. 145; *The Abonoma*, *The Hillerod*, *The Florida*, *The Albania*, *The Adjutant*, [1919] P. 41; *The Achilles*, [1919] P. 340; *The Orteric*, [1920] A. C. 724; *The Vesta*, [1921] 1 A. C. 774. *Generally, Reid.* *The Poona* (1915), 84 L. J. P. 150; *Netherlands American Steam Navigation Co. v. Procurator General*, [1926] 1 K. B. 84.

### C. Freight as Charge on Cargo.

1177. Priority of freight.]—*THE WELBEDIGT-HEID* (1802), cited in 4 Ch. Rob. p. 344; 165 E. R. 635.

Annotation:—*Reid.* *The Vrow Henrica* (1803), 4 Ch. Rob. 342.

1178. —.]—Expenses of the neutral master do not stand on the same ground as freight, decreed to be a charge on the cargo; expenses postponed to the expenses of the captor, where he had obtained condemnation of the cargo, & was entitled to an indemnification, for the expenses incurred by him.

This is a question concerning a remnant of a cargo . . . which has been condemned for want of further proof, after the neutral owner of the ship had obtained a sentence of restitution of the vessel, with freight & expenses, decreed to be a charge on the cargo. . . . On general principles, when condemnation has been obtained, the captor's claims appear to have rather the advantage. . . . The neutral has a right to carry the property of the enemy, but subject to the right of the belligerent to bring in the ship so employed, for the purpose of bringing the cargo to adjudication. . . . A neutral vessel so engaged is not exposed to any penalty at all, but she is entitled to her freight, as a lien attaching on the cargo. The captor takes *cum onere*. The freight attaches as a lien, which he must discharge by payment, provided . . . that there are no unneutral circumstances in the conduct of the ship, to induce a forfeiture of this demand. But the expenses of the neutral master appear to me to stand on a somewhat different footing. As to them, this distinction seems to present itself, supposing the law to be that the neutral ship is liable to be brought in; if she can carry the property of the enemy lawfully, on that condition only, I do not know that she is entitled to the expenses incurred in consequence of being so brought in. . . . It does not appear that the neutral master would, on principle merely, be entitled to an indemnification for expenses so incurred. He is bound to know the condition annexed to his right, & to abide the consequences. A more favourable practice has obtained under which his expenses are usually allowed. . . . But it is not a claim, which the neutral master is entitled to urge against the captor, as a right equally original, & equally vested in him, & in the same manner, as freight is vested, by the receipt of the cargo on board, & the performance of the contract of conveyance. It is said that the cargo was condemned, not as enemy's property, but for want of further proof, & the attestation of the asserted owner. Can that make any difference? . . . The captor is as much entitled, as if the cargo had been condemned on affirmative grounds, & in the first instance on positive evidence, that it was the property of the enemy (*SIR WILLIAM SCOTT*).—*THE BREMEN FLUGGE* (1801), 4 Ch. Rob. 90; 165 E. R. 546.

Annotation:—*Apld.* *The Vrow Henrica* (1803), 4 Ch. Rob. 342.

1179. —.]—Freight is, in all ordinary cases, a lien which is to take place of all others. The captor takes *cum onere*. It is the allowed privilege of neutral trade to carry the property of the enemy, subject to its capture, & to the temporary detention of his vessel; & if the party does not prevaricate, or conduct himself in any respect with ill faith, he is entitled to his freight. It is the general rule. . . . There is one class of cases to which it ought not to be applied: the case of ships, carrying on a trade between ports of allied enemies; a trade which may be said to arise in a great measure out of the circumstances of the war, though not



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altogether; . . . because such a trade exists in a limited degree in times of peace. . . . In such a course of trade, although the ct. has not altogether refused freight to the neutral ship, yet it may not think it unreasonable, that the captor should, in preference, be entitled to his expenses. . . . In the present case, the voyage is not between the ports of allied enemies, but between the ports of two belligerents, from Valencia to London. That constitutes . . . a sort of middle case, with respect to the obligation by which the captor might conceive himself bound to bring the cargo to adjudication. There might be a presumption undoubtedly that the property belonged to the enemy exporter. But there is a foundation, also, for presuming that it might belong to the consignee, & that it would not have been sent on a destination to this country, but under the protection of a licence. . . . I shall apply a sort of a middle judgment. I will allow the captor his law expenses, & direct the other expenses to be postponed to the payment of freight (SIR WILLIAM SCOTT).—THE VROW HENRICA (1803), 4 Ch. Rob. 342; 165 E. R. 634.

**1180. Part of cargo condemned—Average.]**—THE KRONTA ANCHARET (1779), Marr. 258; 165 E. R. 59.

**1181. ———.]**—THE JUNGFRE MARIA (1779), Marr. 273; 165 E. R. 63.

**1182. ——— Reference to master to ascertain amount.]**—THE KALOMO (1915), [1916] P. 176, n.

**1183. Restitution.]**—THE CATHERINA MARIA (1802), cited in 10 Moo. P. C. C. at p. 82, n.; 14 E. R. 422.

*Annotation:—Consd. The Franciska (1856), 10 Moo. P. C. C. 74.*

**1184. Proceeds of cargo insufficient—Practice.]**—This was a Danish vessel, taken on a voyage from a French port to North Bergen. . . . It has happened, that since the restitution of the vessel, she has sustained some injury by the embargo, which was imposed on all Danish ships. The ship was, however, at last liberated, & went away with a decree for freight, & expenses, to be a charge on the cargo; but the ct. did not in any matter determine that a burthen was to be thrown on the captor. It was supposed that the cargo would be sufficient; though unfortunately the event has proved otherwise. Greater expenses may probably have been incurred on account of the embargo. . . . I am of the opinion that the ct. cannot do more than carry into effect the decree which has been made, by ordering the proceeds to be paid to the neutral master. If he has any further demands, they must be prosecuted against the consignee (SIR WILLIAM SCOTT).—THE HAABET (1802), 4 Ch. Rob. 302; 165 E. R. 620.

**1185. ———.]**—THE VROW MARGARETTA (1802), 4 Ch. Rob. 304, n.; 165 E. R. 620.

**1186. ———.]**—DER MOHR, No. 611, *ante*.

*D. Goods carried to Port of Destination.*

**1187. Captor allowed freight—Set-off in case of misconduct.]**—THE VREYHEID (1784), cited in 4 Ch. Rob. at p. 282; 165 E. R. 613, P. C.

*Annotation:—Apld. The Fortuna (1802), 4 Ch. Rob. 278.*

**1188. ———.]**—Freight due to captors, in virtue of the ship, which had been condemned, when the cargo is carried by them to the place of its destination.

It was the intention of the ct., not being apprised of any further demand, that the proceeds should be paid out, but that decree has not been carried

into effect. However, in reference to what has been done in this case, that when there is a decree of the ct. for restitution, it is not to be obstructed by the mere caveat of the party (*per* CUR.).—THE FORTUNA (1802), 4 Ch. Rob. 278; 165 E. R. 612.

*Annotation:—Apld. The Roland (1915), 84 L. J. P. 127.*

**1189. ———.]**—If goods are not carried to their original destination, within the intention of the contracting parties, freight shall not be due; & on this ground, that the contract not being completed, either in substance or form, the speculation of the party has not been productive . . . when the contract is executed, by bringing the cargo to the place of destination, the captor, to whom the vessel is condemned, shall be entitled to the freight which has been earned. He stands in the place of the owner of the ship, & is held entitled to the price of the services which have been performed in the execution of the contract (SIR WILLIAM SCOTT).—THE DIANA (1803), 5 Ch. Rob. 60; 165 E. R. 697.

*Annotations:—Apld. The Roland (1915), 84 L. J. P. 127. Rejd. The Industrie (1854), 1 Ecc. & Ad. 444.*

**1190. ———.]**—Whenever the captor brings the goods to the port of actual destination, he shall be entitled to the freight, on the ground that the contract has been fulfilled; but that in all other cases freight shall not be due, although the ship may have performed a very large part of her intended voyage (SIR WILLIAM SCOTT).—THE VROW ANNA CATHARINA (1806), 6 Ch. Rob. 269; 165 E. R. 927.

*Annotation:—Apld. The Roland (1915), 31 T. L. R. 357.*

**1191. ———.]**—THE ROLAND, No. 257, *ante*.

*E. Goods carried to Intermediate Port.*

**1192. Whether freight allowed.]**—THE ETRUSCO, CONSTANT'S CASE (*circa* 1800), cited in 5 Ch. Rob. at p. 74; 165 E. R. 702, P. C.

*Annotations:—Distd. The Diana (1803), 5 Ch. Rob. 60. Apld. The Vrow Anna Catharina (1806), 6 Ch. Rob. 269.*

**1193. ———.]**—Under these circumstances there cannot be the slightest pretence for a claim of demurrage, against the cargo, on any ground whatever. . . . It is impossible to say that she had earned more than a freight *pro rata itineris*. . . . The expense of conveying the cargo to its ultimate destination belongs to the cargo only, the contract having been in effect determined by the payment of freight *pro rata itineris* (SIR WILLIAM SCOTT).

The maxim that capture is delivery is not to be taken in the general way in which it has been laid down. It is by no means true, except where the captor succeeds fully to the rights of the enemy, & represents him as to those rights. If a neutral vessel, having enemy's goods, is taken, the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli* (SIR WILLIAM SCOTT).—THE COPENHAGEN (1799), 1 Ch. Rob. 289; 165 E. R. 180.

*Annotations:—Mentd. Hallett v. Wigram (1850), 9 C. B. 580; Hall v. Janson (1855), 4 E. & B. 500; Atwood v. Sellar (1880), 5 Q. B. D. 286; Svensden v. Wallace (1884), 13 Q. B. D. 69; Hamel v. Peninsular & Oriental Steam Navigation Co., [1908] 2 K. B. 298.*

**1194. ———.]**—Freight, *pro rata*, on capture & recapture, not given, to a ship brought back to the port, or quasi-port of her departure.—THE HIRAM (1800), 3 Ch. Rob. 180; 165 E. R. 428.

**1195. ———.]**—The ct. decreed the whole freight to be a charge on the cargo (SIR WILLIAM SCOTT).—THE MARTEA (1801), 3 Ch. Rob. 106, n.; 165 E. R. 402.

*Annotation:—Rejd. The Hoffnung (1805), 6 Ch. Rob. 231.*

**1196. ———.]**—Freight not due to captor on goods not brought to the original port of destination though afterwards sold in this country.—THE



FORTUNA (1809), Edw. 56; 2 Eng. Pr. Cas. 17; 165 E. R. 1031.

*Annotations*.—**Consd.** The Juno, [1916] P. 169. **Refd.** The Prins der Nederlanden, [1921] 1 A. C. 754. **Mentd.** Argos (Cargo Ex), Gaudet v. Brown (1873), L. R. 5 P. C. 134.

1197. — **Large part of voyage performed.**—A great part of her voyage was performed, the outward voyage entirely, & a great part of the returned voyage, & solely in the service of the freighters. The master was taken out on the first capture, & owing to that circumstance no claim was immediately given for the cargo. . . . The ship was restored by consent on July 2, whilst no claim was given for the cargo till July 17, & restitution did not pass till Nov. 16. The case of the cargo was litigated. . . . I cannot say that a ship shall wait all such time for the mere chance of taking on the cargo, if eventually it should be restored. It was said that the contract was totally dissolved, but . . . it was in no degree owing to the owner of the ship who might have carried on the cargo, but that the owner of the cargo was not ready to proceed. . . . The ship is entitled to her whole freight (SIR WILLIAM SCOTT).—THE RACEHORSE (1800), 3 Ch. Rob. 101; 165 E. R. 401.

*Annotation*.—**Mentd.** Cox v. May (1815), 4 M. & S. 152.

1198. — — — — —]—THE VROW ANNA CATHARINA, No. 1190, *ante*.

1199. — **Seizure in British port at outbreak of war.**—THE JUNO, No. 1151, *ante*.

1200. — **Voyage becoming unlawful.**—THE ST. HELENA, No. 1052, *ante*.

1201. — — — — —]—Shortly before the outbreak of war a British ship left a Russian port in the Black Sea with a grain cargo for Hamburg, & on the declaration of war between Great Britain & Germany her owners, at the suggestion of the British Admty., diverted the vessel to a British port where the cargo was seized by the customs authorities, & subsequently sold by the marshal, the proceeds being paid into ct. The Russian Bank for Foreign Trade, as owners, claimed the proceeds of part of the cargo, namely, two parcels of barley, & the amount was paid out to them subject to a claim by the shipowners for freight & charges:—**Held**: though at common law no freight was due as the contract of affreightment had not been carried out, & had become illegal by reason of the war, the Prize Ct., acting on equitable principles, would allow such a fair & reasonable sum in respect of freight & charges as should be ascertained by a reference.—THE IOLO, [1916] P. 206; 85 L. J. P. 82; 113 L. T. 604; 31 T. L. R. 474; 59 Sol. Jo. 545; 13 Asp. M. L. C. 141.

#### F. Goods carried Between Enemy Ports.

1202. **Whether freight allowed—Voyage between ports of same enemy.**—THE WILHELMINA (1799), 2 Ch. Rob. 101, n.; 165 E. R. 253.

1203. — — — — —]—THE REBECCA (1799), 2 Ch. Rob. 101; 165 E. R. 253.

1204. — — — — —]—Freight refused to a neutral ship carrying salt from one Spanish port to another. This is the case of a ship sailing under Danish colours & taken with a cargo of salt, on a voyage from Cadiz to Castropol in Galicia. The ship had been restored, reserving the question of freight & expenses. The cargo had been condemned as the property of the King of Spain & the question now is . . . whether freight & expenses shall be allowed to the neutral ship.

Where a capture is made of a cargo, the property of an enemy, carried in a neutral ship, the neutral shipowner obtains against the captor those rights

which he had against the enemy. . . . This principle . . . is liable to some exceptions; as, for instance, . . . contraband goods. If an enemy puts on board a neutral vessel a cargo belonging to himself, which is a contraband cargo, & that cargo is taken, it is condemnable to the captor; but the ct. will not consider itself as bound to enforce the payment of freight, against the captors, although at the same time, the neutral shipowner might have just reason to demand it from the enemy, with respect to whom his contract has been performed, as far as he had not been disabled from fulfilling it by the very circumstance of the other contracting party having put a cargo of that species on board, & consequently exposed the vessel to hostile seizure; & the ct. may, in like manner, not conceive itself under any obligation to say, in other instances, that the captors are liable to the charge of freight, although it may be a good & valid demand against the owner, which the parties must settle elsewhere. . . . In our own country it has long been the system that the coasting trade shall only be carried on by our own navigation. . . . In the ordinary state of affairs, no indulgence is generally permitted to the ships of most other countries to carry on the coasting trade. . . . As to a coasting trade, supposing it to be a trade not usually opened to foreign vessels, can there be described a more effective accommodation that can be given to an enemy during a war than to undertake it for him during his own disability? . . .

A person living *bonâ fide* in a neutral country, is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides, provided it is not inconsistent with his native allegiance (SIR WILLIAM SCOTT).—THE EMANUEL (1799), 1 Ch. Rob. 296; 165 E. R. 183.

*Annotation*.—**Refd.** The Prins der Nederlanden, [1921] 1 A. C. 754.

1205. — — — — —]—THE AMERICA, No. 736, *ante*.

1206. — **Voyage between ports of different enemies—Conduct appearing bonâ fide.**—THE WILHELMINA (1799), 2 Ch. Rob. 101, n.; 165 E. R. 253.

1207. — — — — —]—Priority of captor's expenses.—THE VROW HENRICA, No. 1179, *ante*.

#### G. Ship carrying Contraband.

1208. **Whether freight allowed.**—THE MERCURIUS (1799), 1 Ch. Rob. 288; 165 E. R. 180.

*Annotation*.—**Apld.** The Emanuel (1799), 1 Ch. Rob. 295.

1209. — — — — —]—THE EMANUEL, No. 1204, *ante*.

1210. — **Quantity of contraband relatively small.**—THE NEPTUNUS (1800), 3 Ch. Rob. 108; 1 Eng. Pr. Cas. 264; 165 E. R. 403.

*Annotations*.—**Distd.** The Jeanne, The Vera, The Forsvik, The Albania, [1917] P. 8. **Consd. & Distd.** The Prins der Nederlanden, [1921] 1 A. C. 754.

1211. — **Master or owner ignorant of nature of cargo.**—Contraband freight forfeited, ignorance of the neutral master not allowed.—THE OSTER RISØER (1802), 4 Ch. Rob. 199; 1 Eng. Pr. Cas. 382; 165 E. R. 584.

*Annotations*.—**Refd.** The Hakan, The Maracaibo, [1916] P. 266; The Prins der Nederlanden, [1921] 1 A. C. 754.

1212. — — — — —]—The Prize Ct. has jurisdiction to award freight in respect of the carriage of contraband goods, but the discretion to do so is exercised only in wholly exceptional cases. Its allowance or disallowance does not turn merely on the question whether the shipowner knew the character of the cargo.

Ignorance of neutral shipowners as to the enemy destination of the contraband goods, their conduct

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in informing the British authorities of the proposed shipment, & their services in carrying the goods from Las Palmas, are not sufficient grounds, in accordance with the authorities, for an exercise of the discretion in their favour.—*THE PRINS DER NEDERLANDEN*, [1921] 1 A. C. 754; 90 L. J. P. 273; 125 L. T. 208; 37 T. L. R. 508; 15 Asp. M. L. C. 274, P. C.

1213. — *Matter of grace or discretion.*—Freight is never paid to neutral shipowners in respect of the carriage of contraband, except as a matter of grace or as a matter of discretion.—*THE JEANNE, THE VERA, THE FORSVIK, THE ALBANIA*, [1917] P. 8; 86 L. J. P. 71; 115 L. T. 838; 33 T. L. R. 57; 13 Asp. M. L. C. 567.

*Annotations*.—*Consd.* *The Prins der Nederlanden*, [1921] 1 A. C. 754. *Mend.* *The Vesta*, [1921] 1 A. C. 774.

1214. — *Exercised in wholly exceptional cases.*—*THE PRINS DER NEDERLANDEN*, No. 1212, *ante*.

1215. — *Goods declared conditional contraband—After departure from neutral port.*—*THE KATWIJK*, No. 788, *ante*.

#### *H. Ship detained under Embargo.*

1216. *Freight not allowed.*—Freight demanded by a ship under embargo, against a cargo, but unloaded, to be sent on by another conveyance, not given.

The cargo is claimed for persons not subject to the embargo. The ship was brought in as a Swedish ship, & on that account only the detention has been occasioned, without any co-operation on the part of the cargo. The cargo has been brought out of its course, & has been detained on account of the ship, & is finally compelled to find another vehicle to convey it to its market. Under such circumstances it is not liable to the demand of freight (*per Cur.*).—*THE WERLDSBORGAREN* (1801), 4 Ch. Rob. 17; 165 E. R. 520.

1217. — *Allowance of expenses incurred on account of cargo.*—*THE ISABELLA JACOBINA* (1801), 4 Ch. Rob. 77; 165 E. R. 541.

1218. — *Transfer of cargo by consignee.*—A. having purchased a cargo of the consignee, free of all expenses, & having obtained possession, under an order of the ct., made respecting the ship under embargo, the demand of freight, on the part of the master, against the purchaser, not sustained.—*THE THERESA BONITA* (1802), 4 Ch. Rob. 236; 165 E. R. 597.

#### *I. Payment of Freight by Third Parties.*

1219. *Right to repayment from proceeds.*—The consignee of enemy goods shipped in a neutral ship, & seized & condemned as prize, is entitled to be reimbursed for payments made by him on account of freight & other charges before the cargo was seized by the proper officer on behalf of the Crown; & the master of the ship is entitled to the balance of his freight, if he has not been guilty of unneutral conduct, & to damages for the detention of his ship, if there has been undue delay on the part of the Crown in taking proceedings for the condemnation of the cargo as enemy property.—*THE REMONSTRANT* (1917), 87 L. J. P. C. 26; 3 Br. & Col. P. C. 14.

*Annotation*.—*Reft.* *The Palm Branch*, [1919] A. C. 272.

1220. — *Knowledge that owners enemy aliens.*—Where freight is paid on goods belonging to alien enemies with knowledge that the owners are alien enemies & with the object of preserving the goods for their benefit, the persons making the payment

have no right, in the event of the cargo being seized by the Crown & condemned as prize, to recover back the freight from the shipowners or to obtain from the Crown repayment out of the proceeds of the cargo.—*THE BILBSTER (PART CARGO EX)* (1915), 32 T. L. R. 35; 60 Sol. Jo. 107; 1 P. Cas. 507, n.

*Annotation*.—*Apld.* *The Manningtry*, [1916] P. 329

1221. — *Knowledge of enemy destination.*—

*THE CLAN URQUHART*, [1916] P. 345, n.

*Annotation*.—*Distd.* *The Manningtry*, [1916] P. 327.

1222. — *Payment innocently made.*—(1) Before the outbreak of war, a British steamship left an Australian port for Antwerp with cargo deliverable to order, & after the outbreak of war, put into Torbay for coal. As the ship's papers showed that the charterers were a German co., the Customs officers at Brixham seized the cargo on suspicion that it was enemy owned, & a writ was duly issued. Of this cargo a portion was claimed by a British co. on the ground that they had taken up the shipping documents, accepted the shippers' drafts for the value of the goods, & paid the freight. A Belgian co. also claimed as owners if it should be held that the property had passed from the British co.; but the President condemned this portion of the cargo as being, on the evidence, at the time of seizure, enemy property belonging to the German charterers, the British co. being merely pledgees of the documents & therefore, in accordance with the decision in *The Odessa, The Woolston*, No. 1121, *ante*, not recognised in a prize ct.

(2) Another consignment was claimed as to one-fourth share each by the British co., the Australian Metal co., a registered British co., which shipped all the goods; but the majority of whose shareholders were German, & a British partnership, as being members of a "pool" along with the German charterers.—*Held*: the German co. were, at the time of seizure, the owners, notwithstanding that they had to account for the ultimate profits to the three other members of the pool, & if the pool were deemed a partnership of three British partners & one enemy partner, so that the consignment was the joint property of the four partners, it was incumbent on the three British partners to show, which they had not done, that they had taken prompt steps to sever their business relationship with the enemy partner on the outbreak of war, just as it rests upon a resident in hostile territory to prove that he was not there *animo manendi*.

(3) A British banking co. innocently & honestly paid freight under the impression that they were entitled to have the goods delivered to them as holders of the bills of lading, & in ignorance of the fact that the goods had already been seized as prize on behalf of the Crown.—*Held*: the payment must be treated as made under a mistake, & the money repaid to the bank out of the proceeds of sale of the condemned cargoes.—*THE MANNINGTRY*, [1916] P. 329; 32 T. L. R. 36; 60 Sol. Jo. 75; 1 P. Cas. 497.

*Annotations*.—*As to (2)* *Reft.* *The Anglo Mexican*, [1916] P. 112; *The Lützow*, [1918] A. C. 435.

1223. *Right of recovery from shipowners.*—*THE BILBSTER (PART CARGO EX)*, No. 1220, *ante*.

#### SUB-SECT. 7.—LANDING AND WAREHOUSING CHARGES.

1224. *Claim by unloaders & warehousemen.*—*THE VROW SARAH* (1803), 1 Dods. 355, n.; 165 E. R. 1340.

*Annotation*.—*Distd.* *The Belvidere* (1813), 1 Dods. 353.

**1225. Claim by captor.]**—This is the case of a cargo purchased in the colonies of the enemy. . . . When the master sailed from Hamburg, claimants told him that they were the owners of the cargo, but gave him no instructions to claim for them in case of capture. On being brought into this country as a prize, he claimed the ship, but not with any precipitation, or in any such manner as to raise the slightest suspicion of collusion. The cargo required further proof; the master was under no obligation to stay for it, nor had the captor any right to detain him, or to make a warehouse of his ship. When the vessel is liberated, the cargo must be preserved somewhere. . . . Under the circumstances . . . the expense appears to have been incurred from a necessity arising out of the cargo, & I shall decree them to fall as a charge on the property (SIR WILLIAM SCOTT).—THE INDUSTRIE (1804), 5 Ch. Rob. 88; 165 E. R. 707.

*Annotation:—Refd.* The United States, [1920] P. 430.

**1226. —.]**—THE PEGGY (1804), 5 Ch. Rob. 90, n.; 165 E. R. 708.

*Annotation:—Refd.* The United States, [1920] P. 430.

**1227. —.]**—THE TRITON (1810), 10 Moo. P. C. C. 84, n.; 14 E. R. 423.

*Annotation:—Consd.* The Franciska (1856), 10 Moo. P. C. C. 74.

**1228. —.]**—THE MADOC (1817), cited in 10 Moo. P. C. C. at p. 85, n.; 14 E. R. 423.

*Annotation:—Consd.* The Franciska (1856), 10 Moo. P. C. C. 74.

**1229. Claim by shipowner.]**—THE ROUMANIAN, No. 1176, *ante*.

**1230. —.]**—THE CUMBERLAND, No. 1150, *ante*.

**1231. —.]**—THE JUNO, No. 1151, *ante*.

**1232. Rate of landing charges—How assessed.]**—THE RENDSBERG (1805), 6 Ch. Rob. 143.

*Annotation:—Mentd.* The James Dixon (1860), 2 L. T. 696.

**1233. Rate of warehouse charges—No right in harbour authority to differentiate—In case of prize cargo.]**—By the Bristol Docks Acts the Bristol Corpn. acquired certain docks & were empowered to charge reasonable warehouse rates & rents, Bristol Docks Act, 1881 (c. clxxvii), s. 8, providing that all rates on the same description of articles should be charged without partiality & without regard to the person to whom they belonged. The Acts incorporated the Harbours, Docks, & Piers Clauses Act, 1847 (c. 27), which by sect. 30 makes it illegal for the corpn. to differentiate their warehouse rates & rents as between various owners or persons interested in cargoes:—*Held*: each of the above provisions precluded the corpn. from charging higher warehouse rates & rents in the case of prize grain cargoes taken into store under the order of the Board of Trade or the Admty. Marshal than in respect of the same description of goods belonging to other persons.—THE CLARISSA RADCLIFFE (1914), 31 T. L. R. 98.

**1234. Where no claim made—Continuing charges incurred—Order for sale—Liberty to interested parties to apply.]**—Where the consignees of certain goods in an enemy ship had not taken up the bills of lading & they refused to pay the expenses of detention, on which payment the Procurator-General was willing to release to them the goods, & where they, the consignees, made no claim to the goods, which were still incurring continuing charges for warehousing, an order was made, under Prize Court Rules, Ord. 27, r. 2, for the goods to be sold & the proceeds of sale to be paid into ct., with liberty to any parties interested to apply for payment out of such proceeds of sale.—THE HORST MARTINI (1915), 59 Sol. Jo. 221.

#### SUB-SECT. 8.—LIEN.

*See* Nos. 1123–1130, *ante*.

#### SUB-SECT. 9.—NECESSARIES.

**1235. Whether claim allowed—Bounty of Crown.]**

—THE MARIE GLAESER, No. 1106, *ante*.

**1236. — Postponed to rights of captor.]**—THE TERGESTEA, No. 18, *ante*.

#### SUB-SECT. 10.—REPAIRS.

**1237. Whether claim allowed.]**—THE KIERLIGHETT, No. 973, *ante*.

**1238. — Person purchasing under illegal title.]**

—THE CONSTANT MARY (1697), as cited in 3 Ch. Rob. at p. 100; 165 E. R. 400.

*Annotation:—Apld.* The Kierlighett (1800), 3 Ch. Rob. 95.

**1239. — —.]**—Whoever purchases under an illegal title does it at his own peril; & must take the consequences, both in his purchase & in his own subsequent expenditure upon it, of his inattention to his own security; but I think this was not a title so notoriously bad, at the time when this purchase was made, as to bring it fairly under the application of the general rule to its utmost extent. . . . It appears that a sum of money has been expended on the repairs of this vessel by which claimant will be benefited, though not to the amount of the sum laid out; something must be allowed for wear & tear, & besides, the party who has expended this sum, has had the use of the vessel in the meantime: I shall therefore not allow the whole sum, but I shall take a moiety & I shall allow that, in consideration of the benefit which the original owners are likely to receive from the amelioration (SIR WILLIAM SCOTT).—THE PERSEVERANCE (1799), 2 Ch. Rob. 239; 165 E. R. 302.

*Annotation:—Refd.* The Kierlighett (1800), 3 Ch. Rob. 95.

**1240. — Proceeds of cargo applied in repairs—Claim by captors.]**—(1) Average against the ship, on the part of the captors, in right of the cargo, as demanded, for part of the cargo applied to the repairs of the ship, not sustained.

(2) The right of war is a right *in re*, & the Ct. of Prize accordingly attends only to the *res ipsa*, & the *onera* attaching on the property in right of possession. The ship has the possession of the cargo, which the master is not bound to deliver, till he has been satisfied for his demand of average, if he has such, in the same manner, as for his demand of freight. He has the *res ipsa* in his possession, & may legally detain it. The captor succeeds to the rights of the owner of the ship, when that is condemned, & may detain the cargo also, in virtue of these rights when they exist. But with respect to the cargo, it is very different. That has not in any manner, a right of possession against the ship; it may have the *jus in rem*, possibly, but it has not the *jus in re*, & consequently no right of detention existing at the time of seizure. . . . The right of capture attaches, according to the state in which the property is found; but if a former freight is due to the ship, the captor could not exact it, since he has not earned it. . . . Neither does the captor become subject to the obligations to which the owner is liable. Antecedent collateral contracts, as bottomry, may exist, that will not affect him; he becomes possessed of the *res ipsa* but without being made liable to the personal contracts in which the proprietor is engaged (SIR WILLIAM

*Sect. 4.—In respect of what matters claims allowed: Sub-sects. 10 & 11. Sect. 5. Part XI. Sects. 1, 2, 3 & 4.]*

SCOTT).—THE HOFFNUNG (1807), 6 Ch. Rob. 383; 1 Eng. Pr. Cas. 583; 165 E. R. 970.

*Annotations:—As to (2) Rejd. The Sorfarenen (1915), 85 L. J. P. 121; The Roumanian, [1916] 1 A. C. 124.*

#### SUB-SECT. 11.—OTHER CASES.

1241. **Claim for private adventure.]**—THE CALYPSO (1799), 2 Ch. Rob. 298; 165 E. R. 322.

1242. —.]—THE PRINCE OF AUGUSTENBURG (1827), 2 Hag. Adm. 91; 166 E. R. 178.

1243. **Claim for interest.]**—The usual rule undoubtedly is, not to give interest on interest; but when interest has been given, & the account is made up, the interest then becomes principal, on which it is not unreasonable that further interest may be decreed (SIR WILLIAM SCOTT).—THE DRIVER (1804), 5 Ch. Rob. 145; 165 E. R. 727.

*Annotation:—Rejd. The Ostsee (1855), 2 Ecc. & Ad. 170.*

1244. —.]—THE DIRIGO, THE HALLINGDAL, No. 214, *ante*.

1245. —.]—THE FALK, ETC., No. 1249, *post*.

1246. **Claim for pilotage.]**—THE FALCK (1805), 10 Moo. P. C. C. 91, n.; 14 E. R. 422.

*Annotation:—Apld. The Francisca (1856), 10 Moo. P. C. C. 74.*

1247. —.]—THE HANNA LARSEN (1914), *Times*, Sept. 12.

1248. **Salvage services — Rendered prior to seizure.]**—Where salvage services were rendered to ship, cargo, & freight prior to the seizure of the cargo as prize, the Prize Ct. ordered payment, out of the proceeds of the sale of the cargo condemned as prize, of the cargo's proportion of the salvage expenses, & of the salvors' costs.—THE CHATEAUBRIAND (1910), 85 L. J. P. 152.

1249. **Damages for delay.—In releasing goods.]**—(1) The Procurator-General, in establishing that there was a reasonable suspicion that contraband goods had an enemy destination, so as to justify their seizure, is not limited to information found in the ship's papers or known to the captors at the time of seizure.

Substances used in tanning leather belonging to Swedish applts. were seized on the *Falk* & seven other vessels on their way from America to Sweden as absolute contraband with an ulterior enemy destination in Hamburg. The matter was eventually settled, & the Procurator-General discontinued his proceedings in 1919, four years after the seizure. Applts. claimed damages for the capture & detention of the goods, & for the inaction of the Procurator-General after applts. had disclosed their documents to him & had satisfied his requisitions:—*Held*: the original seizure was not unjustifiable & the continued detention of the goods was not wilfully or recklessly wrong or malicious, & applts.' claim failed.

(2) Nor is he liable for delay in releasing the goods if the delay has not been due to neglect or to some indirect object, & he has materials which are proper to be examined judicially.

(3) A decree for the release of goods does not warrant actual ability to remove them from the realm.

(4) The Procurator-General is not liable for a loss in the selling value of goods owing to a govt. restriction upon their export.

(5) It is not a general rule that whenever the Crown has had the benefit of the proceeds of goods seized claimant is entitled to interest if the goods are released to him.—THE FALK, ETC., [1921] 1 A. C. 787; 90 L. J. P. 282; 125 L. T. 257; 37 T. L. R. 512; 15 Asp. M. L. C. 180, P. C.

1250. **Damages for loss in selling value of goods—Due to restriction on export.]**—THE FALK, ETC., No. 1249, *ante*.

#### SECT. 5.—LOSS OF RIGHT TO CLAIM.

1251. **Whether right lost by lapse of time.]**—THE RENARD (1778), Marr. 222; 1 Eng. Pr. Cas. 17; 165 E. R. 51.

1252. —.]—Captors compelled to proceed to adjudication, notwithstanding a lapse of near two years.

During the existence of the prize commission, there is no fixed & definite time by which the party can be said to be legally barred from calling on the captor to proceed to adjudication, although it may be proper to hold that there must exist a time which would work such an effect; but there is no prescribed limitation against the admission of a claim, nor any means by which the captor can protect himself but by applying to a ct. of competent jurisdiction. If he neglects to apply to any tribunal, he would be guilty of a great misdemeanour; if, through misapprehension he applies to an improper tribunal though he may defend himself against the charge of a misdemeanour, he cannot protect himself from the call of claimant to proceed to adjudication before a competent tribunal. . . . It is always in the power of claimant to compel the captor to proceed, if he neglects to do so himself (SIR WILLIAM SCOTT).—THE HULDAH (1801), 3 Ch. Rob. 235; 1 Eng. Pr. Cas. 303; 165 E. R. 448.

*Annotations:—Consd. The Wilhelmina, [1923] P. 112. Rejd. The Ostsee (1855), 2 Ecc. & Ad. 170. Mentd. The Leucade (1855), 2 Ecc. & Ad. 228.*

1253. —.]—THE KATHARINA (CARGO EX), No. 1043, *ante*.

1254. — **Whether Statute of Limitations applicable.]**—BERKELEY v. MORRICE (1668), Hard. 502; 145 E. R. 569.

*Annotation:—Rejd. Gould v. Gapper (1804), 5 East, 345.*

1255. —.]—THE MENTOR, No. 486, *ante*.

1256. — **More leniency shown to foreigners—Than to British subjects resident in Britain.]**—THE ELIZE (OTHERWISE THE ELISE WILHELMINE), No. 999, *ante*.

1257. **Public Authorities Protection Act, 1893 (c. 61), s. 1—Not applicable.]**—Public Authorities Protection Act, 1893 (c. 61), s. 1 of which provides a limitation of six months for instituting an action against any person for any act done in pursuance or execution of an Act of Parliament or of any public duty or authority, does not apply to an action in prize brought against the Procurator-General, as the representative of the commissioned captors, in respect of the alleged illegal seizure & detention of a ship & cargo.—THE WILHELMINA, [1923] P. 112; 92 L. J. P. 58; 129 L. T. 188; 39 T. L. R. 249; 67 Sol. Jo. 386; 16 Asp. M. L. C. 229.

—.]—*See, generally, PUBLIC AUTHORITIES. Where property parted with after seizure.]—See Nos. 1134, 1135, ante.*

## Part XI.—Procedure.

## SECT. 1.—IN GENERAL.

See Prize Courts (Procedure) Act, 1914 (c. 13); Prize Court Rules, 1914.

1258. Proceedings in rem.]—THE FLAD OYEN, No. 935, *ante*.

1259. Plea of *res judicata*—When available.]—The plea of *res judicata* is available in prize cases if the necessary conditions exist; but it cannot be entertained unless the record of the act of the ct. on which it is founded is forthcoming, or some valid reason is given why it cannot be produced.—LARUE (G.) & Co. v. PROCURATOR-GENERAL, THE ANNIE JOHNSON (1921), 91 L. J. P. 64; 126 L. T. 614; 15 Asp. M. L. C. 443, P. C.

Application of Statutes of Limitation.]—See LIMITATION OF ACTIONS, Vol. XXXII., p. 319, Nos. 50, 51.

1260. Position of Crown—Real party proceeding.]—A Russian ship, coming into a British port under the protection of the Orders in Council & discharging her cargo, instead of departing forthwith was sold to a British subject & remained in a British port. She was seized, & proceedings taken against her, but before having an admission of claim, the Admty. Proctor, by direction of the Lords of the Admty., declared that he proceeded no further, but reserved the question of costs & damages:—*Held*: (1) the declaration does not necessarily entitle claimant to costs, it being always in the power of the Crown to stay the proceedings for condemnation; (2) the purchase of the ship by a British subject was a trading with the enemy not specially permitted by the Orders in Council, & therefore illegal; (3) for those reasons, & also for illegal opposition to those who seized the ship, under the authority of the ct., claimant must be condemned in the costs.

(4) With respect to seizures made by captors commissioned or non-commissioned, that the real party proceeding is always the Crown; in both cases & clearly in the case of commissioned captors, it is under the control of the Crown properly speaking, & the Crown may at any time it thinks fit, order the Queen's Proctor to take any measures it may according to its wisdom deem right, namely, to proceed no further, & to restore the property or whatever else it may deem proper (DR. LUSHINGTON).—THE NEPTUNE (1855), Spinks, 281; 2 Eng. Pr. Cas. 520; 26 L. T. O. S. 110; 1 Jur. N. S. 1144; 4 W. R. 162; 164 E. R. 450.

1261. Stay of proceedings—Right of Crown.]—THE NEPTUNE, No. 1260, *ante*.

## SECT. 2.—MONITION AGAINST CAPTORS TO PROCEED TO ADJUDICATION.

See, now, Prize Court Rules, 1914, Ord. 5, rr. 1, 2, 4.

1262. Captor not proceeding to adjudication—Whether granted—Where no claim entered.]—Monition against captors to proceed to adjudication. Protest that there was no claim before the ct. & that this was a proceeding under the Dutch hostilities, & that the captors had no letter of marque against the Dutch, overruled.

It is the usual practice for a party to give in his claim, in the first instance; but it will not necessarily vitiate the process, if there has been no claim. If it should, in any manner, come to

the knowledge of the ct. that a seizure had been made in the nature of prize, & that no proceedings had been instituted, it would be the duty of the ct. to direct proceedings to be commenced. In common condemnations, it is not necessary to wait for a claim (*per cur.*).—THE WILLIAM (1802), 4 Ch. Rob. 214; 1 Eng. Pr. Cas. 383; 165 E. R. 580.

1263. ——— After lapse of time—Rendering obtaining of evidence difficult.]—THE SUSANNA, No. 511, *ante*.

1264. ——— Against whom granted—Part-owners—Although compensation paid *pro tanto*.]—A part owner of a privateer not exempt from his general responsibility by compensation *pro tanto* & a release of claimant as to him.

The release cannot avail, to exempt this person from being held a party to the suit, to which all the owners of a privateer are, in the first instance, liable, & not merely for their own shares respectively, but for the total amount of what may be awarded against them all (SIR WILLIAM SCOTT).—THE KARASAN (1804), 5 Ch. Rob. 291; 165 E. R. 780.

## SECT. 3.—DISCOVERY.

See DISCOVERY, Vol. XVIII., p. 53, Nos. 105–108.

## SECT. 4.—SHIP'S PAPERS.

See, now, Prize Court Rules, 1914, Ord. 4, rr. 1, 2.

1265. Verification on oath—Necessity for—By master or person able to verify.]—An American vessel coming from America without any knowledge of the blockade of Amsterdam, & bringing a cargo for that port came to Falmouth, & . . . finding that the port of Amsterdam was under blockade petitioned for a licence, & obtained from this govt., as I understand the matter, a licence to go to Amsterdam. . . . The terms of the permission . . . [were] “to the ports of the Vlie, Emden, Rotterdam, or elsewhere.” . . . This vessel was taken entering the Texel. . . . If a licence is given to go through the Vlie, it is not substantially violated by going through another passage, unless it is shown that it contained some specific prohibition as to other passages. . . . To shut up the ports of a country, & exclude neutrals from all commerce with it, is a great inconvenience upon them, although it is one to which they are bound to submit; for . . . a belligerent has a right to impose a blockade on the ports of his enemy. . . . It is a harsh right, & though a licence is a privilege . . . licences in such a case are to be favourably regarded, & it imports the good faith & honour of the govt. which grants them, not to press the letter too rigorously. This licence is “To carry a cargo to the ports of the Vlie or elsewhere”; with several provisions, amongst which there is certainly no proviso that she shall come out again; but that is a benefit incidental to the licence, & inseparable from it; for it cannot be imagined that she was to go there, & be shut up & incarcerated, & become herself an object of the blockade. A ship that has entered previous to the blockade may retire in ballast, or taking a cargo that had been put on board

*Sect. 4.—Ship's papers. Sect. 5: Sub-sects. 1, 2 & 3. Sect. 6: Sub-sect. 1.]*

before the blockade. . . . A neutral has no right to say, I am here accidentally, & therefore I have a right to take out a cargo notwithstanding the blockade. [Where a] man goes in with a permission, which takes off, as to him, the first & primary object of the blockade, the prohibition of taking in a cargo; he is entitled to be distinguished from the ordinary case of other neutrals previously there. . . . In the Ct. of Admty., papers by themselves prove nothing; they are a mere dead letter; if they are not supported by the oaths of persons in a situation to give them validity. . . . The master must verify his papers. . . . The verification should be less positive than where he is himself the agent; but . . . he should depose at least that he believes the cargo to be as asserted in the claim. . . . When a cargo is taken on board in an enemy's port, & that port blockaded, which is a circumstance of some weight, as affording a greater temptation to fraud, if the master is not required to say even that he believes the property to be as claimed, it would open the door to every sort of abuse.

But it is said, the master does go this length in swearing "that all the papers are true" & that this amounts to a verification of the property; so he does if you take that part of his deposition substantively, & apart from the rest; but looking to other parts, & finding, that when he is asked . . . what he knows or believes, for he is examined to his belief, he can depose nothing, & that he has no belief, it is impossible to say that this man's deposition confirms the papers, in the manner in which it is necessary that they should be supported. . . .

I am of the opinion that the master is entitled to his freight & expenses on two grounds; if he had taken no cargo, he would not have been liable to be stopped; & . . . having received this cargo so improperly documented on board, he would have been liable to have been stopped on that account although he has not been coming from a blockaded port (SIR WILLIAM SCOTT).—THE JUNO (1799), 2 Ch. Rob. 116; 1 Eng. Pr. Cas. 198; 165 E. R. 258.

**1266.** — *What must be deposed.*—THE JUNO, No. 1151, *ante*.

**1267.** *Inspection of papers—By person entering claim—Extent of inspection allowed.*—THE PORT MARY (1801), 3 Ch. Rob. 233; 165 E. R. 448.

**1268.** *Spoliation of papers—Effect of—Liability to condemnation—Circumstances of destruction considered.*—By the law of every maritime ct. of Europe, spoliation of papers not only excludes further proof, but does *per se* infer condemnation; the lenity of our code has, however, modified the rule to this extent, that, if all other circumstances are clear, this circumstance alone shall not be damnatory, particularly if the act was done by a person who has interests of his own that might be benefited by the commission of this injurious act.—THE HUNTER (1815), 1 Dods. 480; 2 Eng. Pr. Cas. 208; 165 E. R. 1385.

*Annotation:—Consd. The Johanna Emilie (1854), Spinks, 12.*

**1269.** — — — — —.]—THE JOHANNA EMILIE, No. 66, *ante*.

**1270.** — — — — *Whether excluding further proof.*—THE RISING SUN, No. 1115, *ante*.

**1271.** — — — — —.]—THE HUNTER, No. 1268, *ante*.

**1272.** — — — — —.]—THE JOHANNA EMILIE, No. 66, *ante*.

**1273.** — — — — *Unfavourable presumption.*—THE OPHELIA, No. 349, *ante*.

**1274.** — — — — *Presumption of intention to destroy rebutted.*—THE OPHELIA, No. 349, *ante*.

**1275.** — — — — *What amounts to—Destruction of papers relevant to voyage.*—THE JOHANNA EMILIE, No. 66, *ante*.

**1276.** *Irregularity in papers—Whether excluding further proof.*—THE ANNA CATHARINA, No. 230, *ante*.

**1277.** *Simulated papers—Whether amounting to breach of neutrality.*—HOBBS v. HENNING, No. 798, *ante*.

*Ship's papers as evidence.*—See Sect. 5, *post*.

## SECT. 5.—EVIDENCE AT HEARING.

### SUB-SECT. 1.—IN GENERAL.

*See, now, Prize Court Rules, 1914, Ord. 14.*

**1278.** *Credibility—Master's evidence.*—THE CAROLINA, No. 809, *ante*.

**1279.** — — — — *Interested witness.*—If the witness says only that he expects to share from the bounty of the captors, he is not disqualified or rendered incompetent, whatever may be the deduction of credit to which he is exposed, but if he thinks himself entitled in law, he acts under an impression of interest, which renders him incompetent, however erroneous that opinion may be (*per CUR.*).—THE AMITIÉ (1806), 5 Ch. Rob. 344, n.; 6 Ch. Rob. 269, n.; 165 E. R. 799.

**1280.** *Evidence of title—Bill of sale on board—& sentence of condemnation in foreign court.*—THE COUNTESS OF LAUDERDALE, No. 979, *ante*.

**1281.** *Evidence by affidavit—Not allowed in case of joint capture.*—(1) *Allegation pleading affidavits, in a case of joint capture by plea & proof, rejected.*

This [whether one ship was sole recaptor] is a question which cannot be permitted to be settled by affidavits. If there is any defect of evidence, it has been produced by the neglect of the parties (SIR WILLIAM SCOTT).

(2) There must be many cases in which the claims of non-commissioned persons have been allowed for salvage, on retaking property out of the hands of the enemy (SIR WILLIAM SCOTT).—THE URANIA (1804), 5 Ch. Rob. 148; 1 Eng. Pr. Cas. 438; 165 E. R. 728.

**1282.** *Ship's papers—How far conclusive of facts stated therein.*—Such papers [ship's papers], duly verified & supported, are strong *prima facie* evidence in all cases; & if unopposed, are conclusive evidence; but if there are circumstances & facts appearing in case, leading justly to the conclusion that those papers, though formal in themselves & though formally supported by oath, are nevertheless false, it would be ridiculous to say that the ct. is bound by them (SIR WILLIAM SCOTT).—THE ODIN (1799), 1 Ch. Rob. 249; 1 Eng. Pr. Cas. 127; 165 E. R. 166.

*Annotation:—Apld. The Sorfareren (1915), 85 L. J. P. 121.*

**1283.** — — — — *Breach of blockade.*—THE FORTUNA, No. 583, *ante*.

**1284.** — — — — *Carriage of contraband.*—THE FALK, ETC., No. 1249, *ante*.

**1285.** — — — — *Contradictory papers—Qnus of proof that belligerent rights not affected.*—THE IDA, No. 1126, *ante*.

**1286.** — — — — *Simulated papers—Evidence of breach of neutrality.*—HOBBS v. HENNING, No. 798, *ante*.

*Ship's logs.*—See Nos. 1294, 1295, *post*.

### SUB-SECT. 2.—ADMISSIBILITY.

**1287.** *Facts in other cases.*—THE JUFFROUW ELBRECHT (1799), 1 Ch. Rob. 127; 165 E. R. 121.

1288. —[Depositions of claimant in a former case, in which he was owner & master of the vessel, invoked by the captor. Objection overruled. Evidence admitted.—THE VRIENDSCHAP (1802), 4 Ch. Rob. 166; 165 E. R. 573.

1289. —[THE RAPID, No. 116, *ante*.

1290. Documentary evidence.—Newspaper report.—THE IMMANUEL, No. 239, *ante*.

1291. —Official Gazette.—THE IMMANUEL, No. 239, *ante*.

1292. —Of existence of blockade.—THE ELIZE (OTHERWISE THE ELISE WILHELMINE), No. 999, *ante*.

1293. —Lloyd's books—Evidence of capture.—Lloyd's books are evidence of a capture, not of notice of a loss to any person in particular; but coupled with other evidence, may go to the jury.—ABEL v. POTTS (1800), 3 Esp. 242; 170 E. R. 602.

1294. —Ship's logs.—LE BON AVENTURE, No. 423, *ante*.

1295. —[LE NIEMEN, No. 382, *ante*.

1296. Common law rules not applicable.—THE FRANCISKA, No. 674, *ante*.

1297. —[THE BERLIN, No. 334, *ante*.

#### SUB-SECT. 3.—ONUS OF PROOF.

1298. On captor—Claimant establishing *prima facie* case.—THE COUNTESS OF LAUDERDALE, No. 979, *ante*.

1299. —[The Commercial Ct. for Malta (in Prize) found that a cargo of wheat seized as prize was on its way to an enemy destination & made an order that it should be condemned. At the hearing, the captors adduced no evidence in contradiction of claimants' case, but subjected the whole of the transactions to the closest scrutiny, & suggested that in truth the wheat was on its way to an enemy destination:—Held: as the documents produced by claimants were genuine & regular in form in the absence of evidence to refute them they were deserving of credit. The decision below was based on assumptions that were mere conjectures & were therefore inadmissible, whereas claimants' evidence discharged such burden as rested on them & sufficed to establish their claim on the facts so proved.—THE ELEFTHERIOS K. VENIZELOS (1917), 116 L. T. 383; 33 T. L. R. 260; 13 Asp. M. L. C. 589, P. C.

1300. —Evidence being contradictory.—THE GLIERKTIGHEIT (1805), 6 Ch. Rob. 58, n.; 165 E. R. 849.

Annotation:—Consd. The Aline & Fanny (1856), Spinks, 322.

1301. On claimant—Captor neglecting duty in signalling.—LE BON AVENTURE, No. 423, *ante*.

1302. —Suspicion that ship enemy property.—If any doubt exists as to the character of a ship claimed to be the property of a neutral, being still enemy's property, the rule of the Prize Ct. is, that claimant shall be put to strict proof of ownership, & any circumstance of fraud or contrivance, or attempt at imposition on the ct., in making out his title, is fatal to claimant. Condemnation of the ship as enemy's property necessarily follows.—BATTEN v. R., THE MARIA (1857), 11 Moo. P. C. C. 271; 5 W. R. 825; 14 E. R. 698, P. C.

Annotation:—Consd. The Annie Johnson, The Kronprinzessin Margareta, [1918] P. 154.

PART XI. SECT. 5, SUB-SECT. 3.  
r. On captor.—THE HANAMETAL (1914), 10 Hong Kong L. R. 3.

PART XI. SECT. 6, SUB-SECT. 1.  
t. To whom allowed—Whether to person guilty of fraud & perjury.—

THE THREE BROTHERS (1808), C. R. 3 A. C. 348.

u. Ship & cargo purchased in enemy's colony—By agent of claimant—Without claimant's instructions.—THE MERCURY (1809), C. R. 3 A. C. 324.

x. Cargo destitute of proof of pro-

1303. —In case of booty of war—Claimant of share.—In cases of booty of war the actual captors, though they may institute the suit, are *plffs.* only in name, as the burden of proof rests with those claiming a right to share in the booty, & in such cases those who have the burden of proof have also the right to begin.—RE BANDA & KIRWEE BOOTY (1866), L. R. 1 A. & E. 109; 35 L. J. Adm. 11; 14 L. T. 293; 2 Mar. L. C. 323.

Annotations:—Mentd. Re Banda & Kirwee Booty (1875), 33 L. T. 332; Re Banda & Kirwee Booty, Kinloch v. R., Kinloch v. R. & Secretary of State for India in Council, [1882] W. N. 164; The Feldmarschall, [1920] P. 289.

1304. —Seizure of conditional contraband—Proof of destination.—THE NORNE, No. 836, *ante*.

#### SECT. 6.—FURTHER PROOF.

##### SUB-SECT. 1.—IN GENERAL.

See, now, Prize Court Rules, 1914, Ord. 15, rr. 1-3, 7.

1305. Evidence adduced unsatisfactory—Court will not direct yet further proof.—THE BERNON, No. 159, *ante*.

1306. To whom allowed—Not persons guilty of fraudulent conduct—Or departing from neutral character.—THE JUFFROUW ANNA, No. 896, *ante*.

1307. Delay in adducing—Must be accounted for on affidavit.—Delay in exhibiting further proof, suspicious. If unreasonable & beyond a time prescribed for introducing further proof, an affidavit required to account fully for the delay prior to any permission given for its introduction.—L'INVIDIATO (1809), 1 Act. 110; 12 E. R. 42, P. C.

1308. Delay in application—Culpable neglect.—THE SANTO THOMAS, No. 1172, *ante*.

1309. Admissibility of fresh contention on hearing—Contention disclosed in proofs exhibited.—Upon an order for further proof as to particular grounds for condemnation, the ct. will not permit counsel to argue for condemnation upon a fresh ground of impeachment, although disclosed in the further proofs exhibited by the claimants for restitution. The further proof being only a subject of investigation as to the specific points in respect to which the ct. had required explanation.—THE LYDIAHEAD (1811), 2 Act. 135; 12 E. R. 206.

1310. Application for further proof—What must be shown—Facts intended to be proved.—(1) The affidavit accompanying the claim must state the residence of claimant.

(2) A prayer for further proof must be founded on a statement of what is intended to be proved. The omission of such statement renders claimant liable to costs. Claimant must show first that he is entitled to a *locus standi*, & is not tainted with the character of enemy. He must therefore describe affirmatively the character in which he claims.

He must describe the place to which he belongs & he must negative all enemy's interest in a form specially framed for that purpose, & intended to apply, to all intents, to any person resident within the territories of the enemy, to whatever country he may happen to owe allegiance (DR. LUSHINGTON).

perly.—A cargo totally destitute of proof of property, & without any directions, not allowed to go to further proof.—THE ACTIVE (1813), Stewart, 579.

s. No grounds for further proof—Shown in original evidence.—THE JOHANNA (1813), Stewart, 521.



*Sect. 6.—Further proof: Sub-sects. 1 & 2, A., B. & C. Sects. 7, 8 & 9.]*

(3) Where an enemy merchant claims under an Order in Council or licence . . . then, of necessity, the form is altered, & the ground of the special claim inserted. The form of the affidavit has been altered from time to time, according to the states with which Great Britain was at war (DR. LUSHINGTON).

(4) The ct. always requires . . . that whether the request of further proof be founded on the statements of counsel or affidavits or other documents, such a case should be presented as might, if it were proved, entitle claimant to restitution (DR. LUSHINGTON).—THE PANAJA DRAPANIOTISA (1856), Spinks, 336; 2 Eng. Pr. Cas. 560; 164 E. R. 469.

*Annotations:—As to (2) Connd. The Marie Glaesser, [1914] P. 218. Redd. The Palm Branch, [1916] P. 230.*

**1311. — Facts entitling claimant to restitution.]**—THE PANAJA DRAPANIOTISA, No. 1310, *ante*.

**Effect of spoliation or irregularity in ship's papers.]**—See Nos. 1268–1276, *ante*.

#### SUB-SECT. 2.—WHEN ORDERED.

##### A. In General.

**1312. Specific points requiring explanation.]**—THE LYDIAHEAD, No. 1309, *ante*.

##### B. At Instance of Claimant.

**1313. Master discredited—& papers unverified.]**—THE CALYPSO (1799), 2 Ch. Rob. 153; 165 E. R. 272.

**1314. Circumstances making case utterly incredible.]**—Letters of procuration are required to be exhibited in purchases made by agents in the belligerent country.

There is no letter of procuration exhibited . . . it is a case of further proof, & being so, it becomes necessary to look further into it; for unless the circumstances are such as to satisfy the ct., at least in some degree, that it is a fair case, the parties will not be entitled to the privilege of further proof.

The circumstances of a case may be such as to make it utterly incredible, although there are confident attestations in support of it; the circumstances may be highly unnatural & irreconcilable with any view of a fair transaction. The court must undoubtedly be upon its guard against running wild upon mere general presumptions; but it must judge of the common transactions of life upon the same ordinary principles on which the probity & fairness of such matters is examined in the general practice of mankind (SIR WILLIAM SCOTT).—THE ARGO (1799), 1 Ch. Rob. 158; 165 E. R. 133; *affd.* (1802), 6 Ch. Rob. IX.

**1315. Agent purchasing in belligerent country—No letter of procuration exhibited.]**—THE ARGO, No. 1314, *ante*.

**1316. Fraudulent suppression of enemy interest.]**—THE GRAAFF BERNSTORF, No. 72, *ante*.

**1317. Suspicious circumstances appearing.]**—Notwithstanding circumstances of suspicion in the general trade of an alleged neutral owner, admitted to the benefit of further proof.—THE JANE (1809), 1 Act. 38; 12 E. R. 15, P. C.

**1318. Property already condemned—Delay in taking proper steps.]**—Application for admission of further proof refused. Claimants resident in Bohemia having neglected to enter a claim in proper time in the ct. where, after the adjudica-

tion had been reserved for a considerable time, this property was condemned, from which sentence no appeal was interposed for seven months subsequently.—THE EUROPA (1810), 1 Act. 320; 12 E. R. 124, P. C.

**1319. Colourable papers for fraudulent purposes—Claimant bound by act of agent.]**—THE IDA, No. 1126, *ante*.

**1320. Failure of evidence of master.]**—When the evidence of the master as to the ownership of the property claimed is deficient, it cannot be restored without further proof.—THE FIDENTIA (1854), Spinks, 39; 1 Ecc. & Ad. 344; 2 Eng. Pr. Cas. 281; 8 L. T. 58; 164 E. R. 198.

**1321. Ignorance of master as to ownership—Absence of bill of sale.]**—The absence of the bill of sale & the ignorance of the master as to the ownership, both necessitate further proof.

If claimant elects to proceed by plea & proof the case is open to further proof on the part of the captors.—THE MARIA (1855), Spinks, 321; 8 L. T. 92; *subsequent proceedings, sub nom.* BATTEN v. R., THE MARIA (1857), 11 Moo. P. C. C. 271, P. C.

##### C. At Instance of Captor.

**1322. Only on special grounds.]**—THE ADRIANA, No. 78, *ante*.

**1323. — Matter not connected with original evidence.]**—Prayer to admit extraneous evidence on the part of the captor, to show an illegal course of trade, not granted, there being nothing in the original evidence pointing to such a suspicion. The Ct. of Admlty. is at all times studious to preserve the simplicity of prize proceedings.—THE SARAH (1801), 3 Ch. Rob. 330; 1 Eng. Pr. Cas. 318; 165 E. R. 483.

**1324. Additional evidence not altering case.]**—DER FRIEDE (1803), cited in Spinks at p. 300; 330; 26 L. T. O. S. at p. 263; 164 E. R. 466.

*Annotation:—Distd. The Aline & Fanny (1856), Spinks, 322.*

**1325. Circumstances of suspicion in evidence of claimants.]**—Under this defect of all circumstances of suspicion in the original evidence, the ct. is called upon to admit the affidavits of the captors, first, for the purpose of working condemnation, as, if that fails, to save the captors from the payment of any expenses which they may have incurred. If I should accede to this demand, the consequence would be, that I must do it upon a uniform principle of admitting affidavits universally & in all cases, though there should be nothing to excite suspicion in the original evidence, & though the language of all the witnesses is as precise as possible. I can come to no such conclusion (SIR WILLIAM SCOTT).—THE HAABET (1805), 6 Ch. Rob. 54; 1 Eng. Pr. Cas. 524; 165 E. R. 848.

*Annotations:—Apld. The Aline & Fanny (1856), Spinks, 322. Redd. The Leucade (1855), Spinks, 217; The Ostsee (1855), 2 Ecc. & Ad. 170.*

**1326. —**By the law of prize, the evidence, whether to acquit or condemn the ship, must, in the first instance, come from the ship's papers & the primary depositions of the master & crew: & the captors are not, except under circumstances of suspicion arising from the primary evidence, entitled to adduce any intrinsic evidence in opposition.—R. v. HILDEBRANDT, THE ALINE & FANNY (1856), 10 Moo. P. C. C. 491; 8 L. T. 92; 4 W. R. 807; 14 E. R. 577, P. C.

**1327. — Disclosed in letter taken from another ship.]**—A paper is offered to the ct. as evidence in this case, which, it is contended, cannot be received. . . . The ct. itself might possess information that would completely falsify the claim. Could it

be said, in such a case, that, because the depositions & the formal papers were consistent, there should be no means of extracting the real truth of the facts? Could it be expected that the ct. should proceed to judgment on the mere formal evidence, in opposition to its own private conviction, that the whole of what was there stated was false? It would be impossible to maintain that proposition to the utmost extent. . . . When a case is perfectly clear, & not liable to any just suspicion, the disposition of the ct. will certainly lean strongly against the introduction of extraneous matter, & against permitting the captors to enter upon further inquiries, but in the present instance the case is not free from objection on the original evidence. . . . If there is no doubt that the paper offered was a ship's paper, though on board another vessel . . . it is competent to me, when the evidence is of so stringent a nature as that proposed, to admit it (SIR WILLIAM SCOTT).—THE ROMEO (1806), 6 Ch. Rob. 351; 1 Eng. Pr. Cas. 568; 165 E. R. 959.

*Annotation*:—*Distd. & Dtd.* The Allie & Fanny (1856), Spinks, 322.

**1328. Claimant proceeding by plea & proof.**—THE MARIA, No. 1321, *ante*.

#### SECT. 7.—ARREST.

*See, now*, Prize Court Rules, 1914, Ords. 10, rr. 1-5, 7-9; 13, rr. 1, 2, 5; 14, rr. 6, 7-11.

Arrest generally, *see* ADMIRALTY, Vol. I., pp. 161-166, Nos. 698-763.

**1329. Claimant must proceed against captor—Before warrant issued.**—THE GENERAL WALTERSTORF (1799), 1 Ch. Rob. 328; 165 E. R. 194.

*Annotation*:—*Refd.* The George (1801), 3 Ch. Rob. 212.

**1330.** ———.]—THE GEORGE, No. 509, *ante*.

#### SECT. 8.—APPRAISEMENT AND SALE.

*See, now*, Prize Court Rules, 1914, Ord. XI., rr. 1, 2, 5, 11.

**1331. When appraisement & delivery ordered—Delay in prosecution—Perishable goods—Discretion of court.**—Writs of delivery & appraisement when, & for what causes granted. They are granted at the discretion of the ct.—PAIKER v. ASTON (1717), Bunb. 21; 145 E. R. 581.

*Annotation*:—*Refd.* Vincent v. De Laar (1758), Park, 196.

**1332. Application for appraisement—Necessity for despatch.**—(1) The execution of commissions of appraisement & sale, ought to be proceeded on with all possible despatch, & brought to a conclusion without delay (SIR WILLIAM SCOTT).

(2) Returns to commissions must themselves be short & simple, & unembarrassed with foreign & insignificant matter (SIR WILLIAM SCOTT).—THE PRINCESSA & LA REINE ELIZABETH (1799), 2 Ch. Rob. 31; 165 E. R. 229.

**1333.** ——— Necessity for notice.]—THE SABBIA (1914), Times, Dec. 2.

**1334. Application for release of cargo on ball—To obtain benefit of particular market.**—THE COPENHAGEN, No. 1341, *post*.

**1335. Return to commission—Delay in making return—Monition with attachment embodied against commissioners.**—THE FORTUNA (1801), 4 Ch. Rob. 78; 165 E. R. 541.

**1336.** ——— Nature & essentials of.]—THE PRINCESSA & LA REINE ELIZABETH, No. 1332, *ante*.

**1337.** ——— Not necessarily conclusive.]—The return to a commission of appraisement in prize is not invariably conclusive.

Claimants' goods were requisitioned & an appraisement was made without notice to claimants. The prize proceedings resulted in the release to claimants of the proceeds, *i.e.* the appraised value of the goods paid into ct. by the Crown. It appeared that the valuation had been made on an erroneous basis:—*Held*: a fresh inquiry must be held into the actual value of the goods.—THE CONSUL OLSSON, [1920] P. 43; 89 L. J. P. 145.

**1338. By whom proceedings instituted—By captors—Liability for expenses.**—Commission of appraisement & sale is an instrument, in the first instance, taken out by captors. They are primarily answerable for the expense, etc.

They [the expenses] may be ultimately . . . divided between both parties (*i.e.* the captor & claimant) (*per* CUR.).—THE FRAU MARIA (1799), 2 Ch. Rob. 292; 1 Eng. Pr. Cas. 235; 165 E. R. 320.

**1339. Date at which appraisement made.**—A German merchant ship was seized in the port of Sydney upon the outbreak of war. On Oct. 6, 1914, the Prize Ct. in New South Wales ordered that the ship be detained, & that she be temporarily delivered to the Lords of the Admty. without appraisement upon an undertaking to comply with the provisions of Ord. 29 of the Prize Ct. Rules, 1914. On June 3, 1915, the Crown filed a notice under that Ord. stating that it was desired to requisition the ship. On June 4, 1915, the Prize Ct., in pursuance of the notice, made an order under Ord. 29, r. 3, that the ship be forthwith released & delivered to the Crown without appraisement & providing that the order should be a confirmation of the delivery already made; & it was thereby further ordered, under r. 4, that, unless the parties should within twenty-eight days agree the value, it be referred to the Registrar "to fix the amount to be paid by the Crown in respect of the value of the ship & her consumable stores & provisions," the order providing that the value was to be taken as at Oct. 6, 1914:—*Held*: the value of the ship was properly ordered to be fixed under Ord. 29, r. 4, as at Oct. 6, 1914.—THE GERMANIA (No. 2), [1918] A. C. 472; 87 L. J. P. C. 86; 118 L. T. 273; 14 Asp. M. L. C. 231, P. C.

#### SECT. 9.—BAIL.

*See, now*, Prize Court Rules, 1914, Ord. 12, rr. 1, 2, 4, 6.

*See, generally*, ADMIRALTY, Vol. I., pp. 168-171, Nos. 779-823.

**1340. Nature of ball bonds.**—Ball bonds are not mere personal securities to individual captors, but are given to the ct. to abide the adjudication of all events impending before it at the time.

#### PART XI. SECT. 8.

b. *Person bearing expenses—Whether given additional right or control over property.*—Though the parties who apply for the order of appraisement are to bear the expenses, this gives them no additional right or control over the property. The custody is still to be joint.—LA MERCE (1811), Stewart, 219.

c. *Whether coal in bunkers—Appraised as part of ship.*—In appraising a ship brought in as a prize the coal in the bunkers is not to be appraised as part of the ship; it should be inventoried separately. Where the appraisers have acted in good faith the ct. will not interfere with their judgment.—*Re THE HAMBORN* (No. 1)

(N. S.) (1918), 17 Exch. C. R. 243.

#### PART XI. SECT. 9.

d. *Delivery on bail—Before hearing—Danger of capture perishing.*—No authority whatever is given to the ct. to release or deliver the capture, either on bail, by sale, or by any other

**Sect. 9.—Bail.** Sects. 10, 11 & 12: Sub-sects. 1 & 2. Sect. 13.]

Sureties not responsible in case of a subsequent intervention of hostilities. Bail dismissed.

This ct. is not in the habit of considering the effect of bonds precisely in the same limited way as they are viewed by the cts. of common law. In those cts. they are very properly considered as mere personal securities for the benefit of those parties to whom they are given. In this place they are subject to more enlarged considerations; they are here regarded as pledges or substitutes for the thing itself, in all points fairly in adjudication before the ct. (SIR WILLIAM SCOTT).—THE NIED ELWIN (1811), 1 Dods. 50; 165 E. R. 1229.

**1341. Delivery on bail—Before hearing—Necessity for consent.**—Petition to take cargo on bail before adjudication, not granted but upon consent.

I know of no instance in which the ct. has made such an order, unless where all the parties are consenting to it. The proper remedy for the inconvenience stated in this petition would be a commission for appraisement & sale (*per CUR.*).—THE COPENHAGEN (1800), 3 Ch. Rob. 178; 165 E. R. 428.

**1342. — Payment of costs & expenses incurred—Not condition of release.**—Where goods seized as prize have been sold pending the hearing of the action for condemnation, the ct. will not order the proceeds in ct. to be placed on deposit or to be invested in the public funds.

Where goods seized as prize have not been sold, but, pending the hearing of the action for condemnation, are released to claimants against a bail bond, claimants are not required, as a condition of the release, to pay unconditionally the costs & expenses already incurred incident to the seizure & detention of the goods. These costs & expenses are only payable by claimants who obtain a decree in their favour in the condemnation action.

Claimant who has paid the costs & charges incident to the seizure & detention upon receiving delivery of the goods on bail should be given credit for the payment as against the bail, which represents the full value of the goods in the event of their subsequently being condemned, & the bail bond should be framed in terms which give effect to this right.—THE DROTNING SOPHIA, [1920] P. 200; 89 L. J. P. 245; 125 L. T. 123; 15 Asp. M. L. C. 294.

**1343. — Credit for payment allowed.**—THE DROTNING SOPHIA, No. 1342, *ante*.

**1344. Bail at admitted value—Sale for less—Bail not reduced.**—Bail for cargo taken by claimant not reduced to the amount of the actual proceeds.—THE BETSEY (1804), 5 Ch. Rob. 295; 165 E. R. 782.

**Annotations:—***Reid*. The Sir Francis Burton (1828), 2 Hag. Adm. 156; The Mary Caroline (1848), 3 Wm. Rob. 101; The Mellona (1848), 12 Jur. 271.

**1345. Liability for expenses—Incurred after bail.**—THE GRAAFF BERNSTORFF (1805), 5 Ch. Rob. 296; 165 E. R. 782.

#### SECT. 10.—CAVEAT.

*See, now*, Prize Court Rules, 1914, Ord. 14.

**1346. Obstruction by caveat—Restitution.**—THE FORTUNA, No. 1188, *ante*.

**1347. — Condemnation.**—If the interest of the part owner was clearly established, it would not be competent for him to object to the delivery of the interlocutory to the captor, who is the person legally entitled to it (*per CUR.*).

Interlocutory of condemnation issues to the master. Part owner not entitled to obstruct the delivery, on demand of bail to protect his interests.—THE VENUS (1806), 6 Ch. Rob. 235; 165 E. R. 914.

#### SECT. 11.—REFERENCE TO REGISTRAR.

*See, now*, Prize Court Rules, 1914, Ord. 18, rr. 1, 5, 10.

**1348. Reference to registrar & merchants—Nature of report.**—This is a question on a report of the registrar & merchants, respecting an allowance & insurance on a cargo of corn seized & brought into this country. The cargo was decreed to be restored, & the registrar & merchants were directed to make a report on the value due to claimant; such reports are in their nature partly legal & partly mercantile. It is a report proceeding from persons qualified, in both these respects, to form a sound judgment on the subject before them; one of them being, from his connection with cts. of justice, supposed capable of forming his own opinion, & of assisting his associates on all questions of law, in the first instance subject to the inspection & correction of the ct., whilst the other part of this domestic forum consists of persons acquainted with trade, & exercising their judgment on matters relative to commerce (SIR WILLIAM SCOTT).—THE HAABET (1800), 2 Ch. Rob. 174; 165 E. R. 279.

**Annotations:—***Mentd.* The Zamora, [1916] 1 P. 27; The Derfflinger, The Forde, The Leda, *Re* American Meat Packers Agreement, *Re* Certain Swedish Copper, [1919] P. 264.

#### SECT. 12.—COSTS.

##### SUB-SECT. 1.—IN GENERAL.

*See, now*, Prize Court Rules, 1914, Ords. 18, 19.

**1349. General rule—Costs not given.**—The status of the Ionian states relative to Great Britain being of so doubtful a character, & depending on the nice construction of public documents, a commissioned captor, seizing an Ionian vessel, on the ground of illegal trade with Russia, though that trade is, in fact, legal, is not liable to condemnation in costs & damages, as having captured her without probable cause.

In the Prize Ct. ordinary costs, *i.e.* law costs, were seldom or never given to captors or claimants.

Costs & damages may be best expressed by the term *restitutio in integrum*—complete indemnity for the capture (DR. LUSHINGTON).—THE LEUCADE (1855), Spinks, 217; 2 Ecc. & Ad. 228; 1 Jur. N. S. 554; 164 E. R. 403; *previous proceedings*, *sub nom.* THE IONIAN SHIPS, 2 Ecc. & Ad. 212.

**Annotations:—***Reid*. The Fortuna (1855), Spinks, 307; The Regina d. Italia, [1925] P. 123. *Mentd.* The Aline & Fanny (1856), Spinks, 322.

**1350. When awarded to claimant—Marshal not appearing.**—THE HOOP (1801), 4 Ch. Rob. 145; 165 E. R. 566.

**Annotation:—***Consd.* The Rendsberg (1805), 6 Ch. Rob. 143.

mode, before the hearing of the cause, except where there is danger of perishing.—THE CURLEW (1812), Stewart, 312.

s. — — —.]—WARREN'S

PETITION (1812), Stewart, 327.

1. To whom bail granted—Whether to persons not representatives of owner.]—A ct. of prize in a neutral country has no authority to deliver a vessel upon bail

to persons, not the representatives of the owners; & the right of the owners upon re-capture is not defeated by such delivery.—THE HIBBERTS (1804), Stewart, 40.

**1351. When awarded against claimant—Neutral claimant—Fraudulently protecting enemy property.**—Condemnation in the costs of an appeal, where it appeared applt. had entered into a written agreement to avail himself of the neutral character to protect the speculations & property of an enemy.—*THE FALCON* (1810), 1 Act. 331; 12 E. R. 129.

**1352.** — — — Only in special circumstances.] —*THE IDA*, No. 1126, *ante*.

**1353.** — — — British subject—False negation of enemy interest.]—Parties knowingly making a fraudulent claim condemned in the costs of the proceedings.—*THE ATLANTIC* (1854), 2 Ecc. & Ad. 93; Spinks, 104; 164 E. R. 325.

*Annotation* :—*Refd.* *The Leucade* (1855), Spinks, 217.

**1354.** — — — Trading with enemy—Opposing authorised captors.]—*THE NEPTUNE*, No. 1260, *ante*.

**1355.** — — — Reference to registrar & merchants—Claim found exorbitant—Large deductions made.]—*THE LEVEN LASS* (1850), 6 L. T. 194.

**1356.** Captor disobeying monition.—To proceed to adjudication—Not allowed costs.]—Property restored on further proof. Application for captor's costs refused, the captor having neglected to bring in the proceeds in disobedience to a monition from the ct. below.—*THE ELIZA* (1810), 1 Act. 336; 12 E. R. 131.

**1357.** Proceedings abandoned by Crown—Reserving question of costs & damages.]—*THE NEPTUNE*, No. 1260, *ante*.

**Costs & damages on restitution.**]—*See* Part V., Sect. 4, sub-sects. 2, 3, *ante*.

#### SUB-SECT. 2.—SECURITY FOR COSTS.

*See* Prize Court Rules, 1914, Ord. 18, r. 2.

**1358. When ordered—Claimant ordinarily resident out of jurisdiction.**]—The Procurator-General claimed the condemnation, as goods having an enemy destination or as enemy property, of pork consigned from the United States to applt. in Sweden. Applt., who was ordinarily resident at Gothenburg, filed a claim to the goods as his property intended exclusively for consumption in Sweden, the claim being supported by an affidavit & exhibited documents. The President, without any evidence on the part of the Crown, made an order that applt. should give £100 security for costs:—*Held*: it did not appear that the discretion conferred by Prize Court Rules, Ord. 18, r. 2, had not been exercised judicially, & the order was valid.—*THE STANTON*, [1917] A. C. 380; 86 L. J. P. 98; 116 L. T. 286; 33 T. L. R. 282; 61 Sol. Jo. 461; 13 Asp. M. L. C. 586, P. C.

**1359. Payment out of court—Plaintiffs successful—Execution stayed pending appeal.**]—Where security for costs has been ordered against pltf. & money has been accordingly paid into ct., pltf. are entitled to have the amount of the security paid out to them upon succeeding in their claim, even though defts. obtain a stay of execution pending an appeal.—*THE BERNISSE & THE ELVE*, [1920] P. 1; 89 L. J. P. 81; 122 L. T. 286; 14 Asp. M. L. C. 525; 3 P. Cas. 517; *on appeal*, [1921] 1 A. C. 458, P. C.

*Annotations* :—*Appl.* Comitato Portuario d'Importazione dei Carboni Fossili di Genova v. Instone, [1921] W. N. 260. *Expld.* Netherlands-American Steam Navigation Co. v. Procurator-General, [1926] 1 K. B. 84.

**1360.** — — — Costs of abandoned appeal.]—A sum of £500 was paid into ct. by claimants as security for the costs of their appeal to the Privy Council against a judgment of the Prize Ct. condemn-

ing their vessel for the carriage of contraband. The appeal was abandoned. Thereupon cross summonses were issued: (a) by claimants' solrs. for payment out of the sum in ct.; (b) by the Procurator-General for a charging order on the sum in ct., on the ground that the unsecured balance of the taxed costs of the Crown in the proceedings in the Prize Ct. would absorb the whole sum remaining after taxation of the Crown's costs in the abandoned appeal. Claimants' solrs. contended that, at any rate so far as their own costs were concerned, they had a prior claim upon the fund in ct.:—*Held*: as the solrs. had neither recovered nor preserved the fund the equitable jurisdiction of the ct. did not apply in their favour, & the Procurator-General's application for a charging order upon the whole fund must be allowed.—*THE DIRIGO*, [1920] P. 425; 90 L. J. P. 48; 125 L. T. 443; 37 T. L. R. 93; 15 Asp. M. L. C. 343.

*Annotation* :—*Distd.* *The Oranje Nassau*, [1921] P. 190.

**1361. Security proving insufficient—Right to charging order against goods restored—In another cause.**]—The power of the President under Prize Court Rules, 1914, Ord. 45, to direct what practice shall be followed in prize proceedings in cases for which no provision is made in these rules does not extend to the creation of new rights against captured goods, & the ct.'s discretion as to costs under Ord. 18 cannot be used to increase the burden of neutral claimants. When captured goods are found to be free from condemnation, the only liability to which they are subject is captor's costs enforceable by international law & arising in the specific cause. Accordingly the Crown is not entitled, against the proceeds of goods ordered to be released to claimants, to a charging order in respect of unpaid costs in other causes in prize in which claimants' goods have been condemned & the security ordered to be given has proved to be insufficient.—*THE ORANJE NASSAU*, [1921] P. 190; 90 L. J. P. 257; 37 T. L. R. 493.

#### SECT. 13.—APPEAL.

*See* Naval Prize Act, 1864 (c. 25), s. 5; Prize Court Rules, 1914, Ord. 44, rr. 2, 5-7.

**1362. Right to appeal—Interlocutory order—Necessity for leave.**]—Leave to appeal against an interlocutory decree of the Admty. Ct., awarding such bounties, [bounties awarded under 6 Geo. 4, c. 49] granted to the Admty. Proctor, on behalf of the Crown, notwithstanding an appeal had not been interposed within due time, the circumstances of the case entitling applts. to such indulgence.—*R. v. BELCHER, THE ILLEANON PIRATES* (1849), 6 Moo. P. C. C. 471; 13 E. R. 766, P. C.

*Annotations* :—*Refd.* *The Macander* (1862), 1 Moo. P. C. C. N. S. 42; *The Leda* (1863), Brown. & Lush. 19.

**1363.** — — — — —.]—Claimants to goods in prize proceedings having refused to comply with an order for discovery, the President, after considering the evidence, condemned the goods. An order or decree was drawn up embodying both the striking out of the claim & the condemnation of the goods:—*Held*: claimants were not entitled under Naval Prize Act, 1864 (c. 25), s. 5, to appeal as of right.—*THE ANTILLA*, [1919] A. C. 250; 88 L. J. P. 11; 119 L. T. 746; 35 T. L. R. 7; 63 Sol. Jo. 10; 14 Asp. M. L. C. 378, P. C.

*Annotations* :—*Refd.* *The Kronprinzessin Cecilie*, [1919] A. C. 964; *The Palm Branch*, [1919] A. C. 272.

**1364.** — — — Final decree.]—*THE ANTILLA*, No. 1363, *ante*.

*Sect. 13.—Appeal. Sects. 14, 15 & 16. Part XII.*  
*Sect. 1.]*

1865. — *Allen enemy.*—THE PINDOS, THE HELGOLAND, THE ROSTOCK, No. 282, *ante*.

1866. *Time for appeal—Allowance of appeal out of time.*—Appeal to the Judicial Committee, allowed from a sentence of the Admty. Ct. in England, in a prize case, although more than three months, the time limited by 17 & 18 Vict. c. 18, s. 37, had elapsed since the date of the sentence.—CREMIDI v. PARKER, THE ACHILLES (1857), 11 Moo. P. C. C. 86; 14 E. R. 628, P. C.

1867. — *Practice.*—Motion by claimant, the owner of the cargo, upon notice to the captor, for leave to appeal from a sentence of the Admty. Ct. in England, pronounced in *poenam contumaciae*, fifteen months after the capture. The proceedings in England were unknown to the owner of the cargo, & the sentence of condemnation not having been communicated by the captors to the owner, he had no knowledge thereof until long after the time for appealing had expired. On the motion coming on, it appeared that no petition for leave to appeal had been lodged or referred to the Judicial Committee. Their lordships refused to entertain the motion, except upon an undertaking to lodge a petition of leave to appeal.—CREMIDI v. PARKER, THE ASPASIA (1857), 11 Moo. P. C. C. 79; 4 L. T. 528; 14 E. R. 625, P. C.

1868. *Informalities in court below—Whether claimant may take advantage.*—If claimant distinctly apprehended the ground of proceeding, as well as of seizure, this ct. will not permit him to take advantage of informalities in the proceedings before the Ct. of Vice-Admty. from which the case is appealed.—THE FRIENDSHIP (1814), 1 Dods. 373; 165 E. R. 1346.

1869. *Appeal in nature of rehearing—Jurisdiction to review questions of fact.*—THE OPHELIA, No. 349, *ante*.

1870. *Admission of fresh evidence—Costs.*—THE KIM (No. 4), THE ALFRED NOBEL (No. 3), THE BJORNSTJERNE BJORNSSON (No. 3), THE FRIDLAND (No. 2) (1921), 90 L. J. P. 188; 124 L. T. 802; 37 T. L. R. 317; 15 Asp. M. L. C. 210, P. C.

*Annotations.*—*Reid.* The Louisiana, The Nordic, The Tomsk, The Joseph W. Fordney (1915), 32 T. L. R. 619; The San Jose, Cometa & Salerno (1916), 33 T. L. R. 12; The Balto, [1917] P. 79; The Noordam, [1919] P. 57; The Ran, [1919] P. 317; The Twee Ambt, [1920] P. 413; Adelaide S. S. Co. v. R. (1922), 92 L. J. K. B. 102.

*Payment of costs out of court where appeal abandoned.*—See No. 1300, *ante*.

SECT. 14.—ENFORCEMENT OF ORDERS.

See, *now*, Prize Court Rules, 1914, Ord. 27, r. 1.

1871. *Decree of Vice-Admiralty Court—Enforcement by High Court of Admiralty.*—THE PICMENTO, No. 1083, *ante*.

1872. — *Whether enforceable in ordinary courts.*—(1) *Semle* : a decree of a Vice-Admty. Ct. called an "interlocutory" is in effect final; & such a decree, requiring a party to pay a certain sum, may be enforced in the cts. at Westminster.

(2) *Qu.* : whether a judgment obtained in a prize ct. by the agent of a foreign power, against a native of this country, can be enforced here by the personal representative of such agent.—OBICINI v. BLIGH (1832), 8 Bing. 335; 1 Moo. & S. 477; 1 L. J. C. P. 99; 131 E. R. 423.  
*Annotation.*—As to (2) *Reid.* Robertson v. Struth (1844), 5 Q. B. 941.

1873. *Proceeds followed—Monition.*—Monition directed to issue against the Principal Registrar,

to pay in proceeds, suspended on showing that he had remitted the money to a particular house in London, by the order & direction of the Principal Registrar.—THE PRIMA VERA (1804), 5 Ch. Rob. 151; 165 E. R. 729; *subsequent proceedings* (1808), 1 Edw. 23.

1874. — *THE LEIFDE & JACOBINE* (1805), 6 Ch. Rob. 93; 165 E. R. 862.

1875. — *Proceeds of prize may be followed wherever they can be traced; monition enforced against persons who were at the time or had been in possession of prize goods.*—THE POMONA (1811), 1 Dods. 25; 165 E. R. 1220.

1876. — *Whoever receives prize proceeds is responsible for them to the captors.*—THE MARY (1819), 2 Dods. 378; 165 E. R. 1519.

1877. — *Arrest.*—THE HERCULES (1819), 1 Hag. Adm. 143, n.; 165 E. R. 1511.

*Annotations.*—*Consd.* R. v. McCleverty, The Telegrafo (or Restauracion) (1871), L. R. 3 P. C. 673. *Reid.* Mersey Docks & Harbour Board v. Turner, The Zeta, [1893] A. C. 468.

1878. *Judgment obtained by agent of foreign power—Whether enforceable by personal representative.*—OBICINI v. BLIGH, No. 1372, *ante*.

1879. *Enforcement in British possession—Where proceedings instituted—Order for costs.*—THE REGINA D'ITALIA, No. 1084, *ante*.

SECT. 15.—SETTING ASIDE DECREE.

1880. *Whether court will set aside decree.*—I will not go so far as to lay it down universally that it is not in the power of the ct. to reconsider its decrees on very particular occasions. . . . As a precedent it would be a practice highly dangerous; & the liberty of reviewing its decrees if it exists . . . is a liberty which the ct. would exercise with very great caution (SIR WILLIAM SCOTT).—THE VROUW HERMINA (1799), 1 Ch. Rob. 163; 1 Eng. Pr. Cas. 91; 165 E. R. 135.

1881. — *Decree of this ct. final. Not its practice to rescind its decrees.*

Application to rescind upon a suggestion of the neutral character of a house asserting an interest in property formerly condemned for insufficiency in the proofs of property—rejected.—THE ELIZABETH (1811), 2 Act. 57; 12 E. R. 178.

1882. — *Restitution in solidum to partnership—Claim by assignee of partner.*—After restitution in solidum to a house of trade in America, a prayer by the assignees of one partner, become a bkpt. in this country, for severance of his share & payment to them, refused.

The whole claim was made on behalf of the house in America, & three-fourths were restored as claimed; had the fourth share been bkpt.'s I should have thought the claim of the comrs. very strong & I should have seen no objection to restore to them instead of bkpt., for I accede to what has been said of the representative character of the assignees. But these assignees are not before the ct. as claimants; they might have appeared, & have given their claim; they have not done this, & restitution has already passed in solidum of three-fourth parts of the property claimed to the members of this house. The question then is, whether the ct. shall proceed again to make a severance between these parties. I cannot think that I have the power to do that (SIR WILLIAM SCOTT).—THE JEFFERSON (1799), 1 Ch. Rob. 325; 165 E. R. 193.

*Annotation.*—*Reid.* The Oranje Nassau, [1921] P. 190.

1883. — *Power should be cautiously exercised.*—THE ORCOMA, [1916] W. N. 118.

**1384. — Injustice of allowing decree to stand.]**—Where substantial injustice would otherwise result, the Prize Ct. has an inherent power to set aside its own decrees of condemnation so as to let in *bonâ fide* claims by parties who have not been heard, & who have not had an opportunity of appearing. This power is discretionary & should not be exercised except where there would be substantial injustice if the decree were allowed to stand, & where the application has been promptly made.—THE BOLIVAR, [1916] 2 A. C. 203; 85 L. J. P. 193; 114 L. T. 1005; 13 Asp. M. L. C. 369, P. C.

**1385. — Order obtained by fraud.]**—By fraudulent suppression of the true facts, claimants, a Copenhagen firm, obtained a decree that the proceeds of certain consignments of lard, which had been seized ex three neutral vessels, should be released to them on the ground that the consignments were shipped to them as *bonâ fide* purchasers to be sold to customers in Scandinavia & were not intended to be sent on to Germany. The Procurator-General, on behalf of the Crown, appealed. Before the appeal had been heard, evidence, which was not available at the time of the hearing, was obtained that at the material time claimants were engaged in exporting lard in considerable quantities to Germany, & that the sole

proprietor of claimants' firm, who had sworn the affidavit which had been instrumental in obtaining the release, had been convicted in Denmark of fraud on the Danish insurance co., which had insured other consignments of lard on claimants' declaration that no foreign interest was involved, whereas in fact claimants had contracted to sell all the goods mentioned in the insurance policies to Germany. Thereupon the Procurator-General issued a fresh writ claiming a decree that the order for release be rescinded:—*Held*: the rule that a ct. has inherent right to set aside its own order if procured by fraud applies to the Prize Ct. as strongly as to any other ct.; had the whole of the facts been put before the ct. the order for release would not have been made; & accordingly, the order would be rescinded & the proceeds of sale condemned.—THE ALFRED NOBEL, THE BJÖRNSTERJNE BJÖRNSSON, THE FRIDLAND, [1918] P. 293; 87 L. J. P. 183; 119 L. T. 320; 14 Asp. M. L. C. 366.

**1386. — Proceeds out of court's control.]**—THE HOFSEFOS, No. 1085, *ante*.

#### SECT. 16.—PRIZE SALVAGE.

See Prize Court Rules, 1914, Ord. 30.

## Part XII.—Prize Salvage.

### SECT. 1.—RECAPTURE.

**1387. Prerequisite to recapture—Effectual possession by enemy.]**—This case comes before me upon an alleged act of recapture performed by the *Thisbe*, who had a number of merchant vessels under her convoy. One was captured by the enemy, & was afterwards retaken by the *Thisbe*; & for that service the *Thisbe* now stands before the ct., demanding the salvage which is allowed to King's ships on ordinary occasions under Prize Act. The first question that arises is, whether a convoying ship may be entitled to salvage from ships under her protection? . . . The relation which had subsisted between the convoying ship, & those under her care, would not take the case out of the general provisions of Prize Act. . . . Many cases might be put of the effect of immediate acts of recapture, to show that it is by no means necessary that the possession by the enemy should be long maintained, or at any particular distance from the convoying ship. The question will always be, whether it was an effectual possession, & such as would suspend the relation of the convoying ship. . . . it will be sufficient, if there has been that complete & absolute possession, which supersedes the authority of the convoying ship; & such a possession must have been maintained for some time in the present instance. Every act of possession was exercised; the master was taken out; the vessel was completely manned with as many of the captor's crew as were sufficient to overpower all resistance, & the vessel was taken in tow by the enemy. By those acts the former relation subsisting between the vessel & the convoying ship was suspended. . . . The capture is, I think, proved to have been sufficiently completed & unless I go to the length of holding that there must be a firm possession; & a bringing *infra praesidia*, I must pronounce this vessel to have been re-

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covered from a situation, which has been decided to be sufficient to support that claim of salvage by the decision of the Superior Ct. (SIR WILLIAM SCOTT).—THE WIGHT (1804), 5 Ch. Rob. 315; 1 Eng. Pr. Cas. 492; 165 E. R. 789.

**1388. — Ship steering for enemy port—Through ignorance of hostilities.]**—THE EL NAVARRO (1793), cited in 4 Ch. Rob. at p. 150; 165 E. R. 507.

*Annotation*:—*Apld.* The Franklin (1801), 4 Ch. Rob. 147.

**1389. — — — —.]**—THE FRANKLIN, No. 535, *ante*.

**1390. What amounts to recapture—Recovery of prize equipped as vessel of war by captors.]**—THE CASTOR (1795), cited in 1 Dods. at p. 114; 165 E. R. 1252, P. C.

*Annotations*:—*Consd.* The Ceylon (1811), 1 Dods. 105; The Georgiana (1814), 1 Dods. 397.

**1391. — — — —.]**—THE HORATIO (1806), 6 Ch. Rob. 320; 165 E. R. 947.

**1392. — — — —.]**—British prize vessel having been fitted out as a privateer by the enemy, although navigating as a merchant vessel at the time of recapture, not restored to the former British owner.—L'ACTIF (1810), 1 Edw. 185; 2 Eng. Pr. Cas. 30; 165 E. R. 1076.

**1393. — — — —.]**—The employment of a vessel in the public military service of the enemy, by those who have competent authority so to employ her, is a sufficient "setting forth for war" under Prize Act, though the vessel may not have been furnished with any formal commission of war.—THE CEYLON (1811), 1 Dods. 105; 2 Eng. Pr. Cas. 133; 165 E. R. 1249.

*Annotations*:—*Refd.* The Georgiana (1814), 1 Dods. 397; The Edna, [1921] 1 A. C. 735.

**1394. — — — —.]**—The mere employment of a ship in the military service of the enemy is not a sufficient setting forth for war to entitle the recaptor to condemnation under the terms of Prize Act; but if there is a fair semblance of

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authority in the person directing the vessel to be so employed, & nothing upon the face of the proceedings to invalidate it, the ct. will presume that he was duly authorised; the commander of a single ship may be vested with this authority as well as the commander of a squadron.—*THE GEORGIANA* (1814), 1 Dods. 397; 2 Eng. Pr. Cas. 193; 165 E. R. 1355.

**1395. — Engagement with captor—Facilitating escape of prize.]**—*The Arethusa* came up for the very purpose of taking this French captor, if he is to be so considered, & actually took him; & it is owing to this act of the *Arethusa* that this vessel was rescued from his grasp. . . . The sending of a prize master on board is a very natural overt act of possession, but by no means essential to constitute a capture. If the merchantman was obliged to lie to & obey the direction of the French lugger, & await her further orders, she was completely under the dominion of the enemy; there was no ability to resist, & no prospect of escape. . . . The only question will be, whether it is a case of salvage under the Act of Parliament, on another ground, viz. that the vessel never came into the actual & bodily possession of the recaptor, I rather incline to think that it is not. But if it is not a case of recapture under the Act, it is, however, still a case of salvage, under the general maritime law, & shall give the same reward, as if it had been under the Act of Parliament (*SIR WILLIAM SCOTT*).—*THE EDWARD & MARY* (1801), 3 Ch. Rob. 305; 1 Eng. Pr. Cas. 312; 165 E. R. 474.

*Annotations:—Apld. The Svanfos, The Borgila, [1919] P. 189. Rejd. The Pellworm, [1922] 1 A. C. 292.*

**1396. — Ship rescued by crew on parole.]**—These persons [the crew] were put on board by their own consent, on terms that were explained to them, & fully acquiesced in by themselves. They were bound, by their own engagement, as strongly as men could be, to abstain from all acts of violence, & to do nothing which had the least connection with hostility. In violation of the duties which they had thus stipulated for . . . they seize the boat of the cartel ship, attack their own vessel by means of this boat & carry her off by force against all opposition. . . . Here is a surprising & retaking, that has been effected through a violation of contract, by persons pretending to act upon rights which they had parted with, as well as by their own engagement, as by the nature of the situation in which they were placed. Such an act is essentially invalid & can have no legal consequence attached to it, either for the benefit of those persons themselves or for the benefit of others who may claim through them (*SIR WILLIAM SCOTT*).—*THE MARY* (1804), 5 Ch. Rob. 200; 165 E. R. 748.

**1397. — Rescue of abandoned ship—Abandoned by enemy captors.]**—*THE GAGE* (1806), 6 Ch. Rob. 273; 1 Eng. Pr. Cas. 554; 165 E. R. 929.

*Annotation:—Rejd. The Cosmopolitan (1848), 6 Notes of Cases Supp. 17.*

**1398. — Hostile ship in vicinity.]**—*THE LAMBTON* (1807), 6 Ch. Rob. 275, n.; 165 E. R. 929.

*Annotation:—Rejd. The Cosmopolitan (1848), 6 Notes of Cases Supp. 17.*

**1399. — Recovery of ship employed in same expedition—Hired transport.]**—Salvage not due to

a King's ship, for rescuing from the hands of the enemy a hired transport employed in the same expedition.—*THE BELLE* (1809), Edw. 66; 165 E. R. 1034.

*Annotation:—Rejd. The Svanfos, The Borgila, [1919] P. 189.*

**1400. — Recovery from port in enemy control—Port not in actual enemy occupation.]**—Salvage given for bringing off a vessel from a Spanish port within the power though not in the actual occupation of the French.—*THE PENSA-MENTO FELIZ* (1809), Edw. 115; 2 Eng. Pr. Cas. 29; 165 E. R. 1051.

*Annotation:—Rejd. The Svanfos, The Borgila, [1919] P. 189.*

**1401. — Recovery of ship liberated on bail.]**—*THE ROBERT HALE* (1810), 1 Edw. 265; 2 Eng. Pr. Cas. 56; 165 E. R. 1104.

**1402. — Possession restored by captors to master—Master undertaking to compensate captors—With intent to defraud.]**—*THE LONDON* (1815), 2 Dods. 74; 165 E. R. 1420.

**1403. Duty of crew of recapturing vessel.]**—*THE TWO FRIENDS*, No. 997, ante.

## SECT. 2.—GRANT OF SALVAGE.

### SUB-SECT. 1.—IN GENERAL.

*See Naval Prize Act, 1864 (c. 25), ss. 40, 41; Prize Court (Procedure) Act, 1914 (c. 13), s. 1, sched.*

**1404. General rule.]**—*LA BONNE AMITIÉ* (1778), Marr. 160; 165 E. R. 37.

**1405. —.]**—*THE BETSEY* (1777), Marr. 80; 165 E. R. 19.

**1406. —.]**—(1) All maritime nations have that common interest in preserving the safe navigation of the seas, that will authorise their respective Cts. of Admty. to entertain, occasionally, questions which relate to the acts & to the interests of foreigners, under circumstances that bring the cases within their local jurisdiction (*SIR CHRISTOPHER ROBINSON*).

(2) *Qu.*: whether the right of the Admiral under 6 Geo. 4, c. 49, to share in salvage for the rescue of vessels from pirates extends to foreign ships.

(3) All salvage, whether civil or military, is founded on the equity of remunerating private & spontaneous services rendered in the protection of the lives & property of others.—*THE CALYPSO* (1828), 2 Hag. Adm. 209; 165 E. R. 221.

**1407. Recaptured ship retaken by enemy—Subsequent ransom.]**—*THE PRINCE EDWARD* (1762), Burrell, 198; 167 E. R. 536, P. C.

**1408. — Subsequent release.]**—Salvage, right of, on recapture, not extinguished by subsequent capture & condemnation in an enemy's port, where the sentence condemning the property is overruled by an order of release from the sovereign power of the state.—*THE CHARLOTTE CAROLINE* (1812), 1 Dods. 192; 2 Eng. Pr. Cas. 249; 165 E. R. 1280.

**1409. Recapture of lost prize.]**—*THE LUCRETIA* (1778), Marr. 227; 165 E. R. 52.

**1410. Recaptured ship sunk before appraisement—After delivery to owners.]**—*THE CREIGHTON* (1782), cited 4 Ch. Rob. at p. 272; 165 E. R. 609.

*Annotation:—Distd. The Three Friends (1802), 4 Ch. Rob. 268.*

## PART XII. SECT. 2, SUB-SECT. 1.

**1404 i. General rule.]**—It is inconsistent with all the settled rules of

admiralty law to make any salvage award whatever to parties who went in search of a dismantled vessel, to assist her, but who, in point of fact,

did not find her, & were, therefore, unable to render her any effectual service.—*THE CONCHITA* (1853), 5 Ir. Jur. 295.



**1411. Right of convoying ship—Relation of convoy broken.]—**THE HINCHINBROOK (1786), cited in 5 Ch. Rob. at p. 316 ; 165 E. R. 789.

*Annotation :—*Apld. The Wight (1804), 5 Ch. Rob. 315.

**1412. ———.]—**THE WIGHT, No. 1387, *ante*.

**1413. Recapture from neutral.]—**THE TWO FRIENDS, No. 907, *ante*.

**1414. Recapture & abandonment by master—Subsequent resumption of possession & rescue.]—**THE BEAVER (1801), 3 Ch. Rob. 293 ; 165 E. R. 468.

*Annotation :—*Mentd. Scaramanga v. Stamp (1800), 5 C. P. D. 295.

**1415. Claim for joint recapture—Claimant in sight—On contrary course.]—**THE LORD MIDDLETON, No. 377, *ante*.

**1416. ———.]—**Becalmed.]—It appears from the evidence of persons who are entirely disinterested, that the crew of the sloop could not have effected the recapture ; since that vessel had been separated, & was becalmed, & could not have got up. However active their intentions might have been, the wind did not favour their exertions. The actual captors were those who came off in a boat from the shore, by whose approach the instant terror was occasioned that intimidated the French, & compelled them to quit their prize—these persons must therefore be pronounced to be the sole salvors. . . .

Whether a salvage is due on the freight . . . will depend on . . . [a] question of fact. Whether the freight was in a course of being earned ? because I cannot go to the length of holding that it would be sufficient that the ship was enabled to earn freight by the act of recapture. If a vessel had been cut out of port, & had been afterwards recaptured, it could not be contended . . . that salvage would be due on freight accruing on the following voyage. . . . The ship had sailed from Savannah le Mar, in Jamaica, & was going to Bluefields, another port of that island, for the purpose of joining convoy : she might be under engagement to call for convoy, & yet be *in itinere*, as to her own voyage. Considering that the commencement had taken place & that the voyage was afterwards successfully terminated, & that the ct. is not in the habit of giving salvage *pro rata itineris*, I am of opinion that the case does come fairly within the general rule, & that the freight should be included (SIR WILLIAM SCOTT).—THE DOROTHY FOSTER (1805), 6 Ch. Rob. 89 ; 165 E. R. 800.

**1417. Ship condemned by former enemy—Intervening lawful acquisition by present enemy.]—**A vessel taken by the enemy, & condemned, & then sold to a neutral person, would be completely converted, & that the character of the vessel so impressed would not be divested in favour of the former British owner by subsequent hostilities. If the vessel was not carried into a French port at the time of capture, that circumstance may be sufficient to shake the presumption that would otherwise arise in favour of a legal condemnation. . . . I must pronounce this ship to have belonged to the Spanish owner at the time of capture, as property acquired *jure belli* by the French captor, & duly transferred, before the commencement of hostilities between this country & Spain. The title of the British proprietor being divested, the ship must be condemned as prize to the captor (SIR WILLIAM SCOTT).—THE PURISSIMA CONCEPTION (1805), 6 Ch. Rob. 45 ; 165 E. R. 844.

**1418. Ship purchased from captors at sea—By master.]—**Salvage on vessel purchased at sea from the enemy for the purpose of restoring her to the

owners.—THE HENRY (1810), 1 Edw. 102 ; 2 Eng. Pr. Cas. 32 ; 165 E. R. 1079.

**1419. Recaptured ship in distress—Grant of civil & prize salvage.]—**Civil salvage is due to a King's ship for services rendered to a vessel in distress, in addition to military salvage for recapture from the enemy.—THE LOUISA (1813), 1 Dods. 317 ; 165 E. R. 1324.

#### SUB-SECT. 2.—NON-COMMISSIONED SHIP.

**1420. Right to salvage.]—**Revenue cutters are entitled to salvage on recapture, as private ships of war.—THE HELEN (1801), 3 Ch. Rob. 224 ; 1 Eng. Pr. Cas. 290 ; 165 E. R. 444.

**1421. ———.]—**THE FORTUNA (1801), 4 Ch. Rob. 78 ; 165 E. R. 541.

**1422. ———.]—**THE URANIA, No. 1281, *ante*.

**1423. ———.]—**A store ship recapturing British property from the enemy, is entitled to an eighth only for salvage.—THE SEDULOUS (1813), 1 Dods. 253 ; 165 E. R. 1302.

#### SUB-SECT. 3.—SALVAGE OF ALLIED PROPERTY.

**1424. Grant to ally salvors—Subject to reciprocity.]—**THE SAN IAGO (1795), cited in 1 Ch. Rob. at p. 50 ; 165 E. R. 92.

*Annotations :—*Apld. The Santa Cruz (1798), 1 Ch. Rob. 50. *Reid*. The Girolamo (1834), 3 Hag. Adm. 169.

**1425. ———.]—**The law of England, on recapture of property of allies, is the law of reciprocity ; adopting the rule of the country to which claimant belongs.—THE SANTA CRUZ (1798), 1 Ch. Rob. 50 ; 1 Eng. Pr. Cas. 54 ; 165 E. R. 92.

**1426. Alliance with former enemy—Treaty providing for payment of salvage.]—**This is the case of a Spanish ship which was recaptured, after being more than twenty-four hours in possession of the enemy. An extract from the *Cádiz Commercial Gazette*, dated Sept. 5, 1809, has been produced by claimants, referring to an article of a treaty between that country & the English Govt., by which it would appear that the vessels of the respective countries were, in future, to be restored on salvage, although the treaty itself has not yet been promulged. I can have no doubt, from the manner in which the fact is announced in the official *Gazette* of Spain, that the article was to take effect from that time. I shall, therefore, in this case, decree restitution to Spanish claimants, on payment of a salvage of one-eighth, & shall apply the same rule in the other cases, if they come within the same limit of time, unless the captors are able to procure evidence sufficient to repel the presumption arising upon what is here furnished by claimants (SIR WILLIAM SCOTT).—THE SAN FRANCISCO (1810), 1 Edw. 279 ; 165 E. R. 1109.

**1427. Property of allied sovereign—Restored free from salvage.]—**The property of an allied sovereign, recaptured from the enemy, restored free from salvage or expenses.—THE ALEXANDER (1815), 2 Dods. 37 ; 165 E. R. 1408.

**1428. Rescue of allied cargo on neutral ship.]—**THE CARRIE, No. 1444, *post*.

#### SUB-SECT. 4.—SALVAGE OF NEUTRAL PROPERTY.

##### A. In General.

**1429. General rule—Salvage not granted.]—**THE JONGE LAMBERT (1745), 5 Ch. Rob. 54, n. ; 165 E. R. 695.

*Annotation :—*Dtd. The Carlotta (1803), 5 Ch. Rob. 55.

*Sect. 2.—Grant of salvage: Sub-sect. 4, A. & B.; sub-sect. 5.]*

**1430.** ———.]—It is not the modern practice of the law of nations to grant salvage on recapture of neutral vessels; & upon this plain principle, that the liberation of a clear neutral from the hand of the enemy is no essential service rendered to him; inasmuch as that same enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to release him, with costs & damages for the injurious seizure & detention (SIR WILLIAM SCOTT).—THE WAR ONSKAN (1799), 2 Ch. Rob. 299; 1 Eng. Pr. Cas. 239; 165 E. R. 323.

*Annotation:—Refd. The Svanfos, The Borgila, [1919] P. 189.*

**1431.** ———.]—Being a recapture of neutral property, it is not within the operation of the Prize Act, & I shall not lend the aid of this ct. to persons coming to seek it, after having behaved so irregularly (SIR WILLIAM SCOTT).—THE BARBARA (1800), 3 Ch. Rob. 171; 165 E. R. 426.

**1432.** ———.]—THE ELONORA CATHARINA, No. 1446, *post*.

**1433.** ———.]—The question now to be decided is, whether salvage is due on the neutral property in this ship, which has been recaptured out of the possession of the enemy. It certainly has not been the practice of this ct. to decree salvage under such circumstances generally. . . . I am therefore not disposed to hold generally, that neutral property recaptured from French cruisers shall be subject to salvage. The rule . . . is rather to be laid down the other way. . . . There does not appear . . . to be any ground on which it can be supposed that this property would have been condemned, merely because it came out of the hands of a British privateer, or because the original voyage had been from the colony of Spain to London. . . . The expenses of the recaptors must be fully paid; but I shall not pronounce salvage to be due (SIR WILLIAM SCOTT).—THE CARLOTTA (1803), 5 Ch. Rob. 54; 165 E. R. 695.

*Annotation:—Refd. The Svanfos, The Borgila, [1919] P. 189.*

**1434.** ———.]—Neutral property recaptured is not subject to salvage by the general rule of law on this subject, founded upon a supposition that justice would have been done if the vessel had been carried into the port of the enemy; & if any injury had been sustained by the act of capture, it would have been redressed by the tribunal of the country to whose cognisance the case would regularly have been submitted. It is true . . . that during the last war the universal system of plunder & violence, which was practised on the part of France, drew this ct. out of its usual course, & induced it to decree salvage, with the perfect acquiescence of the subjects of neutral states, who were fully sensible of the service that was rendered to them, by taking them out of French hands. But this exception did not alter the established doctrine of the ct. (SIR WILLIAM SCOTT).—THE HUNTRESS (1805), 6 Ch. Rob. 105; 165 E. R. 866.

**1435.** ———.]—The general practice of this ct. is not to decree salvage on neutral ships recaptured, upon the presumption that no peril had been incurred, but that on being carried into the cts. of the original captor, they would have been restored. This is a presumption which is to be entertained in favour of every state, which has not sullied its character by a gross violation of the law of nations. But the contrary presumption takes place if states hold out decrees of condemnation, however unjust & decrees on which the

tribunals of the country are enjoined to act, & of which there is every reason to suppose, that they will be carried into execution. The reasoning on which the general rule had been founded is then done away with; the peril is obvious, & the case becomes simply that of meritorious rescue from the dangers of condemnation. . . . I am of opinion that this case stands, without anything that can enable me to distinguish it from the other cases already decided, & that I am bound to pronounce salvage to be due (SIR WILLIAM SCOTT).—THE SANSOM (1807), 6 Ch. Rob. 411; 165 E. R. 981.

*Annotations:—Apld. The Pontoporos (1916), 85 L. J. P. 143. Consd. The Svanfos, The Borgila, [1919] P. 189.*

**1436.** ———.]—By the law of nations, the general rule is that no salvage is due for the recapture of a neutral vessel, upon the principle that the liberation of a *bond fide* neutral from the enemy confers no benefit upon the neutral, inasmuch as the enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized. But where the vessel recaptured was practically liable, whether rightfully or wrongfully, to be confiscated by the enemy, salvage will be awarded to the recaptors.

Thus, where a German cruiser had captured a Greek vessel laden with a cargo of coal belonging to British merchants & destined for the North Western State Railway of India on the ground that she was carrying contraband, & the vessel was recaptured by a British cruiser, the ct., being of opinion that the recapture saved the vessel from condemnation in any German prize proceedings or from the almost certain risk of destruction if dealt with by the captors on the high seas, awarded to the recaptors as prize salvage one-sixth of the vessel's value £7,333.—THE PONTOPOROS, [1916] 1 P. 100; 85 L. J. P. 143; 114 L. T. 418; 32 T. L. R. 414; 60 Sol. Jo. 430; 13 Asp. M. L. C. 303.

*Annotation:—Consd. The Svanfos, The Borgila, [1919] P. 189.*

**1437. Right to expenses incidental to restitution.]**—THE JONGE LAMBERT (1745), 5 Ch. Rob. 54, n.; 165 E. R. 695.

*Annotation:—Dtd. The Carlotta (1803), 5 Ch. Rob. 55.*

**1438.** ———.]—THE CARLOTTA, No. 1433, *ante*.

**1439. Rescue by own crew—With help of British subjects on board.]**—THE TWO FRIENDS, No. 997, *ante*.

**1440. Recaptured ship documented in neutral's name—Restoration to British owner—Salvage payable.]**—THE VRIENDSCHAP (1805), 6 Ch. Rob. 38; 165 E. R. 842.

**1441. Neutral goods on British ship.]**—Salvage is due for the recapture of neutral goods previously taken by the enemy on board a British armed ship.—THE FANNY (1814), 1 Dods. 443; 2 Eng. Pr. Cas. 202; 165 E. R. 1372.

**1442.** ———.]—Stipulation by treaty, "that free ships should make free goods," does not warrant such a certain conclusion, "that enemies ships should make enemies goods," as to induce the ct. to decree salvage for the recapture of property, otherwise neutral, on board British ships.—THE CYGNET (1818), 2 Dods. 299; 165 E. R. 1493.

**1443. Recapture by crew of neutral.]**—Where the ship of a neutral had been seized by a belligerent, on an unfounded charge of the breach of a blockade, & the crew of the ship which was seized afterwards rescued her, & took her to her destined port:—*Held*: this rescue did not entitle the crew to salvage.—WILSON v. ANDERTON (1830), 1 B. & Ad. 450; 9 L. J. O. S. K. B. 48; 109 E. R. 855.

*Annotations:—Mentd. Hawkes v. Dunn (1831), 1 Tyr. 413; Catterall v. Kenyon (1842), 6 Jur. 507; Marshall*

*v. Newsom* (1843), 7 Jur. 901. *Skinner v. Lambert* (1850), 16 L. T. O. S. 244; *Lee v. Bayes* (1856), 18 C. B. 599; *Thorne v. Tilbury* (1858), 31 L. T. O. S. 206; *The Tigress* (1863), Brown & Lush, 38; *Biddle v. Bond* (1865), 6 B. & S. 225; *Glyn, Mills, Currie v. East & West India Dock Co.* (1880), 5 Q. B. D. 129; *Wetherman v. London & Liverpool Bank of Commerce* (1914), 31 T. L. R. 20.

#### 1444. Neutral ship transporting cargo for allies.]

—A Swedish vessel, laden with a cargo of munitions for the French Govt., was stopped in the English Channel by a German submarine & the crew were ordered to take to the boats. The submarine was preparing to sink the vessel, but submerged, presumably on sighting two of His Majesty's armed trawlers, & the crew of the vessel were left in their boats. They refused to return, & the two armed trawlers stood by the vessel & eventually towed her to Falmouth. For these services the officers & crews of the trawlers claimed salvage remuneration from the owners of the Swedish vessel & her cargo, but the claim against the cargo was withdrawn. It was argued for deft. shipowners that plffs. were bound to save a cargo of munitions for an allied Govt. as part of their public duty; that the saving of the ship was merely incidental to the saving of the cargo; that it was salvage from a war risk, namely, the risk of attack by enemy submarines, & not salvage from a marine risk; & that no salvage remuneration was recoverable:—*Held*: (1) assuming plffs. were under a duty to save the cargo, they were under no duty to the Swedish shipowners to save their vessel; (2) the saving was not only from submarine attack but from maritime perils also; & (3) there being a salvage service, the whole risk to the salvaged vessel, war as well as marine risk, should be taken into account in estimating the value of the services.—*THE CARRIE*, [1917] P. 224; 86 L. J. P. 178; 119 L. T. 128; 33 T. L. R. 573; 14 Mar. L. C. 321.

#### B. Immunity Not Recognised by Captors.

1445. *Salvage granted*.]—*THE WAR ONSKAN*, No. 1430, *ante*.

1446. —.]—The standing doctrine of the ct. has been, that neutral property, taken out of the possession of the enemy, is not liable to salvage. It is the doctrine to which the ct. has invariably adhered, till it was forced out of its course, by the notorious irregularities of the French cruisers, & of the French govt., which proceeded, without any pretence of sanction from the law of nations, to condemn neutral property. On these grounds, it was deemed not unreasonable, by neutrals themselves, that salvage should be paid, for a deliverance from French capture (*SIR WILLIAM SCOTT*).—*THE ELEONORA CATHARINA* (1802), 4 Ch. Rob. 156; 1 Eng. Pr. Cas. 367; 165 E. R. 569.

*Annotation*:—*Apld.* *The Svanfos*, *The Borgilla*, [1919] P. 189.

1447. —.]—*THE HUNTRESS*, No. 1434, *ante*.

1448. —.]—*THE SANSOM*, No. 1435, *ante*.

1449. —.]—This is a case which involves the question whether these American ships & cargoes which were not proceeding to French ports are liable to pay salvage on recapture by British vessels out of the hands of the enemy. The principle to which this ct. adheres is that no salvage is due where a service is not actually performed, or where loss was not highly probable. . . . In the present case the ground assigned by the captor for the claim of salvage is, that there are no certificates of origin on board this vessel, & much discussion has taken place upon the question, whether or not this requisition was confined to ships navigating to the ports of France. . . . On the whole of the circumstances of this

case, without looking minutely into the varying policy of France, I think there is very rational ground to apprehend that the French Prize Cts. would have considered these ships as legal captures, & therefore I shall pronounce for the usual salvage.

A similar question arose upon the capture of American vessels by Danish cruisers, when the ct. made the same decree (*SIR WILLIAM SCOTT*).

—*THE ACTRON* (1810), Edw. 254; 165 E. R. 1100.

*Annotation*:—*Apld.* *The Svanfos*, *The Borgilla*, [1919] P. 189.

1450. —.]—*THE PONTOPOROS*, No. 1436, *ante*.

1451. —.]—A German submarine had stopped two neutral vessels, & was about to destroy them as prize of war, when a British submarine came up, engaged the enemy submarine & drove her away:—*Held*: the general rule that no salvage is given on the recapture of a neutral vessel has no application when the belligerent State of which the captor is a national has made it apparent that in defiance of international law the destruction of the neutral vessel will be justified by the cts. of the captor; the rescue was a salvage service; & although rendered by a King's ship, the commander, officers & crew were entitled to salvage remuneration.—*THE SVANFOS*, *THE BORGILLA*, [1919] P. 189; 88 L. J. P. 154; 35 T. L. R. 488; 63 Sol. Jo. 575.

#### SUB-SECT. 5.—AMOUNT OF SALVAGE PAYABLE.

*See Naval Prize Act, 1864* (c. 25), s. 40.

1452. *Salvage for special services*.]—*THE JOHN* (1778), Marr. 152; 165 E. R. 35.

1453. —.]—Salvage on recapture of a vessel cut out from under a French battery: distinctions to take it out of the Act of Parliament for the purpose of increasing the salvage overruled. An eighth given.

The question will be, whether this case is within the Act, & if so, whether there are any expressions in the Act which can be said to distinguish different exertions of gallantry in the service of the recapture: it is, I think, admitted, that the Act acknowledges no such distinctions; all recaptures within it are put on the same footing of merit & reward (*SIR WILLIAM SCOTT*).—*THE APOLLO* (1801), 3 Ch. Rob. 308; 165 E. R. 475.

*Annotation*:—*Refd.* *The Svanfos*, *The Borgilla*, [1919] P. 189.

1454. —.]—In a cause of mixed military & civil salvage, against the owners, the ct. is unwilling, though no bail has been given, to disturb a valuation, not clearly excessive, made under a reference on the spot to three arbitrators chosen by the salvors & consignees of the vessel.

War salvage, being generally fixed at a low rate, may on special services, in the nature of civil salvage, be increased.—*THE SIR FRANCIS BURTON* (1828), 2 Hag. Adm. 156; 166 E. R. 201.

1455. *Ship & cargo destroyed by fire—After appraisalment of ship—Appraisalment of cargo pending*.]—*THE THREE FRIENDS* (1802), 4 Ch. Rob. 268; 165 E. R. 608.

1456. *Jettison of cargo—Effect on valuation*.]—*THE ELEONORA CATHARINA* (1802), 4 Ch. Rob. 156; 1 Eng. Pr. Cas. 367; 165 E. R. 569.

*Annotation*:—*Refd.* *The Svanfos*, *The Borgilla*, [1919] P. 189.

1457. *Salvage on freight earned*.]—*THE DOROTHY FOSTER*, No. 1416, *ante*.

1458. *Appraisalment exceeding proceeds—Deduction for expenses of sale*.]—*THE JONGE BASHAN* (1806), 5 Ch. Rob. 296, n.; 165 E. R. 782.

1459. *Joint recapture*.]—Where a recapture is made by a King's ship, all other King's ships in

*Sect. 2.—Grant of salvage: Sub-sect. 5. Sect. 3. Part XIII. Sects. 1 & 2.]*

sight are permitted to come in as joint salvors; there is a reciprocity in this rule, which operates sometimes to the advantage, sometimes to the disadvantage of every vessel in the service. . . . Considering them both, therefore, as joint actual recaptors, I see no reason why I should take the case out of the common operation of that principle which apportions the reward to the parties according to their respective forces (SIR WILLIAM SCOTT).—THE WANSTEAD (1810), Edw. 268; 165 E. R. 1105.

1460. Ship & cargo released by captor—Con-

ditional on services for captor—Salvage payable to master & crew.]—THE SIR PETER (1815), 2 Dods. 73; 165 E. R. 1419.

1461. Sum agreed upon by salvors & consignees—Valuation on the spot—Whether court will disturb.]—THE SIR FRANCIS BURTON, No. 1454, ante.

1462. Passenger assisting in recapture.]—THE TWO FRIENDS, No. 997, ante.

#### SECT. 3.—PROCEDURE.

See Part XI., Sect. 16, ante.

## Part XIII.—Prize Bounty.

### SECT. 1.—GROUNDS FOR PAYMENT.

See Naval Prize Act, 1864 (c. 25), ss. 42–44; Naval Prize Act, 1918 (c. 30), s. 3 (2); Prize Court Rules, 1914, Ord. 33.

1463. Loss of ship by enemy—Necessity for.]—L'ÉLISE (OR THE LOUISE) (1814), 1 Dods. 442; 165 E. R. 1371.

1464. — Capture of cargo vessel.]—The Ct. of Admty. will not pronounce whether head money is due or not; but only the number of men on board. It does not pronounce that, when there is a cargo on board.—LE FRANCHIA (1799), 1 Ch. Rob. 157; 165 E. R. 133.

Annotation:—Folld. The Santa Brigada (1800), 3 Ch. Rob. 52.

1465. — — —.]—I am disposed to decree head money in cases of capture of public ships of war, as a matter of course, although they may have cargoes on board (*per cur.*).—THE SANTA BRIGADA (1800), 3 Ch. Rob. 52; 165 E. R. 382.

1466. — “Armed ship”—Armed transport.]—Commission of war required to entitle captors to head money.

They [transports] may be armed only for their own defence; as they have no commission to act offensively, they cannot be considered legally as ships of war, to the effect of entitling the captors to head money (*per cur.*).—*Re SEVERAL DUTCH SCHUTTS* (1805), 6 Ch. Rob. 48; 165 E. R. 845.

Annotation:—*Reid. R.M. Submarine E.14*, [1917] P. 85.

1467. — — —.]—An Order in Council of Mar. 2, 1915, made pursuant to Naval Prize Act, 1864 (c. 25), s. 42, provided for the payment of prize bounty to such of the officers & crew of any of H.M. ships of war as were present at the taking or destroying of any “armed ship” of the enemy.

In May, 1915, a British submarine torpedoed & sank a Turkish transport having on board 6,000 Turkish troops, who had with them rifles & ammunition, also six field guns so disposed on the ship's deck that, at suitable ranges, they could have been used with effect against the submarine. The ship was a Turkish fleet auxiliary manned by naval ratings & commanded by Turkish naval officers; she carried as part of her regular equipment a few light quick-firing guns. The officers & crew of the submarine applied to the Prize Ct. for prize bounty:—*Held*: the meaning of the words “armed ship” in Naval Prize Act, 1864 (c. 25), s. 42 was not limited to a ship commissioned & armed for the purpose of offensive action in a naval engagement, & appcts. were entitled to prize bounty under the Order in Council.—H.M.

SUBMARINE E.14, [1920] A. C. 403; 89 L. J. P. 104; 122 L. T. 443; 36 T. L. R. 119; 14 Asp. M. L. C. 533, P. C.; *affg.*, [1917] P. 85.

Annotations:—*Reid. The Triumph, The Usk*, [1917] P. 127; *The Edna*, [1921] 1 A. C. 735; *Re Naval Operations in Mesopotamia 1914–15*, [1923] P. 149.

1468. — — — Lighter transporting armed troops.]—(1) By an Order in Council of Mar. 2, 1915, which put into operation Naval Prize Act, 1864 (c. 25), s. 42, prize bounty at the rate of £5 for each person on board the enemy's ship was payable to such of the officer & crew of any of His Majesty's ships of war as were present at the taking or destroying of any “armed ship” of the enemy:—*Held*: it was not necessary for the ship herself to carry any armament structurally attached to her, & enemy lighters carrying troops armed with rifles were “armed ships” within the meaning of the sect.

(2) No accurate figures being available to establish the numbers of the persons on board the enemy vessels the ct., believing claimants' estimate to have been made with the intention of accuracy, accepted it.—*Re NAVAL OPERATIONS IN MESOPOTAMIA 1914–15*, [1923] P. 149; 92 L. J. P. 106; 129 L. T. 415; 39 T. L. R. 247; 16 Asp. M. L. C. 234.

1469. — — — Sailing vessel conveying munitions—Crew armed with rifles.]—Acting on the instructions of the Naval Commander-in-Chief the claimants, the officers & crew of a British submarine, sank by gunfire a number of small Turkish sailing vessels engaged in carrying munitions of war to the Turkish military bases & arsenals in the Sea of Marmora.

The vessels did not carry any armament structurally attached to them, but their crews were armed with rifles &, on each occasion when attacked, the crews took to their boats, got ashore, & opened fire on the submarine with their rifles.

By an Order in Council of Mar. 2, 1915, which put into operation Naval Prize Act, 1864 (c. 25), s. 42, prize bounty at the rate of £5 for each person on board the enemy's ship is payable to such of the officers & crew of any of His Majesty's ships of war as are present at the taking or destroying of any armed ship of the enemy:—*Held*: (1) the inference to be drawn from the facts that the commander of the submarine had instructions to sink sailing craft of the sort in question & that in each case the crews, instead of scattering & making their escape, opened fire on the submarine, was that these sailing vessels had been taken under the control of the Turkish Administration, & were

not to be regarded merely as merchant vessels in private ownership engaged in the carriage of contraband. They were therefore ships of the enemy within Naval Prize Act, 1864 (c. 25), s. 42; (2) the vessels were armed ships when they were attacked, & it would give too restricted an operation to the rights provided by the statute to hold that they had ceased to be armed ships because their crews with their rifles had left before the vessels were actually destroyed. Claimants, therefore, were entitled to an award of prize bounty.—H.M. SUBMARINE E.12 & TURKISH VESSELS, [1924] P. 29; 93 L. J. P. 7; 40 T. L. R. 18.

**1470. — Actual combat unnecessary.]—**L'ALERTE, No. 1489, *post*.

**1471. — —.]—**Head money is due to the capturing ship whether the surrender has been produced by actual combat or not, but it is never granted unless the act of capture or of destruction is consummated.—LA CLORINDE (1814), 1 Dods. 436; 165 E. R. 1369.

**1472. — —.]—**THE WESER, THE RIPPON (prior to 1818), cited 2 Dods. at p. 304.

*Annotation:—*Reid. The Ville De Varsovie (1818), 2 Dods. 301.

**1473. — Military character—Whether lost by capture & recapture.]—**The military character of a vessel is not so lost by capture & recapture as to extinguish the right to head money.—THE MATILDA (1813), 1 Dods. 367; 165 E. R. 1344.

**1474. — Destruction by own crew—Attack by British force imminent.]—**Head money is due for an enemy's ship of war set on fire by her own crew in consequence of the approach of a British force & totally destroyed.—THE URANIE (1817), 2 Dods. 172; 165 E. R. 1452.

**1475. Loss caused by joint naval & military operations.]—**Head money not due on ships captured by conjunct forces or army & navy in harbours, rivers, etc.—LA BELONE (1818), 2 Dods. 343; 165 E. R. 1508.

*Annotations:—*Consd. The Triumph, The Usk, *Re* Surrender of Tsingtau, [1917] P. 127; The Feldmarschall, [1920] P. 289. *Re* Mesopotamia Operations 1917, The Sulman Pak, [1922] P. 73.

**1476. —.]—**The officers & crews of His Majesty's ships are not entitled to prize bounty under Naval Prize Act, 1864 (c. 25), s. 42, put in force by an Order in Council of Mar. 2, 1915, for the destruction of enemy ships at war, if the destruction was the result of joint naval & military operations although the land & sea forces were operating under separate commanders.—THE TRIUMPH, THE USK, [1917] P. 127; 86 L. J. P. 105; 116 L. T. 512; 33 T. L. R. 331; 61 Sol. Jo. 508; 14 Asp. M. L. C. 63.

**1477. —.]—**In the course of the advance on Baghdad the Commander-in-Chief of the Army in Mesopotamia ordered the naval flotilla, forming part of the naval forces acting in concert with the Army, to push on & inflict as much damage as possible. The flotilla advanced up the Tigris, & fought & captured several armed Turkish vessels. The British cavalry were also advancing, but had been held up by a strong Turkish rearguard, & were some miles away & out of reach of the flotilla when the captures were made. On a motion by the officers & crew of the flotilla for prize bounty under the Order in Council of Mar. 2, 1915, whereby, pursuant to Naval Prize Act, 1864 (c. 25), s. 42, a sum calculated at the rate of £5 each person on board the enemy's ship at the beginning of the engagement was distributable among such of the officers & crews of any of His Majesty's ships of war as were actually present at the taking or destroying of any armed ship of the enemy, it was

objected that the captures were the result of a joint naval & military operation, & therefore outside the provisions of the statute:—*Held*: the question was not whether on the date in question the flotilla & the troops were engaged in a joint scheme of operations, but whether they were jointly engaged in the capture of the Turkish vessels; the troops in fact took no part in the capture; & the officers & crews of the flotilla were entitled to bounty.—*Re* MESOPOTAMIA OPERATIONS, 1917, THE SULMAN PAK, [1922] P. 73; 91 L. J. P. 50; 126 L. T. 607; 38 T. L. R. 215; 15 Asp. M. L. C. 604.

*Annotations:—*Reid. The U.B. 17 (1922), 38 T. L. R. 780; *Re* Naval Operations in Mesopotamia, 1914–15, [1923] P. 149.

## SECT. 2.—BASIS OF COMPUTATION.

*See* Naval Prize Act, 1864 (c. 25), ss. 42–44; Naval Agency & Distribution Act, 1864 (c. 24), ss. 13, 14, 17.

**1478. Number of persons on enemy ship—Function of court to determine.]—**LE FRANCA, No. 1464, *ante*.

**1479. — — Acceptance of claimants' estimate.]—***Re* NAVAL OPERATIONS IN MESOPOTAMIA, 1914–15, No. 1468, *ante*.

**1480. — At time of attack—Subsequent escape of men immaterial.]—**THE BABILLION (1808), Edw. 39; 165 E. R. 1025.

**1481. — Excluding British prisoners of war.]—**Head money for British prisoners of war, on board an enemy's frigate, not pronounced to be due.—THE SAN JOSEPH (1807), 6 Ch. Rob. 331; 165 E. R. 951.

**1482. — Exchanged for British prisoners—Proof of effective exchange.]—**Head money refused, there having no proof of an effective exchange of prisoners.—LA LUNE (1823), 1 Hag. Adm. 210; 166 E. R. 75.

**1483. — Part of crew ashore—Performing crew's duties.]—**By an Order in Council of Mar. 2, 1915, pursuant to Naval Prize Act, 1864 (c. 25), s. 42. His Majesty declared his intention to grant as prize bounty for distribution among such of the officers & crews of any of his ships of war as were actually present at the taking or destroying of any armed ship of any of His Majesty's enemies "a sum calculated at the rate of £5 for each person on board the enemy's ship at the beginning of the engagement":—*Held*: provided they form part of the crew & are in attendance in some form or other on the ship doing work in the capacity of members of the crew, it is not necessary for all the persons in respect of whom the prize bounty is payable to be actually on board the enemy ship at the beginning of the engagement.—THE SYDNEY, [1916] P. 300; 86 L. J. P. 24; 115 L. T. 638; 13 Asp. M. L. C. 521.

**1484. — At beginning of engagement.]—**The ct. made a decree, in accordance with an Order in Council made by virtue of Naval Prize Act, 1864 (c. 25), s. 42, that the officers & ship's company of H.M.S. *Carmania* were entitled to prize bounty as having been actually present at the destruction of the German armed auxiliary cruiser *Cap Trafalgar*, & that on the evidence the number of persons on board the enemy ship at the beginning of the engagement must be taken to have been 423, & that therefore the amount of the bounty at the rate of £5 a head, as fixed by the above sect. was £2,115.—THE CARMANIA (1916), 32 T. L. R. 395.

## SECT. 3.—TO WHOM PAYABLE.

**1485. Applicant with legal title thereto.]—THE MARIANNA (1845), 4 L. T. 179.**

*See Naval Prize Acts, 1864 (c. 25), ss. 42–44; 1918 (c. 30), s. 3; Prize Court Rules, 1914, Ord. 33.*

**1486. Persons in actual engagement with enemy.]—THE DANGÉ (1761), 6 Ch. Rob. 239, n.; 165 E. R. 915.**

**1487. —.]—*Re FALKLAND ISLANDS BATTLE, Ex p. H.M.S. CANOPUS, No. 1492, post.***

**1488. — Constructive assistance insufficient.]—L'HERCULE (1799), cited in 6 Ch. Rob. at p. 238; 165 E. R. 915.**

*Annotations:—Apld. The L'Alerte (1806), 6 Ch. Rob. 239; Re Falkland Islands Battle, Ex p. H.M.S. Canopus, [1917] P. 47.*

**1489. —.]—The claim to share in head-money stands upon a different principle from that which governs the general interests of joint capture. . . . It is not required that there should be an actual fight to support the demand of head money, on the part of the taker, since, if the enemy is overpowered by superior force, the surrender operates in the same manner, & to the same effect, as if he was subdued in the actual contest (SIR WILLIAM SCOTT).—L'ALERTE (1806), 6 Ch. Rob. 239; 165 E. R. 915.**

*Annotation:—Apld. Re Falkland Islands Battle, Ex p. H.M.S. Canopus, [1917] P. 47.*

**1490. —.]—Head money limited to the actual captors.**

Head money, according to the principle which is recognised in this & the superior ct., is the peculiar & appropriate reward of immediate personal exertion, & consequently wherever any claim to participate in a bounty so appropriated has been advanced, it has always been considered in a more rigid manner by the cts., than those which arise out of the general interests of prize (SIR WILLIAM SCOTT).—LA GLORIE (1810), Edw. 280; 2 Eng. Pr. Cas. 58; 165 E. R. 1109.

*Annotation:—Apld. Re Falkland Islands Battle, Ex p. H.M.S. Canopus, [1917] P. 47.*

**1491. —.]—THE EL RAYO, No. 1494, post.**

**1492. —.]—By Order in Council of Mar. 2, 1915, His Majesty, in accordance with Naval Prize Act, 1864 (c. 25), s. 42, declared his intention to grant as prize bounty for distribution among such of the officers & crews of any of his ships of war as were actually present at the taking or destroying of any armed ship of any of His Majesty's enemies a sum calculated at the rate of £5 for each person on board the enemy's ship at the beginning of the engagement.**

On Dec. 7, 1914, a British squadron of warships, which were searching for a squadron of German warships, arrived at Port Stanley in the Falkland Islands. A council of war was held on board the flagship, & it was decided that H.M.S. *Canopus*, which had been lying at Port Stanley for some weeks, should remain there for the defence of the port. The *Canopus* was firmly embedded in the mud, where she had been grounded in a position to obtain an all-round fire to seaward, & her double bottoms had been flooded to keep her steady. On the approach of two enemy cruisers the next morning, being in a position to fire over the land, she fired two salvos with her 12-inch guns at a range of 11,000 yards, & there was evidence that a ricochet from the second salvo hit the bass of the after funnel of one of the cruisers & killed five men. The enemy vessels then steamed away to rejoin their squadron, & the British squadron, with the exception of the

*Canopus*, proceeded out of harbour. A general chase ensued, & late in afternoon, after a running fight, the enemy squadron was brought to action & four of the enemy ships were sunk, the main action taking place over 100 miles away from Port Stanley.

On a motion on behalf of the officers & crew of H.M.S. *Canopus* to share in the sum of £12,160 previously awarded as prize bounty to the British squadron in respect of the destruction of the enemy ships:—*Held*: the *Canopus* did not form a part of the squadron or take part in the engagement, & the officers & crew were not entitled to share in the bounty as being actually present at the destruction of any of the enemy ships within Naval Prize Act, 1864 (c. 25), s. 42.—*Re FALKLAND ISLANDS BATTLE, Ex p. H.M.S. CANOPUS, [1917] P. 47; 86 L. J. P. 48; 116 L. T. 23; 33 T. L. R. 146; 61 Sol. Jo. 202; 13 Asp. M. L. C. 572.*

**1493. — Immediate captor.—Where no effective intervention proved.]—By virtue of Naval Prize Act, 1864 (c. 25), s. 2, & the Order in Council of Mar. 2, 1915, the officers & crews of such of His Majesty's ships of war as are actually present at the taking or destroying of any armed ship of any of His Majesty's enemies are entitled to have distributed among them as prize bounty a sum calculated at the rate of £5 for each person on board the enemy's ship at the beginning of the engagement:—*Held*: in the absence of distinct & conclusive proof of effective intervention on the part of other claimants, the immediate captor is solely entitled to the bounty.—THE U.B. 17 (1922), 38 T. L. R. 780.**

**1494. General engagement.—Whole fleet entitled.]—(1) In a general engagement the whole fleet is entitled to head money, though the formal surrender be made to one ship only.**

**(2) Actual contribution of assistance necessary to entitle a joint captor to share in head money.—THE EL RAYO (1811), 1 Dods. 42; 2 Eng. Pr. Cas. 127; 165 E. R. 1226.**

*Annotations:—As to (2) Consd. Re Mesopotamia Operations, 1917, The Sulman Pak, [1922] P. 73. Apld. The U.B. 17 (1922), 38 T. L. R. 780.*

**1495. —.]—By an Order in Council of Mar. 2, 1915, pursuant to Naval Prize Act, 1864 (c. 25), s. 42, His Majesty declared his intention to grant as prize bounty for distribution among such of the officers & crews of any of his ships of war as were actually present at the taking or destroying of any armed ship of any of His Majesty's enemies "a sum calculated at the rate of £5 for each person on board the enemy's ship at the beginning of the engagement."**

On May 31—June 1, 1916, the British Grand Fleet, consisting of 151 ships, fought the German fleet off the coast of Jutland & eleven enemy ships were destroyed. It being impossible under the circumstances to contend that any one ship or squadron was responsible for the destruction of any particular enemy ship, the Grand Fleet agreed that the battle should be treated as a joint & common enterprise, & there being in all 4,537 persons on board the destroyed enemy ships, the ct. decreed that the bounty due to the officers & crews of the 151 ships concerned was the sum of £22,685.—*Re BATTLE OF JUTLAND, [1920] P. 408; 90 L. J. P. 239; 125 L. T. 445; 15 Asp. M. L. C. 346.*

**1496. — — — — Blockading force.]—Head money due to the whole blockading force, & not to the fireships only which were more immediately employed in the destruction of the enemies ships.—THE VILLE DE VARSOVIE (1818), 2 Dods. 301; 2 Eng. Pr. Cas. 220; 165 E. R. 1493.**



**1497. Title assumed or possessed by Crown—Consent of Crown.]—**THE MARIANNA (1845), 4 L. T. 179.

**1498. Pre-arranged co-operation of aircraft—Right of pilots & observers.]—**An enemy warship was destroyed by two of His Majesty's monitors with the assistance of two aeroplanes, the pilots & observers of which were specially attached to the monitors for the purpose of the attack & were borne

on the ships' books :—*Held* : the pilots & observers formed part of the crews of the monitors within Naval Prize Act, 1864 (c. 25), s. 42, & therefore were entitled to share in the prize bounty distributable in accordance with the provisions of that section.—THE KÖNIGSBERG, [1917] P. 174; 116 L. T. 829; 33 T. L. R. 474; 14 Asp. M. L. C. 106; *sub nom. Re H.M.S. SEVERN & H.M.S. MERSEY*, 86 L. J. P. 129; 61 Sol. Jo. 592.

## Part XIV.—Distribution of Prize Money.

### SECT. 1.—JOINT CAPTORS.

*See* Naval Agency & Distribution Act, 1864 (c. 24), Naval Prize Acts, 1864 (c. 25); 1914 (c. 13); 1918 (c. 30).

**1499. Division proportionate to numbers of crews.]—**If a prize is taken by two or more privateers, they are to share proportionably according to the number of men of which their respective crews consist.—ROBERTS *v.* HARTLEY (1780), 1 Doug. K. B. 311; 99 E. R. 201.

**1500. Share of non-commissioned ship—Confiscated as droît of Admiralty.]—**THE TWEED GUSSTER (1785), 2 Ch. Rob. 284, n.; 1 Eng. Pr. Cas. 230, n.; 165 E. R. 317.

*Annotations :—Distd. Re Cape of Good Hope* (1799), 2 Ch. Rob. 274. *Consd. The Feldmarschall*, [1920] P. 289; *Reid. The Robert* (1800), 3 Ch. Rob. 194.

**1501. ———.]—**LE FRANC (1795), 2 Ch. Rob. 285, n.; 1 Eng. Pr. Cas. 231, n.; 165 E. R. 318. *Annotations :—Distd. Re Cape of Good Hope* (1799), 2 Ch. Rob. 274. *Reid. The Feldmarschall*, [1920] P. 289.

**1502. ———.]—**Monition against the master, & owner of a privateer, not commissioned against the Dutch, to bring in the proceeds of a Dutch prize & show cause why it should not be condemned as droîts of Admty. Prize condemned as droîts.

The person admits that he had no commission. It is therefore impossible for him to contend for a legal interest in joint capture. If he thinks he has any equitable claims, arising from any services that he was performed, they must be represented to the admty. The former proceedings on the part of the non-commissioned captor, are mere nullities, & the property must be proceeded against as droîts of Admty. (*per Cur.*)—THE ABIGAIL (1801), 4 Ch. Rob. 72; 165 E. R. 539.

**1503. Capture by fishing smack—Subsequent formal seizure by excise cutter—Original captors entitled.]—**THE AMOR PARENTUM (1799), 1 Ch. Rob. 303; 165 E. R. 185.

**1504. Method of realisation of prize—Right of actual captor to decide.]—**The actual captor is *potior jure*. Can it be said that when he is desirous of sending the prize to a port not improper, & more commodious for the convenience of the owners, a mere constructive captor should be at liberty to defeat that wish, by suggesting a market which may, by possibility, be in some respects a little more advantageous. . . . If the port to which the prize was intended to be removed had been a port unsuitable in itself, or one in which any danger of embezzlement could be apprehended, it might afford grounds for an opposition of this kind (SIR WILLIAM SCOTT).—THE SACRA FAMILIA (1805), 5 Ch. Rob. 360.

**Joint naval & military operations.]—***See* Part IV., Sect. 6, sub-sect. 1, D., *ante*.

**Prior agreement to share.]—***See* CONTRACT, Vol. XII., p. 425, No. 3413.

### SECT. 2.—OFFICERS AND CREWS.

#### SUB-SECT. 1.—FLAG OFFICERS.

*See* Naval Agency & Distribution Act, 1864 (c. 24); Naval Prize Acts, 1864 (c. 25); 1914 (c. 13); 1918 (c. 30).

**1505. Flag officer in effective command.]—**By Art. 4 of the King's Proclamation of 1797, respecting the distribution of prize, as to flag officers, it is directed, that a chief flag officer returning home from a foreign station shall have no share of the prizes taken by the ships left behind to act under another command : this applies as well to another command devolving by seniority, as to another chief flag officer appointed by express commission to succeed the officer returning home : & such returning home, etc., means the commencement in fact of a commander-in-chief's departure from the local station of his command for the purpose of returning home, leaving his fleet behind, i.e. leaving it for all effective purposes under the control of another commander competent, under the terms of the proclamation, to command in his stead. Therefore where a flag officer, commander-in-chief in the Mediterranean, returned to England by leave of the Admty. for the recovery of his health, leaving the fleet under the command of the next flag officer in seniority, but having, before his departure, dispatched one of the fleet on a cruise, who made captures within the limits of the station, after the departure homewards of such commander-in-chief out of those limits, but before any new orders given by the next flag officer on whom the command of the station had devolved :—*Held* : the right to the one-eighth, or commanding flag officer's share of prize, belonged to the present acting flag officer in command on the station, & not to the chief flag officer returning home, although the latter still retained the title, pay, & table money, of commander-in-chief, after his return home, & did not resign his commission as such till after the prize taken, & had official correspondence with the Admty. in that character till his resignation, & made appointments in the fleet as such ; the governing principle of His Majesty's Proclamation being, that the reward of prize should be attached to the present effective commander on the station, & not to the nominal one who returns home, leaving ships behind to act under another command.—NELSON (LORD) *v.* TUCKER (1803), 4 East, 238; 102 E. R. 821.

*Annotations :—Apld. Keith v. Pringle* (1803), 4 East, 262. *Reid. Harvey v. Cooke* (1805), 2 Smith, K. B. 341; *Duckworth v. Tucker* (1809), 2 Taunt. 7; *The Banda & Kirwee Booty* (1866), L. R. 1 A. & E. 109.

**1506. ———.]—**The King's warrant of June 26, 1800, for the distribution of prize taken in the expedition to the Texel, did not intend to authorise the two commanders-in-chief, & the flag & general officers, or such of them as could conveniently be assembled, to determine or to refer to the



Sect. 2.—Officers and crews: Sub-sect. 1.]

determination of others, the right of a flag officer claiming his share of the distribution, as being the naval Commander-in-Chief at the time of the capture. Where an admiral, appointed to the command of an expedition from this country was instructed to put himself & his fleet under the command of the admiral commanding the station, if his co-operation should be necessary, & did accordingly put himself & his fleet under such command, & was directed by the admiral of the station, whilst he remained with him to consider himself under his command, & to attend to all orders & signals whilst the fleets were on the same station, & the admiral of the station did several acts forwarding the objects of the expedition, & issued orders relating thereto, but in consequence of ill health left the station with the ships under his command, & sailed for England, & at the time when the enemy's fleet agreed to surrender was out of sight, & not in a situation to have afforded the least assistance, & the enemy's fleet surrendered the day after he sailed:—*Held*: the admiral of the station was not entitled to his share of distribution of prize as commander-in-chief of the expedition at the time of the capture, but the admiral appointed to the command of it was.—*DUNCAN (LORD) v. MITCHELL* (1815), 4 M. & S. 105; 105 E. R. 774.

**1507. Inferior flag officer.**—*KINGSTON (LORD) v. VERNON* (1752), Amb. 141; 27 E. R. 92.

**1508. Command relinquished before capture.**—*TAYLOR v. PAWLETT (LORD)* (1759), 1 Hy. Bl. 264, n.; 126 E. R. 155, N. P.

*Annotation*:—*Consd. Nelson v. Tucker* (1802), 3 Bos. & P. 257.

**1509.** — *]*—During the late war, a flag officer on a certain station gave orders to a ship under his command to sail on a cruise; after the orders were given, but before a prize was taken, he accepted another command; but no other flag officer was appointed to succeed him on his former station. He was not entitled to one-eighth of a prize taken by the ship which sailed in consequence of his orders, under the proclamation for the distribution of prizes.—*JOHNSTONE v. MARGETSON* (1789), 1 Hy. Bl. 261; 126 E. R. 153.

*Annotations*:—*Consd. Nelson v. Tucker* (1803), 4 East, 238. *Mentd. R. v. Patteson* (1832), 4 B. & Ad. 9.

**1510. — Temporary relinquishment—Command not resumed.**—*THE ST. ANNE* (1800), 3 Ch. Rob. 60; 165 E. R. 385.

*Annotations*:—*N.F. Nelson v. Tucker* (1803), 4 East, 238. *Held. Keith v. Pringle* (1803), 4 East, 262.

**1511. — Capture within limits of former command.**—*]*—An inferior flag officer succeeding by devolution to the principal command, upon the returning home of his superior flag officer commander in chief on a foreign station, is entitled under the King's Proclamation of 1797 to the chief flag officer's one-eighth share of prize taken within the limits of the station by a squadron which had been detached from the main body, with which such inferior flag officer remained, by the superior flag officer before his return home; but the prize not taken till after he had passed the limits of his station on such return home: & this, though the superior flag officer before his departure directed the inferior flag officer to take under his command those ships only, by name, which continued with him at the principal station, & the detached squadron when they returned to the same place after the particular service performed, for the performance of which he had before limited a time; & though such superior

flag officer's commission was stated to be to command in chief a squadron upon a particular service, & not merely upon a particular station: & though such superior flag officer did not resign his commission of commander in chief till after his return home, & after the prize taken. At least, the superior is not entitled to recover such share of prize from the inferior flag officer who had received it.—*KEITH (LORD) v. PRINGLE* (1803), 4 East, 262; 102 E. R. 830.

**1512.** — *]*—Where the admiral commanding on the Cork station issued orders to the captain of a frigate on that station to go on a particular service, & afterwards to cruise within certain limits for six weeks, & the frigate after performing the service began her cruise, & returned with a prize to Cork, & afterwards the admiral being directed by the Admty. to take one of the frigates & proceed to Plymouth for further orders, & to direct another admiral to take the command, did accordingly direct another admiral to take under his command the frigate, among others, & afterwards took himself the frigate, & sailed in her to Plymouth, & was appointed Commander of the Channel Fleet, & issued an order to the captain of the frigate to cruise for a particular purpose for a week, & at the expiration of that time to proceed in execution of the former orders which he had received from him; & the frigate sailed from Plymouth, & afterwards arrived within the limits prescribed by the former orders, which were taken to be within the limits of the Cork station, & made two captures, one within & another without those limits:—*Held*: the admiral so appointed & commanding on the Cork station at the time of the captures was entitled to the flag eighth of that which was captured within the limits, not as being privy to the former orders, which orders were not suspended by the last order, & again subsisting at the time of the capture, but were expired by efflux of time, but as admiral of the station within the limits of which the frigate had made the capture.—*DRURY v. GARDNER (LADY)* (1813), 2 M. & S. 150; 105 E. R. 339.

**1513. Appointment after cruise of captor commenced—Captor not notified till after capture.**—*LA PACIFIQUE* (1761), Burrell, 158; 167 E. R. 518.

**1514. Admiral superseding another—Capture on orders of superseded admiral.**—*]*—An admiral who supersedes another admiral & takes him under command is entitled to one-eighth part of prizes captured after his taking such command, but under orders issued by the admiral who has been superseded.—*PIGOT v. WHITE* (1785), 4 Doug. K. B. 302; 1 Hy. Bl. 265, n.; 99 E. R. 893.

*Annotation*:—*Apld. Nelson v. Tucker* (1803), 4 East, 238.

**1515.** — *]*—One of the ships of a squadron is detached by the commanding flag officer to lay off a certain place within the limits of the station, from whence the captain, without any further orders for that purpose, though he had written for such to his superior officer & waited for them some time, takes upon him on his own responsibility, though from laudable motives which were afterwards approved of by the Admty., to depart, & to proceed as convoy with the homeward bound trade, & in the course of the voyage home, out of the limits of his station, but nothing turned on the question of limits, he takes a prize:—*Held*: the superior flag officer who had before the capture succeeded the one by whom the order for being detached had been originally issued, admitting him to stand in the same situation in point of right, was not entitled to share the flag officer's share of one-eighth given by the King's Proclamation to a flag officer directing or assisting

in a capture by a ship under his command.—*HARVEY v. COOKE* (1805), 6 East, 220; 2 Smith, K. B. 341; 102 E. R. 1271.

**1516. Capture in operations ordered by Admiralty**  
—Orders directly issued to subordinate officer.]—*THE DESIREE* (1803), 4 Ch. Rob. 422; 165 E. R. 662.

*Annotation*.—*Mentd.* *The Banda & Kirwee Booty* (1866), L. R. 1 A. & E. 109.

**1517.** ———.]—Claim of Admiral Kingsmill for a flag-eighth in a capture made by a frigate, formerly under his command, rejected, on account of orders given to the frigate by the Admty., which were held to constitute a separate & distinct service.—*THE ORION* (1803), 4 Ch. Rob. 362; 165 E. R. 641.

*Annotations*.—*Consd.* *Harvey v. Cooke* (1805), 6 East, 220; *Gardner v. Lyne* (1811), 13 East, 574. *Mentd.* *The Banda & Kirwee Booty* (1866), L. R. 1 A. & E. 109.

**1518. Capture within limits of command—By reinforcing fleet.**—This question turns on the interpretation of that passage of the proclamation which directs that “when an inferior flag officer is sent out to reinforce a superior flag officer, the superior flag officer shall have no right to any share of prizes taken by the inferior flag officer before the inferior flag officer shall arrive within the limits of the command of the superior flag officer, & actually receive some order from him. . . .” Lord Keith was Commander-in-Chief on the Mediterranean station. . . . Sir James Saumarez was sent out for the general purpose of reinforcing him. . . .

The Mediterranean station was of very wide extent, comprehending services very miscellaneous in their nature, & of great importance. . . .

The terms of the orders to Sir J. Saumarez were “to invigorate the blockade of Cadiz,” which Lord Keith’s force was then keeping up. Sir J. Saumarez came within the limits of the station. He heard of an enemy’s squadron in Algeiras Bay, & attacked them, but unsuccessfully, & went to Gibraltar to refit, which was the principal port of the station, & might be called almost the headquarters of the Commander-in-Chief. When he was there, he received orders from Lord Keith. . . . The prize [was] a vessel which had escaped from the blockading force. . . .

Here is an exercise of authority connected with the very service to be performed. I am of opinion that it does fall within the words of the proclamation, & that Lord Keith is entitled to his flag share (SIR WILLIAM SCOTT).—*THE SAN ANTONIO* (1804), 5 Ch. Rob. 209; 165 E. R. 751.

*Annotations*.—*Refd.* *Re Captures on the Jamaica Station* (1823), 1 Hag. Adm. 129. *Mentd.* *The Banda & Kirwee Booty* (1866), L. R. 1 A. & E. 109.

**1519.** ——— *Within limits for repair only.*]—A flag officer at the Cape of Good Hope sent a ship of his squadron within the limits of another flag officer’s command in the Asiatic seas, for the special purpose of getting her repaired; & the ship, after going there & completing her repairs in the manner directed by the latter officer, & receiving an order from him to convoy certain ships on her return to her former station; while executing such order, being accidentally separated from her convoy, took a prize within the limits of the flag officer’s command in the Asiatic seas, but in the course of rejoining her original flag officer:—*Held*: the latter was not entitled to the flag officer’s one-eighth share of the prize; his command over the ship being suspended while she was out of the limits of his own, & within the limits of another command.—*HOLMES v. RAINIER* (1807), 8 East, 502; 103 E. R. 435.

*Annotation*.—*Consd.* *Gardner v. Lyne* (1811), 13 East, 574.

**1520.** ———.]—Commander-in-chief of a station,

together with his junior flag officers, entitled to share as constructively assisting in a capture made in consequence of the detachment of another junior flag officer in chase of a particular fleet, which having escaped, & intelligence being received of another fleet cruising in a different quarter, a second chase was commenced without any fresh order, & continued until the capture was finally made within the limits of another admiral’s station, one of whose vessels assisted in the capture. The claim of the admiral in whose station the capture was made rejected. Claim of a junior flag officer on another station, who communicated the intelligence which led to the capture, in which he also assisted, admitted.—*THE DIOMEDE* (1810), 1 Act. 239; 12 E. R. 92, P. C.

**1521.** ———.]—The commander of the Cork naval station, on May 3, ordered the *Loire* frigate, under his command, to cruise for a month within certain limits mentioned; whether within the Cork station or not did not appear, but in case of obtaining intelligence of the enemy being at sea, to return immediately & report the same to him, unless the captain should deem it more serviceable first to apprise the Commander-in-Chief of the Channel Fleet off Brest of it, & then to return to Cork without loss of time. The *Loire* having sailed & obtained such intelligence on her cruise, went off Brest & communicated it to the Commander of the Channel Fleet on May 25, who, on the 28th, ordered the *Loire* to go off Ferrol with dispatches, etc., & afterwards, & whilst in the execution of her former orders from the commander of the Cork station, to look out for the Jamaica homeward bound convoy within certain limits, which were partly within & partly beyond her original cruising orders, & if met with, to protect them up St. George’s & the Bristol Channel. The *Loire* having delivered the dispatches, etc., to the naval commander off Ferrol, on her return took three prizes, beyond, as was admitted, the limits of the Channel station, & asserted to be within the Cork station; but whether or not within the Cork station, was deemed to be immaterial in this case:—*Held*: the Commander-in-Chief of the Channel Fleet did not, in the true meaning of his orders to the *Loire*, intend to retain her under his command after the execution of his order off Ferrol, but only that she should attend to his further instructions whilst executing her original orders, & as a modification of or addition to such orders, rather than as a supercession or abrogation of them. But if he had so intended, he had no right so to retain her out of the limits of his command, by partial modifications of her original orders, for the purpose of entitling himself to prize taken by her out of such limits, in derogation of the rights of another flag officer. *Qu.*: how the case would be where a cruiser in chase pursues an enemy out of the limits of one station into another.—*GARDNER (LADY) v. LYNE* (1811), 13 East, 574; 104 E. R. 493.

**1522. Commodore acting flag officer—Subsequent ratification of promotion.**]—A commodore, who appoints a captain under him, without having authority for that purpose, is not entitled to share as a flag officer in the distribution of prizes, under His Majesty’s Proclamation of July 7, 1803. Neither will the subsequent ratification of such appointment, by the Lords of the Admty., or the King in Council, entitle him to share as a flag officer, in any prizes taken before the date of such ratification.—*DONELLY v. POPEHAM* (1807), 1 Taunt. 1; 127 E. R. 729.

*Annotations*.—*Consd.* *Montagu v. Janverin* (1811), 3 Taunt. 442. *Distd.* *Wellard v. Moss* (1823), 1 Bing. 134. *Refd.* *The Calypso* (1828), 2 Hag. Adm. 209.

**Sect. 2.—Officers and crews: Sub-sects. 1 & 2. Sect. 3: Sub-sects. 1 & 2.]**

**1523. Flag officer of allied fleet—Serving under British command.]**—(1) If the fleet of an ally & a British fleet serve together under a British commander-in-chief, who detaches the squadron of the ally, the admiral of the auxiliary power is not entitled as a flag officer to share prizes made by British ships detached in another direction, to which he lent no actual co-operation in effecting the capture. Because he is not in the pay of Britain, & the prize Acts & proclamations give the prizes only to those who are in the king's pay; & because he is not, within the meaning of the proclamation, a flag officer assisting in the capture.

If an ally actually co-operates in effecting a capture, he cannot recover any proportion of the prizes in the common law cts. of this country, he must sue in the prize cts. If the prize ct. condemns a captured vessel as prize to his Majesty, the sentence, while unappealed from, is conclusive on the common law cts., & on all the world, that no ally or other person is entitled to a share in it. The common law cts. cannot entertain jurisdiction of the question, whether prize or no prize, or by whom taken.—*DUCKWORTH v. TUCKER* (1809), 2 Taunt. 7; 127 E. R. 976.

*Annotation*:—*As to* (1) *Reid. Re French Guiana* (1809), 2 Dods. 151.

**1524. Assistance of flag officer in another command.]**—*THE DIOMEDE*, No. 1520, *ante*.

**1525. Command by Admiralty authority.]**—Flag share. Claim of C. upon two grounds; first, that he assumed the command of the fleet under orders from the Admty.; secondly, that without any direct orders from the Admty., he had a right, acting upon his own authority, as Admiral, though subject to responsibility for so doing, to take upon himself the command of the fleet; not sustained.

If an Admiral is appointed by the Admty., & actually has given an order to a fleet, he is entitled to share in captures, though he was not within the station at the time they were made.

I know of no such indulgence having been shown to an Admiral who has issued a command without such authority (*LORD STOWELL*).—*Re CAPTURES ON THE JAMAICA STATION* (1823), 1 Hag. Adm. 129; 100 E. R. 47.

**SUB-SECT. 2.—OTHER RANKS.**

See Naval Agency & Distribution Act, 1864 (c. 24); Naval Prize Acts, 1864 (c. 25); 1914 (c. 13); 1918 (c. 30).

**1526. Officers not commissioned to captor.]**—*THE NOSTRA SIGNORA DE CABADONGA* (1747), 6 Ch. Rob. 305, n.; 165 E. R. 941, P. C.; *sub nom.* *THE GLOUCESTER*, cited in 1 Doug. K. B. at p. 326.

*Annotations*:—*Consd.* *Wemys v. Linzee* (1780), 1 Doug. K. B. 324. *Appld.* *The Nostra Signora del Carmen* (1806), 6 Ch. Rob. 302. *Distd.* *The Charlotte* (1813), 1 Dods. 212.

**1527. —.]**—Claim of Lieutenant N. of His Majesty's ship *Niger*, but a passenger, & doing duty by request on board the *Tribune*, not sustained.—*THE NOSTRA SIGNORA DEL CARMEN* (1806), 6 Ch. Rob. 302; 165 E. R. 940.

**1528. Captain of marines on board—Share as passenger.]**—A captain of marines, who happens to be on board a man of war when she takes a prize, but does not belong to her complement, shares only as a passenger.—*WEMYS v. LINZEE* (1780), 1 Doug. K. B. 324; 99 E. R. 209.

*Annotations*:—*Consd.* *Mackenzie v. Maylor* (1784), 4 Doug. K. B. 3; *Camden v. Home* (1791), 4 Term Rep. 382.

*Appld.* *Lumley v. Sutton* (1799), 8 Term Rep. 224. *Consd.* *The Nostra Signora del Carmen* (1806), 6 Ch. Rob. 302; *The Alert* (1813), 1 Dods. 236. *Reid.* *Taylor v. Pill* (1810), 8 Taunt. 805.

**1529. Army captain on board—By order of admiral.]**—A captain in the army sent with his company on board a man of war, by order of the admiral of the fleet with which they were sailing, & there acting as marines, is not entitled to share prize money as captain of marines: if he were so entitled, he might maintain an action in a ct. of law to recover the prize money.—*MACKENZIE v. MAYLOR* (1784), 4 Doug. K. B. 3; 99 E. R. 737.

**1530. Captain under arrest—Ship actually commanded by another officer.]**—The captain of a ship actually on board at the time of a capture, is entitled to prize money, though under arrest at the time, & though another officer had been sent on board to command the ship.—*LUMLEY v. SUTTON* (1799), 8 Term Rep. 224; 101 E. R. 1358.

*Annotation*:—*Distd.* *Waterhouse v. King* (1802), 2 East, 507.

**1531. Junior captain—Senior captain commanding.]**—An appointment by the Lords of the Admty. of a captain in the Navy to be second commander on board a King's ship is valid by their general authority to appoint what officers they think proper for the service although another was appointed to the first command on board the same ship, & notice is only taken of one captain in the book of regulations for the Navy. & such second captain is entitled to a captain's share of prize under the King's proclamation. The book of regulations for the Navy submitted by the Lords Comrs. of the Admty. to the King in Council in 1730 & approved by His Majesty by an Order of Council is only directory to the Lords Comrs.—*WATERHOUSE v. KING* (1802), 2 East, 507; 102 E. R. 463.

**1532. Prize master—Benefit enures to ship's company.]**—It [is] the general practice of the Navy . . . that prize interests acquired by a prize master on board a captured ship, shall enure to the benefit of the whole ship's company (*SIR WILLIAM SCOTT*).—*THE FREDERICK & MARY ANN* (1805), 6 Ch. Rob. 213; 165 E. R. 906.

**1533. Mate acting commander.]**—A., when a prize was taken by a revenue cutter, bore the commission of mate, but was acting commander on board under an order from the comrs. of customs, communicated by letter to the comptroller & collector of the port to which the cutter belonged, & by them communicated by letter to A., directing him to take care that the cutter should be kept at sea under his command, to the end that the service might not suffer, until another commander should be appointed:—*Held*: (1) he was entitled to the commander's share, the King's warrant, referring to a former warrant, which described the share as to be distributed amongst the commanders, officers, & crew of the vessel making the capture, as a reward for that service; although the former commander, whose commission as such had been before withdrawn & cancelled on some supposed misconduct, & who had consequently left the cutter, was afterwards restored, & a new commission granted to him, bearing the date of his former commission, viz. a date anterior to the capture; (2) A. was not entitled to the full share of commander without deducting the share of a deputed mariner, who was on board at the time of the capture, but who, at the time of A.'s beginning to act as commander, acted as mate, & was acting as such, & not as a deputed mariner, at the time of capture, but without any commission or authority to act as mate.—*TAYLOR v. PILL* (1810), 8 Taunt. 805; 129 E. R. 596, Ex. Ch.; *varying*

S. C. *sub nom.* **PILL v. TAYLOR** (1809), 11 East, 414.

*Annotation:—As to* (1) **Consd. Wellard v. Moss** (1823), 1 Bing. 134.

**1534. Acting lieutenant at capture—Appointment subsequently approved—Not confirmed.]**—This is a question whether Mr. W. is to be considered as a sea lieutenant, so as to share in the prize taken by the *Agamemnon*. . . . Captain H. reported the appointment to Sir J. Orde, who expressed some approbation . . . ; but he did not confirm the appointment. . . . Under a consideration of all the circumstances . . . I do not conceive . . . that Mr. W. was appointed a sea lieutenant, so as to be entitled to share . . . (SIR WILLIAM SCOTT).—**THE NOSTRA SIGNORA DEL CORO** (1808), 6 Ch. Rob. 309; 165 E. R. 942.

**1535. Invalided soldiers on board.]**—Invalided soldiers on board a capturing ship are entitled to share in the proceeds of prize.—**THE ALERT** (1813), 1 Dods. 236; 2 Eng. Pr. Cas. 157; 165 E. R. 1295.

### SECT. 3.—NAVAL PRIZE FUND.

#### SUB-SECT. 1.—PAYMENTS INTO FUND.

*See* Naval Prize Act, 1918 (c. 30), Sched. I.

**1536. Value of prizes released—Release before Naval Prize Act, 1918 (c. 30).]**—**THE DERFFLINGER, THE FORDE, THE LEDA, Re AMERICAN MEAT PACKERS' AGREEMENT, Re CERTAIN SWEDISH COPPER**, No. 33, *ante*.

#### SUB-SECT. 2.—CHARGES ON FUND.

*See* Naval Prize Act, 1918 (c. 30), Sched. Part II.

**1537. Necessity for sanction of tribunal.]**—In Apr. 1916, a neutral vessel was seized as prize on the ground that she was engaged in unneutral service. The law officers of the Crown advised that on the facts the vessel could not be condemned, & eventually a claim for damages amounting to over 170,000, dollars put forward by the charterer, was compromised by a payment of 55,000 dollars & the vessel was released. The decision that the claim must be settled was arrived at before the passing of the Naval Prize Act, 1918 (c. 30), & at a time therefore when no one had any interest in prize money except the Crown, but the actual payment & release of the vessel did not take place until Dec. 1919, more than a year after the passing of Naval Prize Act, 1918 (c. 30), & the promulgation thereunder of the proclamation authorising the payment of prize money to the fleet:—**Held**: (1) after the passing of Naval Prize Act, 1918 (c. 30), the officers of the Crown would have had no authority to create charges on the fund, & it would be prudent in future cases to obtain the sanction of the tribunal to any compromise intended to result in a charge on the fund. As, however, the decision was before Naval Prize Act, 1918 (c. 30), & the tribunal was of opinion that the advisers of the Crown acted rightly in settling the claim, the Exchequer was entitled, under para. 5 of the sched. to Naval Prize Act, 1918 (c. 30), to be indemnified out of the fund. But as the tribunal was also of opinion that the amount for which the claim was settled was larger than it would have been if the vessel had been released sooner, the fund ought not to be charged with the whole amount. Accordingly, it would be decreed that the fund should bear one-third & that two-thirds would remain a charge on the Exchequer.

**Insurances against fire & damage by aircraft**

were effected by the marshal on the goods of certain neutral claimants under a floating policy covering all ships & cargoes seized in port. The goods, which if condemned would have been droits of the Crown, were ordered to be released & claimants were held to be not liable for the insurance premiums:—**Held**: (2) the premiums, including the proportionate amounts for the periods between the orders for release & the dates when claimants took away their goods, were, under para. 1 of the sched. to Naval Prize Act, 1918 (c. 30), a charge upon the fund.—**THE OREGON, THE CAIRNSMORE, & THE GUNDA**, [1921] P. 224; 90 L. J. P. 311; 37 T. L. R. 521.

*Annotation:—As to* (1) **Consd. The Canadia** (1922), 127 L. T. 499.

**1538. Expenses arising from disposal of prize—Where formerly payable by allottees of prize proceeds.]**—Under para. 4 of Part II. of the sched. to the Naval Prize Act, 1918 (c. 30), "Charges on Naval Prize Fund" "include any claims in respect of any ship or goods subject to prize jurisdiction, which are droits of the Crown or which if condemned would have been droits of the Crown or of the proceeds of sale of, or money representing, any such ship or goods which the Treasury on the recommendation of the Prize Claims Committee may have paid or may hereafter pay, being claims of a nature that had they been established in prize proceedings would have been ordered by a prize ct. to be paid by the persons entitled to the ship or goods, or out of the money representing the same."

The Treasury, on the recommendation of the Prize Claims Committee, paid various claims for wages, disbursements, towage, mtge. & other matters in respect of ships condemned as prize & declared to be droits of the Crown, but none of the claims were of a character which could be supported in a prize ct.:—**Held**: as the second condition of para. 4 of the sched. to Naval Prize Act, 1918 (c. 30), was not fulfilled the sums paid by the Treasury were not repayable out of the Naval Prize Fund.—**THE ADOLPH**, [1920] P. 333; 90 L. J. P. 100; 123 L. T. 688; 36 T. L. R. 634; 15 Asp. M. L. C. 192.

**1539. Claim of neutral owners—Loss due to seizure of ship—Where no unneutral act found.]**—**THE OREGON, THE CAIRNSMORE, & THE GUNDA**, No. 1537, *ante*.

**1540. ———.]**—The *C.*, a neutral vessel, was stopped by a British cruiser & sent into port under a prize crew for examination. By an error of the navigating officer she was lost before reaching the examination port. It subsequently appeared that the cargo on board the *C.* was not contraband, that the *C.* had not committed any unneutral act, & that if she had reached port she would have been released after examination. Claims by the neutral owners for the loss of the *C.* & her cargo were eventually admitted by the Govt., & certain sums were paid to them in compensation. The Treasury claimed to have these sums charged on the Naval Prize Fund under Part II. (5) of the sched. to Naval Prize Act, 1918 (c. 30), which provides that there shall be charged on & payable out of the Naval Prize Fund "costs, charges, expenses & claims which the tribunal consider may reasonably be treated, having regard to the principles & practice heretofore observed by prize cts., as being costs, charges, and claims which, had there been a grant of prize to captors, captors would have been liable to pay." At the hearing it appeared that the loss of the *C.* was due to her speed having been inaccurately given to the prize officer by her master, & not to the negligence

*Sect. 3.—Naval prize fund: Sub-sect. 2. Parts XV. & XVI.]*

of the prize officer:—*Held*: an unconditional admission of liability by the Govt. did not constitute binding & un rebuttable evidence that there was a liability, nor relieve the Naval Prize Tribunal of determining for themselves whether a claim was to be treated as one which the captors would have been liable to pay having regard to the principles & practice heretofore observed by prize cts. But in view of the difficulty of defending the case in the Prize Ct., & of the fact that the admission of the Govt. had perhaps saved the fund from an adverse decision, such sum as might reasonably have been paid to effect a settlement ought to be charged on the prize fund. Half the sums paid ordered to be charged on the prize fund.—*THE CANADIA* (1922), 127 L. T. 499; 38 T. L. R. 553; 15 Asp. M. L. C. 606.

1541. ————.]—*The Oscar II.*, a neutral vessel laden with a cargo of coffee, was sunk through a collision with a British cruiser while the cruiser was engaged in effecting the capture of the vessel & her cargo as prize. The collision was solely due to the negligence of the officer in command of the cruiser. The owners of a parcel of the lost coffee brought an action against the Procurator-General & recovered damages. *The Bernisse & The Elve* were two neutral vessels bound from a French colonial port to Rotterdam which were stopped by a British

cruiser just outside the area declared by Germany to be a prohibited area in which any neutral vessel would be liable to be sunk by German submarines. The vessels were sent in for examination to Kirkwall on the ground that they had not got certain clearance papers which were given to vessels which had called at a British port. When in the submarine area one of the vessels was sunk by a German submarine & the other was damaged. Their owners recovered damages from the Procurator-General on the ground that, having come from a French port with proper documents, it was a mistake to send the vessels to Kirkwall:—*Held*: in each case the damages constituted a charge upon the Naval Prize Fund & not upon the Exchequer.—*THE OSCAR II, THE BERNISSE, THE ELVE*, [1921] P. 173; 90 L. J. P. 279; 37 T. L. R. 368.

1542. ————.]—*Ship sunk through negligence of captors.*—*THE OSCAR II, THE BERNISSE, THE ELVE*, No. 1541, *ante*.

1543. ————.]—*Claim granted before Naval Prize Act, 1918 (c. 30).—Subsequent adjustment by Naval Prize Tribunal.*—*THE OREGON, THE CAIRNSMORE, & THE GUNDA*, No. 1537, *ante*.

1544. *Insurance premiums on ships seized—Between order for release & actual recovery.*—*THE OREGON, THE CAIRNSMORE, & THE GUNDA*, No. 1537, *ante*.

1545. *Marshal's expenses—Not where Crown strictly liable.*—*THE ANTARES* (1921), 38 T. L. R. 159.

## Part XV.—Ransom.

*See Naval Prize Act, 1864 (c. 25), s. 45.*

1546. *Legality of ransom.*—*HAVELOCK v. ROCKWOOD*, No. 971, *ante*.

1547. *Distinguished from capitulation.*—Capitulations are certainly of the nature of ransoms, but admitting of very favourable distinctions. Ransoms have been forbidden, as subject to great abuse, being, in the common acceptance, contracts entered at sea, by individual captors, & very liable to be abused, to the great inconvenience of neutral trade. But even ransoms, under circumstances of necessity, are still allowed. Capitulations, in their nature, can scarcely become liable to the same objection; they being contracts between the commander & the conquered state; on the contrary they have always been favourably supported, & it is of great importance to the general interests of the captured that they should be sustained (SIR WILLIAM SCOTT).—*SHIPS TAKEN AT GENOA* (1803), 4 Ch. Rob. 388; 165 E. R. 650. *Annotation*.—*Refd.* *The Abonema, The Hillerod, The Florida, The Albania, The Adjutant*, [1919] P. 41.

1548. *Right of hostage to sue for redemption—Proceedings against ship.*—If the master of a captured vessel agrees for her ransom, & gives himself up as a hostage, & the owners neglect to pay the money, he may proceed against the ship in the Admiralty for his redemption.—*WILSON v. BIRD* (1894), 1 Ld. Raym. 22; 91 E. R. 911.

1549. ————.]—*TRANTOR v. WATSON*, No. 1006, *ante*.

1550. ————.]—*Proceedings against cargo.*—*TRANTOR v. WATSON*, No. 1006, *ante*.

1551. ————.]—Even in the case of ransoms which were contracts, but contracts arising *ex jure belli*, & tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the cts. of his own country, for the recovery of his freedom (SIR WILLIAM SCOTT).—*THE HOOP* (1799), 1 Ch. Rob. 196; 1 Eng. Pr. Cas. 107; 165 E. R. 146.

*Annotations*.—*Refd.* *Potts v. Bell* (1800), 8 Term Rep. 548; *The Ionian Ships* (1855), 2 Ecc. & Ad. 212; *Esposito v. Bowden* (1857), 7 E. & B. 763; *The Chile* (1914), 84 L. J. P. 1; *The Marie Glaeser*, [1914] P. 218; *The Mowe*, [1915] P. 1; *The Panariellos* (1915), 84 L. J. P. 140; *Horlock v. Boal*, [1916] 1 A. C. 486; *The Mannigtry*, [1916] P. 329. *Mentd.* *Willson v. Patteson* (1817), 1 Moore, C. P. 133; *Arnhold Karberg v. Bythe, Green, Jourdain, Schneider v. Burgett & Newsam*, [1915] 2 K. B. 379; *Continental Tyre & Rubber Co. (Great Britain) v. Daimler Co., Same v. Tilling* (1915), 84 L. J. K. B. 926; *Re Merten's Patents, Porter v. Freudenberg, Kreglinger v. Samuel & Rosenfeld*, [1915] 1 K. B. 857; *Robson v. Premier Oil & Pipe Line Co.*, [1915] 2 Ch. 124; *British & Foreign Marine Insce. v. Sanday*, [1916] 1 A. C. 650; *Halsey v. Lowenfeld*, [1916] 2 K. B. 707; *Zinc Corp'n v. Hirsch*, [1916] 1 K. B. 541; *Continho Caro v. Vermont*, [1917] 2 K. B. 587; *Stevenson v. Akt. fur Cartonnagen Industrie*, [1917] 1 K. B. 842; *Tingley v. Muller*, [1917] 2 Ch. 144; *Ertel Bieher v. Rio Tinto Co., Dynamit Act v. Same, Vereinigte Königs & Laurahütte Act v. Same*, [1918] A. C. 260; *Naylor, Benzon v. Krainische Industrie Gesellschaft*, [1918] 1 K. B. 331; *Rodriguez v. Speyer*, [1919] A. C. 59; *Johnstone v. Pedlar*, [1921] 2 A. C. 262.

1552. ————.]—It being determined that during

### PART XV.

*g. General rule.*—When a captor is unable to secure a prize & send it into port, though to ransom may be more beneficial to himself, it is more

consistent with the policy of war & the benefit of the country to destroy it.—*THE FANNY & THE PLOUGH BOY* (1813), Stewart, 554.

*h. Whether extended to repurchases of*

*vessels.*—22 Geo. 3, c. 25, & Prize-Acts do not extend to repurchases of vessels not seized as prize. They extend only to vessels captured in war, not to those seized for other causes.—*THE PATRIOT* (1812), Stewart, 350.

war all commercial intercourse with the enemy is illegal at common law, it follows that whatever contract tends to protect the enemy's property from the calamities of war, though effected antecedent to the war, is nevertheless illegal. It has been supposed that the doctrine which has prevailed respecting ransom bills tends to favour these insurances; but, no action was ever maintained upon a ransom bill in a ct. of common law until the case of *Ricord v. Bettenham* (1765), 3 Burr. 1743; & I have the authority of Sir William Scott for saying that in the Admty. Ct. the suit was always instituted by the hostage. The case, however, certainly tended to show that such an action might be maintained in the cts. of common law at the suit of an alien enemy. In consequence of this a similar action was brought in *Cornu v. Blackburn* (1781) Doug. 641, & after argument the ct. of King's Bench held that it might be maintained. But in *Anthon v. Fisher* (1782), Doug. 649, the contrary was expressly determined upon a writ of error in the Exchequer Chambers (LORD ALVANLEY, C. J.).—*FURTADO v. ROGERS* (1802), 3 Bos. & P. 191; 127 E. R. 105.  
*Annotations*:—*Reid*, *Esposito v. Bowden* (1857), 7 E. & B. 763; *Daimler Co. v. Continental Tyre & Rubber Co. (Great Britain)* (1916), 32 T. L. R. 624; *Ertel Bieber v.*

*Rio Tinto Co., Dynamit Act. v. Same, Vereinigte Königs & Laurahütte Act. v. Same*, [1918] A. C. 260. *Mentd. Kellner v. Le Mesurier* (1803), 4 East, 396; *Felze v. Thompson* (1808), 1 Taunt. 121; *Oom v. Bruce* (1810), 12 East, 225; *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484; *Zinc Corp'n. v. Hirsch*, [1918] 1 K. B. 541; *Re Ferdinand (Ex-Tsar of Bulgaria)*, [1921] 1 Ch. 107.

1553. Right of recovery on ransom bill—Action by alien.]—*THE HOOP*, No. 1551, *ante*.

1554. ———.]—*FURTADO v. RODGERS*, No. 1552, *ante*.

———.]—*See, also*, *ALIENS*, Vol. II., p. 150, Nos. 266–268.

1555. Right of crew to wages.]—*CHANDLER v. MEADE* (1705), cited in 2 *Ld. Raym.* at p. 1211; 92 E. R. 300.

*Annotation*:—*Consd. Beale v. Thompson* (1803), 3 Bos. & P. 405.

1556. ———. Sailor becoming hostage.]—A promise by a captain of a ship on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, is binding on the owners although they abandon the ship & cargo.—*YATES v. HALL* (1785), 1 Term Rep. 73; 99 E. R. 979.

*Annotations*:—*Mentd. Hansen v. Royden* (1867), L. R. 3 C. P. 47; *Jackson v. S.S. Blanche*, [1908] A. C. 126.

## Part XVI.—Requisition by Admiralty.

*See Prize Court Rules, 1914.*

1557. What may be requisitioned—Neutral property—*Selzure* as contraband.]—By Prize Court Rules, 1914, Ord. 1, r. 2, “unless the contrary intention appears, the provisions of these Rules relative to ships shall extend & apply, mutatis mutandis, to goods.” By Ord. 29, r. 1, where the Lords of the Admty. desire to requisition a ship & there is no reason to believe that the ship is entitled to be released, the judge shall order the ship to be appraised & to be delivered to them, “Provided that no order shall be made by the judge under this rule in respect of a ship which he considers there is good reason to believe to be neutral property.” By r. 3, where a ship is required forthwith for the service of the Crown, a judge can order it to be forthwith released to the Lords of the Admty. without appraisal. Certain copper was shipped at New York by an American co. on board a Norwegian vessel & was consigned to Sweden, & was bought afloat by Swedish subjects under a contract guaranteeing that it was for consumption in Norway &/or Sweden. While the vessel was at sea, copper was declared absolutely contraband, & the copper in question was afterwards seized at sea & brought to Liverpool, & the Crown issued a writ in prize claiming that the goods were liable to confiscation. Subsequently an order was made *ex p.* by the registrar instructing the marshal to release the copper to the Lords of the Admty. who wished to requisition it. On an application to discharge the order:—*Held*: though there was sufficient doubt as to whether the goods were entitled to be released to prevent the order from being bad on the ground that there was reason to believe that they were so entitled, yet as they were neutral property it was impossible for the Crown to requisition them, & therefore the order must be discharged.—*THE ANTARES* (1915), 31 T. L. R. 290; 59 Sol. Jo. 384.

1558. ———.]—In the autumn of 1914, a

vessel owned by a Mexican co., but in fact of German character, rendered services to a German cruiser in the supply of coal & in other respects; she, however, took no direct part in hostilities, & was not in the employment of the German Govt., nor under the control of an agent placed on board by that Govt. In Oct. 1915, she was bought *bond fide* & paid for by a neutral firm. In Jan. 1916, the vessel was captured by a British cruiser, & subsequently she was requisitioned by the British Govt. The vessel's condemnation was sought on the ground that the sale was invalid; the neutral purchasers claimed damages & costs, also the profits derived from the use of the vessel:—*Held*: the neutral owners were not entitled to damages or costs, since on the facts, including those unknown at the time of capture, there was substantial ground for questioning the neutral or private character of the ship, & claimants' case had been supported by flagrantly false affidavits which rendered a judicial inquiry a reasonable requirement; & in any case the claim to the profits earned by the use of the ship under requisition could not be sustained.—*THE EDNA*, [1921] 1 A. C. 735; 90 L. J. P. 263; 125 L. T. 198; 37 T. L. R. 494; 15 Asp. M. L. C. 260, P. C.

1559. ———. Prerogative right of Crown.]—A British ship lying in a neutral port & laden with a cargo of timber belonging to neutrals of another country was requisitioned during the war by the British Govt., & brought home with her cargo to this country without the consent & against the protest of the cargo owners. The timber was then requisitioned by the Comptroller of Timber Supplies on behalf of the Board of Trade avowedly under Defence of the Realm Regulations, regs. 2 B. & 2 JJ. The owners of the cargo made a claim in the War Compensation Ct. for compensation & contended that it should be assessed under Indemnity Act, 1920 (c. 48), s. 2 (2) (iii) (a), on the ground that in the circumstances they



would but for Indemnity Act, 1920 (c. 48), have had a legal right to compensation:—*Held*: Defence of the Realm Regulations did not apply to a seizure of goods of a neutral brought into this country against his will; the requisition of the timber was justifiable as an exercise of the royal prerogative right of angary & was therefore made "in exercise of" a prerogative right of His Majesty "within Indemnity Act, 1920 (c. 48), s. 2 (1) (b), inasmuch as that right involved the obligation to pay full compensation to the owner of the property seized, claimants "would have had apart from Indemnity Act, 1920 (c. 48), a valid claim for compensation by petition of right, & the Crown admitting that such a claim constituted "a legal right to compensation," compensation was therefore to be assessed according to the principle laid down in Indemnity Act, 1920 (c. 48), s. 2 (2) (iii) (a).—*COMMERCIAL & ESTATES CO. OF EGYPT v. BOARD OF TRADE*, [1925] 1 K. B. 271; 94 L. J. K. B. 50; 132 L. T. 516, C. A.

*Annotation*.—*Expld.* Netherlands American Steam Navigation Co. v. Procurator General, [1926] 1 K. B. 84.

**1560. Appeal from requisitioning order—When leave granted—By Judicial Committee.**—The Judicial Committee will not grant special leave to appeal from a requisitioning order made by the judge of the Prize Ct. under the Prize Court Rules, Ord. 29, it not being disputed that the goods were urgently required for the prosecution of the war, unless, in their Lordship's opinion, the judge, in determining that there was cause for investigation so that an immediate release to claimant would be improper, applied the wrong principles or came to an obviously erroneous decision. Special leave to appeal refused without deciding whether there was an appeal as of right.—*THE CANTON*, [1917] A. C. 102; 86 L. J. P. 30; 115 L. T. 845; 33 T. L. R. 65; 13 Asp. M. L. C. 565, P. C.

**1561. Owner's rights—Whether entitled to profits earned by use of ship.**—*THE EDNA*, No. 1558, *ante*.

**1562. — Damages & costs—Suspicion as to neutrality.**—*THE EDNA*, No. 1558, *ante*.

**1563. — Compensation for loss of ship—Appraised value—Where owner entitled to restoration.**—Art. 2 of Hague Convention No. 6 provides that a belligerent may not confiscate an enemy merchant ship detained in the belligerent's port at the commencement of hostilities, but may "merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of payment of compensation."

The applicability of the above Art. between two belligerents does not depend upon whether they have mutually agreed to allow days of grace as contemplated in Art. 1; Art. 2 is obligatory, while Art. 1 is optional. Whatever may be the true meaning of the condition in Art. 6 that the Convention is to apply only "if all the belligerents are parties," Great Britain during the recent war frequently recognised that the Convention was binding, & thereby waived the right to rely upon non-fulfilment of the condition.

The conduct of Germany during the war in committing many acts in flagrant defiance of the Hague Conventions does not prevent Art. 2 of the sixth Convention from being binding upon Great Britain. Apart from considerations of municipal law, it is not the function of a prize ct., as such, to be a censor of the general conduct of a belligerent, as distinct from his dealings in the particular matters before the ct., or to sanction disregard of solemn obligations by one belligerent because it reprehends the whole behaviour of the other.

Where a detained ship has been requisitioned under Prize Court Rules, 1914, Ord. 29, & sunk, the German owner, if entitled to restoration under Art. 2, is entitled to the appraised value as the compensation provided for by Art. 2, & that right exists although the ship was sunk by German hostile action.

Part VIII., annex 3, Art. 1, of the Treaty of Versailles operates to transfer to the Allied & Associated Powers the property in all German ships of 1,600 tons & upwards. The former owners of ships of that tonnage therefore have no *locus standi* before the Prize Ct. under Art. 2 of the sixth Convention, nor right to discuss how those powers may deal *inter se* with the ships. But annex 3 effects no transfer of ships of lesser tonnage, at least until selected for surrender.

Art. 297 of the Treaty does not annul or modify the obligations under the Convention. The claim of Great Britain thereunder to retain ships to the release of which the German owners are entitled under Art. 2 of the Convention is not one for determination by the Prize Ct., but orders of the Prize Ct. for release should contain a provision to prevent rights under the Treaty from being defeated.

Three ships, each of under 1,600 tons gross, owned by a Danzig corpn. & detained in a British port at the commencement of hostilities, were requisitioned under Ord. 29 for the service of the Crown; while so requisitioned one of the ships was lost by grounding, & one by German hostile action. Applying the various considerations above stated, an order was advised that the appraised value of the two lost ships, & the ship remaining in specie, be released to the Custodian of Enemy Property to be delivered to the Danzig corpn., if after six months no proceedings had been begun for delivery to the Crown, otherwise to abide the final determinations of those proceedings.—*THE BLONDE*, [1922] 1 A. C. 313; 91 L. J. P. 91; 126 L. T. 769; 38 T. L. R. 328; 15 Asp. M. L. C. 461, P. C.

**1564. — — — — —**—*THE PELLWORM*, No. 266, *ante*.

**1565. — Compensation for user of ship.**—*THE PELLWORM*, No. 266, *ante*.

**1566. — Compensation for use of cargo—How compensation assessed—Indemnity Act, 1920 (c. 48).**—*COMMERCIAL & ESTATES CO. OF EGYPT v. BOARD OF TRADE*, No. 1559, *ante*.

**1567. Return of requisitioned ship.**—*THE BLONDE*, No. 1563, *ante*.

**1568. — Free from expenses.**—*THE PELLWORM*, No. 266, *ante*.



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## PROCESS.

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## PROOF OF DEBT.

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